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## A Gap Between Ideals and Reality: The Right to Health and the Inaccessibility of Healthcare for haitian Migrant Workers in the Dominican Republic

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## A GAP BETWEEN IDEALS AND REALITY: THE RIGHT TO HEALTH AND THE INACCESSIBILITY OF HEALTHCARE FOR HAITIAN MIGRANT WORKERS IN THE DOMINICAN REPUBLIC

*“Doctors are thieves. . . . Dominicans don’t want to take you [at the hospital] if you don’t have money. . . . Without money you cannot get healthcare, only God can help somebody.”*<sup>1</sup>

—Anonymous Haitian Migrant Worker, Caobete, Dominican Republic, 2012

### INTRODUCTION

The preceding quote is from an undocumented Haitian migrant worker who moved to the Dominican Republic in 2008.<sup>2</sup> Marie and her husband are poor and have money only for basic necessities. They live in a shack right next to a canal.<sup>3</sup> The shack has no electricity, toilet, or running water, so they use the canal to shower and defecate.<sup>4</sup> The first time Marie decided to go to the hospital was when she started bleeding for nine days straight and also feeling strong abdominal pains after missing her menstruation for several months.<sup>5</sup> Finally, her husband convinced her to attend the nearest public hospital.<sup>6</sup>

At the hospital, the nurses told Marie that she had a cyst in her abdominal area and that an operation to remove it would cost about RD \$60,000.<sup>7</sup> She cannot, by any means, afford such an operation.<sup>8</sup> She still has the cyst, and not only does it cause her pain, but it also prevents her from having children.<sup>9</sup> Marie sees money, transportation, and lack of insurance as the greatest barriers

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<sup>1</sup> Interviews with Anonymous Haitian Woman, in Caobete, Duarte Prov., Dom. Rep. (July 20–21, 2012) (on file with author).

<sup>2</sup> *Id.* For purposes of this Comment, she will be named Marie.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* See *Official Exchange Rate (LCU per US\$, Period Average)*, WORLD BANK, <http://data.worldbank.org/indicator/PA.NUS.FCRF> (last visited Oct. 3, 2013), for continually updated data on official exchange rates of local currency units relative to the U.S. dollar. At the time of this interview, the average exchange rate was RD \$39.34 to US \$1, which makes the cost of Marie’s cyst removal about US \$1,525. *Id.*

<sup>8</sup> Interviews with Anonymous Haitian Woman, *supra* note 1.

<sup>9</sup> *Id.*

in seeking and receiving the medical care she needs.<sup>10</sup> She describes her experience living in the Dominican Republic as “pure misery.”<sup>11</sup> Marie’s story exemplifies the impoverished lifestyle of most undocumented Haitian migrant workers in the Dominican Republic and some of the obstacles they encounter when trying to access healthcare, despite the country’s efforts in 2001 to establish a universal healthcare system.<sup>12</sup>

Even though the Dominican Republic’s laws and newly established 2010 Constitution oblige the government to provide healthcare for all persons in the country,<sup>13</sup> the exclusion of Haitian migrants from this health system, as exemplified by Marie’s story, proves that these ideals do not translate into practice.<sup>14</sup> The problem seems to be one of lack of funding for the public health sector and lack of enforceability of the country’s health laws. Hospitals are not providing free care to the poor and uninsured,<sup>15</sup> despite being required by law to do so; employers are not complying with social security and labor laws, which require them to provide health insurance even to undocumented workers;<sup>16</sup> and no institution is holding either one accountable for lack of compliance.<sup>17</sup>

This Comment examines the barriers that undocumented Haitian migrants face when accessing healthcare, despite their entitlement to health under the country’s domestic laws. It then provides steps the Dominican Republic can take to begin moving toward its promise of universal healthcare. The existing health system is well structured and requires little modification. Instead, the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See PAN AM. HEALTH ORG., HEALTH SYSTEMS PROFILE DOMINICAN REPUBLIC: MONITORING AND ANALYZING HEALTH SYSTEMS CHANGE 2 (3d ed. 2007) [hereinafter HEALTH SYSTEMS PROFILE].

<sup>13</sup> CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], as amended G.O. No. 10561, enero 26 del 2010, tít. 2, art. 61 (Dom. Rep.); Ley General de Salud No. 42-01 [General Health Law], G.O. No. 10075, del 10 de marzo del 2001 (Dom. Rep.).

<sup>14</sup> See *infra* Part III.

<sup>15</sup> See Magdalena Rathe, *Dominican Republic: Can Universal Coverage be Achieved?* 7 (World Health Org. [WHO], World Health Report Background Paper No. 10, 2010), available at [http://www.who.int/healthsystems/topics/financing/healthreport/DR\\_No10.pdf](http://www.who.int/healthsystems/topics/financing/healthreport/DR_No10.pdf) (quoting Editorial, *Universal Health Coverage? Access to What?*, 374 LANCET 1946 (2009)).

<sup>16</sup> See *infra* Part III.B.

<sup>17</sup> See Rathe, *supra* note 15 (citing MAGDALENA RATHE, FUNDACIÓN MEXICANA PARA LA SALUD, FINANCIAMIENTO EN SALUD Y PROTECCIÓN SOCIAL EN AMÉRICA LATINA Y EL CARIBE: PROTECCIÓN FINANCIERA EN SALUD EN LA REPÚBLICA DOMINICANA [FINANCING HEALTH AND SOCIAL PROTECTION IN LATIN AMERICA AND THE CARIBBEAN: FINANCIAL PROTECTION IN HEALTH IN THE DOMINICAN REPUBLIC] (2010) (“The institutional disorder led to a health system that was inefficient, poor quality and low capacity of resolution, highly inequitable and with reduced levels of financial protection.”)).

focus needs to be on raising extra funds to allocate to the public health sector and creating effective mechanisms to safeguard human rights, as will be described in Part V.

This Comment has five parts. Part I briefly describes the background of migration between Haiti and the Dominican Republic, the role Haitian migrants play in the Dominican economy, and how migrants' living and working conditions affect their health. Part II explains the basic framework and structure of the Dominican health system as established by the country's constitution, laws, and treaties. Part III describes how that health structure systematically excludes undocumented Haitian migrant workers in the country from accessing healthcare centers and treatment. Part IV explores the lack of legal enforceability that exists in the public health sector. Finally, Part V provides recommendations to ameliorate healthcare access, such as implementing mechanisms to incentivize closer enforcement of the country's health laws.

## I. HISTORY AND BACKGROUND

Knowing some general history and background about the Haitian population of the Dominican Republic helps understand some of the issues explained in this Comment. Part I describes: (1) The long history of migration that exists between Haiti and the Dominican Republic; (2) the different labor markets that exist for Haitian workers; (3) the health risks that migrants face as a result of their arduous workplace and living conditions and how their health impacts the rest of the country; and (4) the complicated process of acquiring documentation.

### A. *History of Migration from Haiti to the Dominican Republic*

Haiti and the Dominican Republic share a border on the island of Hispaniola.<sup>18</sup> The immigration of Haitians to the Dominican Republic dates back to the early twentieth century when the Dominican Republic began to focus on labor-intensive sugar production, an arrangement heavily dependent

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<sup>18</sup> ALEJANDRO I. CANALES ET AL., CENTRO LATINOAMERICANO Y CARIBEÑO DE DEMOGRAFÍA [CELADE], MIGRACION Y SALUD EN ZONAS FRONTERIZAS: HAITI Y LA REPÚBLICA DOMINICANA [MIGRATION AND HEALTH IN BORDER AREAS] 10 map.1 (2010) (showing migration patterns from Haiti to Dominican Republic).

on Haitian manual labor.<sup>19</sup> Since then, the number of Haitians moving to the Dominican Republic has varied over time,<sup>20</sup> though no precise number of the total Haitian population in the Dominican Republic exists.<sup>21</sup> Due to often highly contentious and political undertones associated with such figures, and the largely untracked and undocumented status of most Haitians, estimates of their numbers range from five hundred thousand to more than one million.<sup>22</sup> However, it is certain that after the earthquake in Haiti in January 2010, the number of undocumented Haitians in the Dominican Republic increased dramatically.<sup>23</sup>

The reasons for Haitian migration to the Dominican Republic have been primarily economic. Haitians traditionally migrate to their richer counterpart in search of jobs and a better life.<sup>24</sup> In 2010, about forty-one percent of the Dominican Republic's population lived below the poverty line, and eighty percent of the population had access to an improved water source.<sup>25</sup> In contrast, in Haiti, seventy-seven percent of the population lived below the poverty line, and only forty-nine percent had access to an improved water source.<sup>26</sup> These statistics exemplify that there is less poverty in the Dominican Republic than in Haiti, which serves as an incentive for many Haitians to move there.<sup>27</sup>

The labor migration of Haitians to the Dominican Republic has not been without hardships and hurdles. Part of the history of migration includes Dominican racial discrimination against Haitians, which has led to mass forced repatriations<sup>28</sup> and deportations throughout the years. Sometimes Haitians have

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<sup>19</sup> Lauren Derby, *Haitians, Magic, and Money: Raza and Society in the Haitian-Dominican Borderlands, 1900 to 1937*, 36 COMP. STUD. SOC'Y & HIST. 488, 492 (1994).

<sup>20</sup> CANALES ET AL., *supra* note 18, at 10–11.

<sup>21</sup> *See id.* at 10.

<sup>22</sup> *See id.*

<sup>23</sup> *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, REPORT TO S. COMM. ON FOREIGN RELATIONS & H. COMM. ON FOREIGN AFFAIRS, S. PRT. NO. 112-30, vol. II, at 2775, 2782 (1st Sess. 2011) [hereinafter COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010].

<sup>24</sup> CANALES, ET AL., *supra* note 18, at 9–10.

<sup>25</sup> *Data: Dominican Republic*, WORLD BANK, <http://data.worldbank.org/country/dominican-republic> (last visited Nov. 2, 2013).

<sup>26</sup> *Data: Haiti*, WORLD BANK, <http://data.worldbank.org/country/haiti> (last visited Nov. 2, 2013).

<sup>27</sup> *See* CANALES, ET AL., *supra* note 18, at 9–10.

<sup>28</sup> Repatriation refers to:

The personal right of a refugee, prisoner of war or a civil detainee to return to his or her country of nationality under specific conditions laid down in various international instruments (Geneva Conventions, 1949 and Protocols, 1977, the Regulations Respecting the Laws and Customs of

been denied the opportunity to show that they are legal residents or to express fear of being prosecuted in Haiti.<sup>29</sup> Many agricultural workers, lacking documentation, remain in their communities and do not seek necessary medical care when needed for fear of harassment by immigration authorities.<sup>30</sup>

The word “immigrant” will not be used to refer to Haitian workers in the Dominican Republic. The word “immigrant” instead refers to “a person who comes to a country to take up permanent residence.”<sup>31</sup> A “migrant,” on the other hand, is commonly used by the International Organization of Migration (“IOM”) to include “certain kinds of shorter-term migrants, such as seasonal farm-workers who travel for short periods to work planting or harvesting farm products.”<sup>32</sup> Since it is known that many Haitians engage in irregular patterns of travel between the two countries—often dependent on seasonal work and the need to care for extended family in Haiti<sup>33</sup>—it is not true that all Haitians in the Dominican Republic seek to establish permanent residence. Thus, for purposes of this Comment, the word “migrant” as defined by the IOM is more applicable and will be used to refer to those individuals who move from Haiti to the Dominican Republic to better their lives or those of their family, without necessarily establishing permanent residency as connoted by the term “immigrant.”

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War on Land, Annexed to the Fourth Hague Convention, 1907, human rights instruments as well as customary international law). The option of repatriation is bestowed upon the individual personally and not upon the detaining power.

*Key Migration Terms*, INT’L ORG. FOR MIGRATION, <http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#Migration> (last visited Jan. 23, 2013). “Though Dominican authorities officially describe this process as one of legal ‘repatriation’ of unauthorised migrants, the reported lack of individualised adjudication and the large numbers of individuals affected lead us to describe these incidents as collective, mass expulsions.” Lauren Fletcher & Timothy Miller, *New Perspectives on Old Patterns: Forced Migration of Haitians in the Dominican Republic*, 30 J. ETHNIC & MIGRATION STUD. 659, 660 (2004). At the same time, these same officials often facilitate the entry of undocumented migrants by charging them money in exchange for turning a blind eye. *Id.*

<sup>29</sup> COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, *supra* note 23, at 2775, 2789.

<sup>30</sup> *See id.* at 2790.

<sup>31</sup> WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 601 (1988).

<sup>32</sup> *Key Migration Terms*, *supra* note 28.

<sup>33</sup> OBSERVATORIO DEL MERCADO LABORAL DOMINICANO, MINISTERIO DE TRABAJO, INMIGRANTES HAITIANOS Y MERCADO LABORAL: ESTUDIO SOBRE LOS TRABAJADORES DE LA CONSTRUCCIÓN Y DE LA PRODUCCIÓN DEL GUINEO EN REPÚBLICA DOMINICANA [HAITIAN IMMIGRANTS AND THE LABOR MARKET: STUDY ON CONSTRUCTION AND BANANA PRODUCTION WORKERS IN THE DOMINICAN REPUBLIC] 43 (2011) [hereinafter HAITIAN IMMIGRANTS AND THE LABOR MARKET].

## B. Haitian Labor in the Dominican Republic

Haitian workers are essential to the Dominican economy. The Dominican Republic is known for its sugar, coffee, and tobacco exports.<sup>34</sup> Although Haitian migrants historically worked in Dominican sugarcane fields, known as *bateyes*, they now work in other sectors including rice, tobacco, construction, and tourism.<sup>35</sup> For example, in 2010, Haitian labor made up about fifty-three percent and seventy percent of all labor utilized in the Dominican construction<sup>36</sup> and banana<sup>37</sup> industries, respectively.

Two types of labor markets exist for Haitian migrants—the formal and the informal.<sup>38</sup> Haitian migrants who are hired permanently by construction or agricultural companies subject to labor and social security laws form part of the formal labor market.<sup>39</sup> In contrast, Haitian migrants who work seasonally for different bosses and have no steady job form part of the informal labor market.<sup>40</sup> Although those who work in the formal labor market tend to have more job security, both groups often perform cheap labor and have employers who ignore minimum wage, health, safety, and employee benefit laws.<sup>41</sup> Even though legal protections are available to all workers without regard to their immigration status, migrant workers are unaware of these legal rights, and underfunded government agencies lack the power or the will to enforce them.<sup>42</sup>

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<sup>34</sup> CIA, THE WORLD FACTBOOK 2012–13, at 217–18 (50th Anniversary ed. 2012) [hereinafter THE WORLD FACTBOOK].

<sup>35</sup> *Id.*; see David Simmons, *Structural Violence as Social Practice: Haitian Agricultural Workers, Anti-Haitianism, and Health in the Dominican Republic*, 69 HUM. ORG. 10, 10 (2010).

<sup>36</sup> HAITIAN IMMIGRANTS AND THE LABOR MARKET, *supra* note 33, at 40.

<sup>37</sup> *Id.* at 105. Even though the Labor Code requires an eighty percent Dominican workforce and a twenty percent foreign workforce in the banana industry, in reality, the opposite is true. CÓDIGO DE TRABAJO [CÓD. TRAB.] [LABOR CODE] tít. 1, art. 135 (Dom. Rep.) (“El ochenta por ciento, por lo menos, del número total de trabajadores de una empresa debe estar integrado por dominicanos.”).

<sup>38</sup> HAITIAN IMMIGRANTS AND THE LABOR MARKET, *supra* note 33, at 81; see also COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, *supra* note 23, at 2792; Dean Hubbard, *Reimagining Workers’ Human Rights: Transformative Organizing for a Socially Aware Global Economy*, 5 HASTINGS RACE & POVERTY L.J. 1, 16 (2008) (citing IMMANUEL NESS, IMMIGRANTS, UNIONS AND THE NEW U.S. LABOR MARKET 13–57 (2005), and JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHTS FOR IMMIGRANTS RIGHTS 39–44 (2005)).

<sup>39</sup> *Id.* at 94.

<sup>40</sup> *Id.* at 81.

<sup>41</sup> *Cf.* Hubbard, *supra* note 38, at 16 (citing IMMANUEL NESS, IMMIGRANTS, UNIONS AND THE NEW U.S. LABOR MARKET 13–57 (2005), and JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHTS FOR IMMIGRANTS RIGHTS 39–44 (2005)).

<sup>42</sup> *Cf. id.* at 18.

Employers take advantage of workers' fear of deportation to evade following the law.<sup>43</sup>

### C. *Risks to Health and Country Implications*

The health of Haitian migrants is affected by their rough workplaces and living conditions. As a result of their employment in jobs with no contract and substandard pay, many of these workers can only afford to live in small shelters with dirt floors located in clandestine communities far from any healthcare facilities and schools.<sup>44</sup> Many workers are overexposed to the sun, use sharp and heavy tools,<sup>45</sup> and have inadequate access to medical facilities, running water, sanitation, and electricity.<sup>46</sup> In June 2012, a survey found that out of all the Haitian migrants living in eighteen communities in the Duarte Province,<sup>47</sup> about ninety-three percent fell into the bottom two socioeconomic quintiles, about eighty percent used an unsafe source of drinking water, and only about thirty-seven percent had access to improved sanitation.<sup>48</sup> In a focus group of Haitian women conducted in a community in the Duarte Province during the same time period, the women said they only use canal water to bathe, cook, and wash clothes, but the men of the community often drink canal water when they are exhausted from working in the rice fields.<sup>49</sup> Given that

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<sup>43</sup> See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, *supra* note 23, at 2775, 2792; cf. Hubbard, *supra* note 38, at 18.

<sup>44</sup> Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Rep. on Mission to Dominican Republic*, Human Rights Council, para. 75, U.N. Doc. A/HRC/7/19/Add.5 (Mar. 18, 2008) (Gay McDougall) [hereinafter *Racial Discrimination, Xenophobia and Related Intolerance*].

<sup>45</sup> See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, *supra* note 23, at 2775, 2793.

<sup>46</sup> *Racial Discrimination, Xenophobia and Related Intolerance*, *supra* note 44, paras. 97, 135.

<sup>47</sup> Andrea Lund, *Assessing Differences in Cholera Risk Between Migrant Haitians and Dominicans Living in the Duarte Province, Dominican Republic* (Apr. 25, 2013) (unpublished MPH thesis, Rollins School of Public Health, Emory University) (on file with author). The Duarte Province is one of the provinces in the Dominican Republic located in the Cibao Valley on the northeast coast of the island. MINISTERIO DE SALUD PUBLICA, INFORME DEL OPERATIVO REALIZADO EN LA PROVINCIA DE SAN FRANCISCO MACORÍS: 27 Y 28 DE JULIO 2013 [REPORT OF OPERATION CONDUCTED IN THE SAN FRANCISCO MACORÍS PROVINCE: JULY 27–28, 2013], at 1 (Dom. Rep.). The Province is politically divided into seven municipalities, one of which is the capital, San Francisco de Macorís. *See id.*; OFICINA NACIONAL DE ESTADÍSTICA, EVOLUCIÓN POBLACIONAL Y TERRITORIAL: PROVINCIA DUARTE (1920–2009) [POPULATIONAL AND TERRITORIAL EVOLUTION: DUARTE PROVINCE (1920–2009)], at 2 (Dom. Rep.) Within those municipalities, there are numerous communities. *See id.* The region is known for its cacao, coffee, plantain, banana, and rice production. LEON G. MEARS, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., ERS-FOREIGN 51, THE DOMINICAN REPUBLIC: AGRICULTURE AND TRADE 24–28 (1963).

<sup>48</sup> Lund, *supra* note 47, at 18, 20, 44.

<sup>49</sup> Focus Group with Haitian Women, in *La Enea, Duarte Province, Dom. Rep.* (July 22, 2012).



undocumented Haitians are more likely to live in conditions that predispose them to disease, they face a high need for healthcare.

The health of such a migrant population has significant implications for the populations of both the Dominican Republic and Haiti. Migrants often make periodic trips to their communities of origin in Haiti, a migration pattern that has important epidemiological implications.<sup>50</sup> Migrants travel with the exposure to infectious diseases, risk factors, and vulnerabilities present in their communities.<sup>51</sup> As described by a World Health Organization (“WHO”) report on the health of migrants, if immunization coverage is low in the country of origin, the original population risk is carried over to the destination country.<sup>52</sup> Similarly, if a particular risk to a disease is higher in the country of origin, migrants are more likely to be affected by the condition and/or transport it across borders.<sup>53</sup> Also, certain non-communicable diseases, such as cardiovascular diseases, diabetes, and cancer, increasingly burden migrant populations and impose considerable demands on the health systems of destination countries.<sup>54</sup> From an epidemiological perspective, taking care of the health of migrants is essential to reducing the spread of infectious, communicable, and sexually transmitted diseases across country borders, especially in countries where the existing healthcare infrastructure capabilities are strained.<sup>55</sup>

#### *D. Difficulty of Acquiring Legal Status*

Members of the Haitian population not only face serious health risks due to their occupations, but their undocumented status keeps them poor and disenfranchised, with little access to medical care. Acquiring legal status could allow Haitian migrants to improve their living and working conditions by granting them more entitlement to basic legal rights, but the process of obtaining documentation proves close to impossible due to the high costs involved.<sup>56</sup> The high costs of new passports (US \$129), visas (US \$200),

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<sup>50</sup> See WHO Secretariat, *Health of Migrants: Rep. by the Secretariat*, paras. 13–17, A61/12 (Apr. 7, 2008).

<sup>51</sup> See *id.* para. 14.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* para. 16.

<sup>56</sup> Ezequiel Abiú López, *Haitian Migrants Must Get Dominican Work Permits*, ASSOCIATED PRESS, June 11, 2012, available at LEXIS, Newswire; *Haitian Workers Jeopardized by New Work Permit Requirements*,

required medical exams, and other monthly penalties for having an expired visa dissuade Haitian migrants from seeking a regular legal status,<sup>57</sup> especially when migrant workers who form part of the informal economy are only making the equivalent of about US \$5 per day.<sup>58</sup> Transportation to the border or to the capital to fulfill these requirements also makes costs involved in acquiring documentation unfeasible.<sup>59</sup> Employers might have deep enough pockets to pay for some of their workers' documentation expenses, but the costs involved are high—so high, in fact, that they discourage employers from following immigration and labor laws and providing adequate protections for their employees because the costs are not worth the risk of losing easily replaceable employees.<sup>60</sup>

Most recently, in October 2011, Dominican president Leonel Fernández signed *Reglamento* 631-11, a regulation that interprets the country's law on migration and provides reasoning on how it should be implemented.<sup>61</sup> The new regulation is particularly controversial because it creates new documentation procedures and costs.<sup>62</sup> Instead of establishing a migration policy to better regulate immigration, the country created even more complicated procedures,<sup>63</sup> which in turn drove migrants to remain undocumented and incentivized employers to evade paying social security benefits for their undocumented workers.

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CARIBBEAN 360 (June 15, 2012), [http://www.caribbean360.com/index.php/news/dominican\\_republic\\_news/588771.html](http://www.caribbean360.com/index.php/news/dominican_republic_news/588771.html).

<sup>57</sup> *Id.*; see *infra* note 62.

<sup>58</sup> See Resolución No. 2/2013, Sobre Salario Mínimo Nacional para los Trabajadores del Sector Privado No Sectorizado [Resolution on National Minimum Wage for Informal Private Sector Workers], 13 de julio del 2013 (Dom. Rep.); COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, *supra* note 23, at 2775, 2782; Focus Group with Haitian Men, in Rancho Viejo, in La Vega Prov., Dom. Rep. (July 15, 2012).

<sup>59</sup> See *Haitian Workers Jeopardized by New Work Permit Requirements*, *supra* note 56.

<sup>60</sup> See *id.*

<sup>61</sup> ALLISON J. PETROZZIELLO, OBSERVATORIO MIGRANTES DEL CARIBE, HAITIAN CONSTRUCTION WORKERS IN THE DOMINICAN REPUBLIC: AN EXPLORATORY STUDY ON INDICATORS OF FORCED LABOR 15 (2012) [hereinafter OBMICA STUDY]

<sup>62</sup> Decreto No. 631-11, Reglamento de Aplicación de la Ley General de Migración No. 285-04, del 15 de agosto del 2004 [Decree Implementing Regulations for the General Law on Migration], del 19 de octubre del 2011 (Dom. Rep.); see also OBMICA STUDY, *supra* note 61, at 15.

<sup>63</sup> Skype Interview with Gianni Dal Mas, Manager for Human Resources and Social Responsibility, Plantaciones del Norte, Dom. Rep. (Aug. 4, 2012).

## II. THE BASIC STRUCTURE OF THE DOMINICAN HEALTH SYSTEM AS ESTABLISHED BY LAW

The Dominican Republic has adopted a body of law that outlines a fundamental right to health for every person.<sup>64</sup> The framework of the system is inclusive and idealizes the equality of all persons regardless of their race, legal, or socioeconomic status.<sup>65</sup> As a result, a comprehensive and complete public health system theoretically exists in the country with the purpose of providing affordable medical care for the poor.<sup>66</sup>

Part II discusses the laws of the Dominican Republic that pertain to the right to health. First, it analyzes whether undocumented migrants qualify as “persons” under Dominican Law. Next, it discusses the fundamental right to health as established by the country’s Constitution. Then, it describes the domestic laws that form the structure for an inclusive national health system. Last, it names the U.N. Treaties to which the Dominican Republic is a party that also support a fundamental right to health.

### A. *Undocumented Migrants as “Persons” Under Dominican Law*

To understand the human rights ideals espoused by the Dominican Republic, an analysis needs to be made as to whether the country considers undocumented persons to be worthy of these rights. An examination of the Dominican Republic’s Constitution, its health laws, and the views of some members of the legal community indicates that undocumented Haitian migrants are “persons” under Dominican law.

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<sup>64</sup> Ley General de Salud No. 42-01 [General Health Law], G.O. No. 10075, del 10 de marzo del 2001 (Dom. Rep.); Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01 [Law that Creates the Dominican Social Security System], G.O. No. 10086, del 9 de mayo del 2001 (Dom. Rep.); HEALTH SYSTEMS PROFILE, *supra* note 12, at 2.

<sup>65</sup> See *infra* Part II.

<sup>66</sup> See, e.g., Ley que Crea el Código para el Sistema de Protección y los Derechos Fundamentales de Niños, Niñas y Adolescentes No. 136-03 [Law that Creates the Code for the Protections of the Fundamental Rights of Children and Adolescents], tit. 2, art. 1, G.O. No. 10234, del 17 de octubre del 2003 (citing Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3) (Dom. Rep.); CÓDIGO PARA EL SISTEMA DE PROTECCIÓN DE LOS DERECHOS FUNDAMENTALES DE NIÑOS, NIÑAS Y ADOLESCENTES [CÓD. SIS. PROT. DER. FUND. NIÑO. NIÑA. Y ADOL.] [CODE FOR THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF CHILDREN AND ADOLESCENTS] tit. 2, arts. 28–33 (Dom. Rep.); see generally CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] tit. 2, art. 34 (Dom. Rep.); Ley General de Salud No. 42-01 [General Health Law] (Dom. Rep.).

First, under the Constitution, it is clear that migrants are “persons.”<sup>67</sup> Article 25 of the Constitution explicitly defines the rights of foreigners.<sup>68</sup> Article 25 states that all foreigners in the Dominican Republic have the same rights and duties as Dominican nationals, except for the limitations to these rights and duties explicitly established in the Constitution.<sup>69</sup> With this distinction made clear, the rest of the Constitution differentiates between Dominican nationals and/or citizens and “all persons.”<sup>70</sup> When referring to the right to health, education, social security, and family, among others, the Constitution does not make a distinction between citizen and foreigner but uses words such as “*toda persona*” and “*hombres y mujeres*” as entitled to such rights.<sup>71</sup> None of these articles lists an exception for foreigners present in the country in relation to their entitlement to healthcare.<sup>72</sup>

Aside from the Constitution, the National Health Law also makes clear that undocumented migrants are “persons” under Dominican law.<sup>73</sup> Article 1 of the National Health Law states that the purpose of such a law is to allow the state to implement the right to health specified in its Constitution.<sup>74</sup> Article 2 then explains how each individual’s health reflects on the common well-being of the population.<sup>75</sup> Article 3 mentions that all Dominicans, foreign citizens, and residents are entitled to the right to health without discrimination of any kind, including the ability to pay.<sup>76</sup> Furthermore, Article 3 adds that foreign non-residents present in the Dominican Republic have the same rights as citizens guaranteed in the country’s laws, international covenants, bilateral agreements, and other legal dispositions.<sup>77</sup> Such an affirmation referring to “foreign non-residents” encompasses undocumented migrants.<sup>78</sup>

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<sup>67</sup> See CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], as amended G.O. NO. 10561, enero 26 del 2010, tít. 2, art. 25 (Dom. Rep.)

<sup>68</sup> *Id.* Like in the United States, the Dominican Constitution is the supreme law of the land. *Id.* tít. 1, art. 6. The Dominican Constitution also defines what it means to be a Dominican national. *Id.* tít. 1, art. 18.

<sup>69</sup> *Id.* art. 25.

<sup>70</sup> See generally *id.*

<sup>71</sup> See *id.* arts. 55, 60–61, 63. *Toda persona* meaning “everyone” and *hombres y mujeres* meaning “men and women” in Spanish.

<sup>72</sup> See generally *id. passim.*

<sup>73</sup> Ley General de Salud No. 42-01 [General Health Law], cap. 1, art. 3, G.O. No. 10075, del 10 de marzo del 2001 (Dom. Rep.).

<sup>74</sup> *Id.* art. 1.

<sup>75</sup> *Id.* art. 2.

<sup>76</sup> *Id.* art. 3.

<sup>77</sup> *Id.*

<sup>78</sup> See *id.*

Last, there is a view among the legal community that undocumented migrants are considered “persons” under Dominican law and are entitled to the protection of their fundamental right to health.<sup>79</sup> In an interview from July 10, 2012, a judge from the Duarte Province stated that the right to health should not hinge on the stipulations laid out by migration policies:

I understand that the right to health is a universal right. All people should have the right to access healthcare and to [access] essential care. . . . There are state policies for migratory control but I do not believe one has anything to do with the other and therefore, they should not be linked to health policies.<sup>80</sup>

For this informant, the right to health should not hinge on the stipulations laid out by migration policies. Similarly, during an interview conducted on July 12, 2012, in the Duarte Province, a labor lawyer stated that the Dominican Republic should offer the right to health to every individual present in the country, regardless of his or her nationality.<sup>81</sup> “In this country and anywhere else in the world, the right to health is a fundamental right and . . . cannot be based on race or identity limiting that right. As a result, I think that any citizen who happens to be in the Dominican Republic has that right.”<sup>82</sup>

In conclusion, the Dominican Republic’s Constitution, its domestic laws, and some members of the legal community all include migrants in their definition of “persons” under Dominican Law.

### *B. The Constitution of the Dominican Republic and the Right to Health*

The 2010 Dominican Republic Constitution protects the fundamental right to health in three of its articles.<sup>83</sup> Article 60 of the Constitution explains that the State commits itself to the progressive development of social security to secure a universal access for “*toda persona*” to protection from illness, disability, unemployment, and old age.<sup>84</sup> Article 61 lays out the right of everyone to health, drinking water, nourishment, sanitation services, hygienic

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<sup>79</sup> See, e.g., Interview with Claudio Anibal Medrano, Judge and President of the Criminal Court, in San Francisco de Macorís, Dom. Rep. (July 10, 2012); Interview with Francisco Francisco, Labor Lawyer, in San Francisco de Macorís, Dom. Rep. (July 12, 2012).

<sup>80</sup> Interview with Claudio Anibal Medrano, *supra* note 79.

<sup>81</sup> Interview with Labor Lawyer, *supra* note 79.

<sup>82</sup> *Id.*

<sup>83</sup> See CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], *as amended* G.O. No. 10561, enero 26 del 2010, tít. 2, arts. 60, 61, 68 (Dom. Rep.).

<sup>84</sup> *Id.* art. 60.

conditions, prevention and treatment of all illness, and access to quality medicine.<sup>85</sup> It specifically guarantees the right to free medical and hospital care to everyone who needs it.<sup>86</sup> Because undocumented migrants are “persons” under the Dominican Constitution, they, too, are entitled to these rights. Article 61 also guarantees the economic and social rights of the low-income population, and assumes the role of protector of the poorest and most vulnerable groups.<sup>87</sup> This would indicate that the government has an active responsibility to provide healthcare for undocumented migrants, not simply a responsibility to refrain from precluding them from access. Finally, Article 68 guarantees the state’s role as protector of the fundamental rights of every person.<sup>88</sup> Because healthcare is a fundamental right under the Constitution, the government must protect undocumented migrants from those who would deny them healthcare.

### *C. Domestic Health Laws Structure an Inclusive National Health System*

Besides the Dominican Constitution’s efforts to stress the importance of every individual’s right to health, a set of domestic health, social security, and labor laws also strive for an inclusive and accessible health system. Two of these laws, the health and social security laws, form part of a countrywide health reform that took place in 2001.<sup>89</sup> The General Health Law and the Social Security Law establish the structure of the Dominican National Health System.<sup>90</sup> These laws create a universal healthcare system based on principles of equity and solidarity.<sup>91</sup> The General Health Law regulates the activities that allow the State to ensure that the right to health is fulfilled,<sup>92</sup> while the Social Security Law establishes the framework for a social protection system with universal coverage that promotes insurance coverage by the government,

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<sup>85</sup> *Id.* art. 61(1).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* art. 61(2).

<sup>88</sup> *Id.* art. 68.

<sup>89</sup> Ley General de Salud No. 42-01 [General Health Law], G.O. No. 10075, del 10 de marzo del 2001 (Dom. Rep.); Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01 [Law that Creates the Dominican Social Security System], G.O. No. 10086, del 9 de mayo del 2001 (Dom. Rep.); HEALTH SYSTEMS PROFILE, *supra* note 64, at 2.

<sup>90</sup> HEALTH SYSTEMS PROFILE, *supra* note 64, at 2.

<sup>91</sup> Rathe, *supra* note 15, at 3.

<sup>92</sup> Ley General de Salud No. 42-01 [General Health Law], art. 1 (Dom. Rep.); HEALTH SYSTEMS PROFILE, *supra* note 64, at 2.

employers, and workers.<sup>93</sup> Both laws aim to ensure the fundamental right to health, to improve access to medicines, and to increase health insurance coverage among the population.<sup>94</sup>

The Social Security Law also creates two main types of financing regimes for the insurance plans of the population: contributive and subsidized.<sup>95</sup> The contributive system provides financing by workers and their employers, including the State as an employer.<sup>96</sup> Those covered by contributive insurance often go to private clinics for higher quality medical care.<sup>97</sup> The subsidized regime provides financing for workers with unstable incomes that are below the minimum wage, and the government finances it.<sup>98</sup>

Both laws divide the functions of the National Health System among a group of federal institutions.<sup>99</sup> The Ministry of Public Health and Social Assistance (SESPAS)<sup>100</sup> holds the “steering role” of the National Health System at the national, regional, and local levels by coordinating the activities of public and private sector institutions and ensuring compliance with national health policies.<sup>101</sup> It holds regional offices accountable and imposes sanctions for lack of compliance with the national health framework.<sup>102</sup>

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<sup>93</sup> Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01 [Law that Creates the Dominican Social Security System], art. 1; HEALTH SYSTEMS PROFILE, *supra* note 64, at 2.

<sup>94</sup> See Ley General de Salud No. 42-01 [General Health Law], art. 1 (Dom. Rep.); Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01 [Law that Creates the Dominican Social Security System], art. 1; HEALTH SYSTEMS PROFILE, *supra* note 64, at 15.

<sup>95</sup> Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01, art. 7 (Dom. Rep.); Rathe, *supra* note 15, at 8–9. There is a third form of coverage, the contributive-subsidized regime, which protects those on average wages and is funded through contributions from the worker and through state subsidy rather than an employer subsidy. Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01, art. 7(c) (Dom. Rep.). The contributive-subsidized regime has not yet been implemented in the country. *See id.*

<sup>96</sup> Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01, art. 7(a) (Dom. Rep.); Rathe, *supra* note 15, at 8.

<sup>97</sup> Interview with Insurance Worker at Hospital Universitario San Vicente de Paul, in San Francisco de Macoris, Dom. Rep. (Aug. 3, 2012).

<sup>98</sup> Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01, art. 7(b) (Dom. Rep.); Rathe, *supra* note 15, at 9.

<sup>99</sup> HEALTH SYSTEMS PROFILE, *supra* note 64, at 2.

<sup>100</sup> *Secretaría de Estado de Salud Pública y Asistencia Social* is the official name of the institution. Note that most of the acronyms used in this Comment are formed from the original Spanish name of each organization.

<sup>101</sup> HEALTH SYSTEMS PROFILE, *supra* note 64, at 14.

<sup>102</sup> *Id.* at 16.

In the public sector, the National Health Insurance Authority (SENASA) serves as the main insurance provider.<sup>103</sup> SENASA is in charge of financing the healthcare services of low-income populations via subsidies from the government.<sup>104</sup> SENASA provides subsidized insurance to low-income groups.<sup>105</sup> The subsidized insurance covers 100 percent of medical costs, including operations, consulting, and medicine.<sup>106</sup> If the public hospital runs out of surgery tools or prescription drugs, and a patient has subsidized insurance, the hospital is in charge of providing these for the patient.<sup>107</sup>

Sistema Único de Beneficiarios (SIUBEN), a sub-institution of SENASA,<sup>108</sup> is one of the means by which poor Dominicans can get health insurance coverage.<sup>109</sup> SIUBEN targets and identifies low-income individuals and families who qualify for all types of government benefits, including government-funded health insurance.<sup>110</sup> Although SIUBEN conducts periodic operations to target the poorest groups, individuals can also visit SIUBEN's regional office with a copy of their Dominican identification card, *cédula*, and fill out an application form.<sup>111</sup> The SIUBEN website also allows visitors to input their *cédula* number and solicit inclusion in the program.<sup>112</sup> All adults who want to solicit coverage need to show a valid Dominican *cédula*, while all minors need only show a birth certificate.<sup>113</sup> Part III.A below will explain how SIUBEN fails to include undocumented individuals who need monetary aid for medical care by requiring a Dominican *cédula*, which the majority of Haitians in the country do not have.

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<sup>103</sup> *Id.* at 18.

<sup>104</sup> *Id.* at 5.

<sup>105</sup> Interview with Insurance Worker at Hospital Universitario San Vicente de Paul, *supra* note 97.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Decreto No. 143-05, Dispone que la Identificación de los Beneficiarios del Régimen Subsidiado en Salud Tendrán Transitoriamente como base la Ficha y los Procedimientos Técnicos del Sistema Unico de Beneficiarios (SIUBEN) 2005 [Stipulates that those Persons Selected for the Subsidized Health Regime Shall Temporarily be Entitled to the Procedures Established by the Unified System of Beneficiaries (SIUBEN)], G.O. No. 10315, del 21 de marzo del 2005 (Dom. Rep.); Rathe, *supra* note 15, at 10. *Sistema Único de Beneficiarios* is Spanish for “Unified System of Beneficiaries.”

<sup>109</sup> Rathe, *supra* note 15, at 10.

<sup>110</sup> *Preguntas Frecuentes* [Frequently Asked Questions], SISTEMA UNICO DE BENEFICIARIOS, <http://www.siuben.gob.do/preguntas-frecuentes.aspx> (last visited Nov. 2, 2013).

<sup>111</sup> *Id.*; *see Ley que Crea el Sistema Dominicano de Seguridad Social No. 87-01* [Law that Creates the Dominican Social Security System], art. 11, G.O. No. 10086, del 9 de mayo del 2001 (Dom. Rep.)

<sup>112</sup> *Solicitud de Inclusion* [Applying for Inclusion], SISTEMA UNICO DE BENEFICIARIOS, <http://www.siuben.gob.do/atención-al-usuario/solicitud-de-inclusión.aspx> (last visited Nov. 2, 2013).

<sup>113</sup> *Preguntas Frecuentes*, *supra* note 110.



#### D. Domestic Labor Laws and Health

In addition to health and social security laws, the country's labor laws also protect the health status of laborers. Such labor protections are especially necessary for migrants because they work in environments that tend to negatively affect their health. The Labor Code prohibits "[e]xclusion or preference based on grounds of sex, age, race, color, nationality, social origin, political opinion, trade union activism or religious belief, with the exceptions laid down in the Code itself for the purpose of protecting the worker."<sup>114</sup> It also states that all employers and employees shall have the right to freely associate, to enjoy a just salary, and to preserve physical and personal integrity.<sup>115</sup> The Labor Code classifies as "serious" those actions by employers that violate a worker's right to fair wages, weekly time off, and reasonable work hours and classifies as "very serious" those actions that violate the laws that require the working environment to be hygienic and free from danger to life, health, or security.<sup>116</sup> The Labor Code also labels as "very serious" situations in which an employer refuses to pay the worker's social security quotas to the Dominican Social Security Institute (IDSS).<sup>117</sup> These payments to the IDSS are those that finance the worker's risk of old age, disability, retirement, illness, and labor risks, among other things.<sup>118</sup>

#### E. United Nations Treaties Supporting the Fundamental Right to Health<sup>119</sup>

Aside from establishing a fundamental right to health in its Constitution and domestic laws, the Dominican Republic is a member of two important treaties that stipulate the right to health of every individual. As a member of the United Nations, the Dominican Republic must adhere to the 1948 Universal Declaration of Human Rights, which states that, *inter alia*:

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<sup>114</sup> CÓDIGO DE TRABAJO [CÓD. TRAB.] [LABOR CODE] pr. VII (Dom. Rep.).

<sup>115</sup> *Id.* pr. XII.

<sup>116</sup> *Id.* lib. 8, tít. 2, arts. 720(2)–3.

<sup>117</sup> *Id.*. The official name of Dominican Social Security Institute (IDSS) is "Instituto Dominicano de Seguros Sociales." *Id.* tít. 7, art. 83

<sup>118</sup> *Social Security*, OMG, <http://www.omg.com.do/en-US/resources/uniGC.aspx?xpST=NewsGeneral&key=d6b0e4c3-9645-41b5-b347-bf98d1960998&activeEntry> (citing the Dominican law on social security) (last visited Jan. 18, 2013).

<sup>119</sup> In addition to the domestic protections guaranteed under Article 25, the Constitution also ensures protection for the health of migrants under international treaties. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], *as amended* G.O. NO. 10561, enero 26 del 2010, tít. 1, art. 25 (Dom. Rep.). Article 26 of the Constitution on international relations and law affirms the Dominican Republic's role as a member state of the international community in recognition and application of the norms established by international law. *See id.* art. 26.

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care and necessary social services, and the right to security in the event of . . . sickness. . . .”<sup>120</sup> It also adheres to the 1966 International Covenant on Economic, Social and Cultural Rights, which establishes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>121</sup> Article 26 of the Constitution classifies as official those treaties ratified by the country and commits the Dominican state to follow the fundamental rights established by international law.<sup>122</sup> By making official such international law treaties ratified by the country, the Dominican Republic commits itself to ensuring the right to health, which is a norm established by international law.

### III. INACCESSIBILITY OF HEALTHCARE TO UNDOCUMENTED HAITIAN MIGRANT WORKERS

Both the country’s health and labor laws as described in Part II above strive for an inclusive and accessible healthcare system. However, this Part demonstrates that these laws are not being effectively implemented and enforced in the Dominican Republic. Part III explains two types of hardships migrants face when attempting to access healthcare. Subpart A illustrates the issue of unaffordable care for poor, undocumented, and uninsured migrants. Subpart B shows how employers often ignore labor laws and social security laws and do not comply with their obligation to contribute payments to the IDSS for their workers. Subpart C discusses how these barriers to healthcare access lead many Haitian migrants to delay seeking care until the point of an absolute emergency.

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<sup>120</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc. A/RES/217(III), at 76 (Dec. 10, 1948).

<sup>121</sup> International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, S. TREATY. DOC. No. 95-19, 993 U.N.T.S. 3 (1978); 1 UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 1 APRIL 2009, at 182, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2003) [hereinafter SIGNATORIES AND RATIFICATIONS OF MULTILATERAL TREATIES]. However, the Dominican Republic is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, despite the large migrant population present in the country. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 93; SIGNATORIES AND RATIFICATIONS OF MULTILATERAL TREATIES, *supra*, at 454; *Racial Discrimination, Xenophobia and Related Intolerance*, *supra* note 44.

<sup>122</sup> CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], *as amended* G.O. No. 10561, enero 26 del 2010, tít. 1, art. 26 (Dom. Rep.) (“La República Dominicana es un Estado miembro de la comunidad intencional, abierto a la cooperación y apegado a las normas del derecho internacional . . . .”)

### A. *Unaffordable Care*

Although the National Health System described in Part II of this Comment establishes a universal healthcare system, the story of Marie above demonstrates some of the obstacles Haitian migrant workers face when seeking medical care.<sup>123</sup> Cost is by far the biggest barrier to healthcare in the Dominican Republic,<sup>124</sup> and Haitian workers often do not have leftover money at the end of the month to afford medical care.<sup>125</sup> These costs involve not only the actual costs of care, but also the transportation costs to and from the hospital and the costs of any medicines and follow-up care.<sup>126</sup> Under the health laws discussed in Part II, a public hospital is supposed to provide care free of charge to indigent patients. However, in Marie's case, the hospital did not,<sup>127</sup> and will not in most cases.<sup>128</sup> For example, in 2007, only forty-four percent of all patients who consulted a public hospital reported that those public health services were free, thirty-six percent said they had to pay everything out-of-pocket, and only twelve percent reported that their insurance covered their costs.<sup>129</sup> Even though the law stipulates that service at public hospitals is supposed to be free, in reality close to half of the national expenditure on health is funded by direct payment.<sup>130</sup>

There are two reasons why Haitian migrants have a harder time affording the cost of care than other poor Dominicans: First, they do not qualify for government-funded health insurance, and second, they are paid less for performing similar or identical jobs. When it comes to accessing healthcare, a percentage of poor Dominicans who work in the informal market can, at least in theory, mitigate the costs by using their Dominican *cédula* to qualify or apply for government-subsidized insurance through SIUBEN and SENASA.<sup>131</sup> On the other hand, undocumented Haitians who work in the informal market and also earn below the minimum wage are, in effect, systematically excluded

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<sup>123</sup> See *supra* text accompanying notes 1–12.

<sup>124</sup> Skype Interview with Gianni Dal Mas, *supra* note 62.

<sup>125</sup> *Id.*

<sup>126</sup> Rathe, *supra* note 15, at 7, 15.

<sup>127</sup> Interviews with anonymous Haitian woman, *supra* note 1.

<sup>128</sup> See generally Rathe, *supra* note 15, at 6.

<sup>129</sup> *Id.*

<sup>130</sup> CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], as amended G.O. No. 10561, enero 26 del 2010, tít. 2, art. 61(2) (Dom. Rep.); Rathe, *supra* note 15, at 6.

<sup>131</sup> *Preguntas Frecuentes*, *supra* note 110; see discussion *supra* Part II. The words “at least in theory” appear because almost half of the country’s national expenditure on health is funded by direct payment. See *infra* Part IV.A. That means even many low-income Dominicans do not depend on government subsidies. See generally Rathe, *supra* note 15.

from these subsidies because they do not have a Dominican *cédula*.<sup>132</sup> Although both groups face monetary obstacles to healthcare access, Dominicans can count on the government's help through subsidies, while undocumented Haitians cannot. Similarly, when it comes to receiving salaries, Haitian migrants are often paid less than their Dominican counterparts for performing the same job. About half of the existing jobs in the country are in the informal market, which means these jobs pay equal to or less than the minimum wage.<sup>133</sup>

### *B. Employers' Lack of Compliance with Labor Laws*

There is also a contradiction between the laws established by the country's labor code to facilitate the general health and well-being of employees and the practices that exist in reality. Historically, Haitian workers have been a cheap source of labor, exploiting the migrants' lack of work alternatives and their extreme poverty.<sup>134</sup> Some large agricultural companies circumvent labor laws by paying the social security benefits for some of the workers and having them share their identity cards with others who are sick or injured and need to attend the hospital.<sup>135</sup> By contrast, independent employers will ignore labor laws outright because they know Haitians do not feel entitled to demand such benefits or contest their rights.<sup>136</sup> The following story of a Haitian man named Pedro<sup>137</sup> exemplifies this problem.

Pedro left his wife and three kids in Haiti in 1986 to move to the Dominican Republic in search of a job.<sup>138</sup> Even though he has a valid passport and visa, he has never been able to find work in the formal economy.<sup>139</sup> Pedro does not have a fixed boss, and he makes about the U.S. equivalent of \$5 to \$7 per day working in the rice fields from 7 a.m. to 1 p.m.<sup>140</sup> Pedro says his

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<sup>132</sup> *Preguntas Frecuentes*, *supra* note 110.

<sup>133</sup> Rathe, *supra* note 15, at 14 ("About half of the existing jobs in the Dominican Republic are in the informal sector and a high percentage of these receive an income equivalent to or less than the minimum wage.").

<sup>134</sup> Org. of Am. States, Inter-Am. Comm'n H.R., *Rep. on the Situation of Human Rights in Dominican Republic*, OAS Doc. OEA/Ser.L/V/II.104, Doc. 49 rev. 1, para. 316 (Oct. 7, 1999).

<sup>135</sup> Skype Interview with Gianni Dal Mas, *supra* note 63.

<sup>136</sup> Hubbard, *supra* note 38, at 16, 18.

<sup>137</sup> The name Pedro will be used for purposes of this Comment because the Interviewee wished to remain anonymous.

<sup>138</sup> Interview with Haitian Man, in La Vega Prov., Dom. Rep. (July 15, 2012) (on file with author).

<sup>139</sup> Focus Group with Haitian Men, Rancho Viejo, in La Vega Prov., Dom. Rep. (July 15, 2012) (on file with author).

<sup>140</sup> *Id.* The pay is usually between 300 and 350 Dominican pesos. *Id.*

bosses treat Dominicans better, and they pay them separate from the Haitians so that they can pay them more.<sup>141</sup> Pedro says he keeps his mouth shut and does not complain because otherwise other “bosses” will hear about it and will not hire him.<sup>142</sup>

When it comes to covering his health costs, Pedro says his boss will not even give him a bandage if he gets a cut at work, much less pay for his health insurance.<sup>143</sup> If he needs medicine, he has to go to the pharmacy and pay for it himself.<sup>144</sup> Pedro also believes that money is the biggest obstacle that Haitians face when attempting to access healthcare.<sup>145</sup> Even though he has a valid visa on his passport, he has never applied or heard of government- or employer-subsidized health insurance.<sup>146</sup> Even if he wanted to apply for government-subsidized insurance, he would need a Dominican *cédula*, which he does not possess.<sup>147</sup> Pedro’s story is an example of how Dominican employers, especially in the informal market, do not comply with labor laws that require regular payments of social security and insurance for all workers.

### 1. *Why Employers Do Not Comply With Labor Laws*

One of the reasons employers are discouraged from complying with labor laws is because compliance is difficult. The new immigration regulation, *Reglamento* 631-11, is a complicated and convoluted law that describes the requirements necessary for a migrant to establish temporary residence in the Dominican Republic.<sup>148</sup> The law also specifies that employers must now write a letter to solicit each foreign worker, register contracts with foreign workers with migration authorities, and ensure that their workers repatriate after the contract terms are over.<sup>149</sup> If the worker does not have a valid birth certificate, the worker needs to be sent back to Haiti to obtain one.<sup>150</sup> Employers who do

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Interview with Haitian Man, *supra* note 138; Focus Group with Haitian Men, *supra* note 139.

<sup>147</sup> Focus Group with Haitian Men, *supra* note 139; *see infra* Part III.A.

<sup>148</sup> Decreto No. 631-11, Reglamento de Aplicación de la Ley General de Migración No. 285-04, del 15 de agosto del 2004 [Decree Implementing Regulations for the General Law on Migration] arts. 69–79, del 19 de octubre del 2011 (Dom. Rep.).

<sup>149</sup> OBMICA STUDY, *supra* note 61, at 15; Decreto No. 631-11, art. 76–77, 83 (Dom. Rep.).

<sup>150</sup> Decreto No. 631-11, art. 48(g) (Dom. Rep.); *Haitian Migrants Must Get Dominican Work Permits*, *supra* note 56.

not comply with the law face penalties.<sup>151</sup> Although on its face the new regulation updates the control of migrant labor,<sup>152</sup> employers have conceded an underlying motive: to drastically reduce the Haitian migrant labor force in the Dominican Republic through complicated administrative fees and procedures.<sup>153</sup>

According to the director of human resources at a large banana company:<sup>154</sup> “Those regulations have been designed to sensibly reduce [the] foreign working force. That is, the migration regulations are so complete and the costs are so high that a company won’t be able to afford the luxury of having a foreign worker.”<sup>155</sup> The company felt the after-effects of the law. Beforehand, the company employed 800 Haitian workers, but after *Reglamento* 631-11 was passed, the company’s customs director allowed the company to hire only 600 Haitian workers and to acquire their work permits under the procedure specified by the regulation.<sup>156</sup> In effect, the regulation has left employers worrying that they will not be able to afford such costs.<sup>157</sup> Naturally, the change will not provide incentives for migrants to leave the country, but instead will push more workers to be streamlined into the informal sector, where independent employers can continue to ignore labor laws, and where no institution will enforce them.<sup>158</sup>

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<sup>151</sup> Decreto No. 631-11, arts. 141–42 (Dom. Rep.); *Haitian Migrants Must Get Dominican Work Permits*, *supra* note 56.

<sup>152</sup> OBMICA STUDY, *supra* note 61, at 15.

<sup>153</sup> Skype Interview with Gianni Dal Mas, *supra* note 63.

<sup>154</sup> *First Work Visas for Foreigners: Migration Begins to Comply with Regulations*, DIARIO LIBRE (Feb. 2, 2012), [http://www.diariolibre.com/noticias\\_print.php?id=322650&s=](http://www.diariolibre.com/noticias_print.php?id=322650&s=).

<sup>155</sup> Skype Interview with Gianni Dal Mas, *supra* note 63.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See HAITIAN IMMIGRANTS AND THE LABOR MARKET, *supra* note 38, at 82. Some Haitian migrant groups are beginning to stand up to their employers who do not pay them fairly. For example, a group of 112 Haitians started a protest on December 14, 2012 in front of the Ministry of Labor building in Santo Domingo demanding that their ex-employer, a company that produces coconut products, pay them the money owed to them after its liquidation. Adriana Peguero, *Haitianos Levantan Protesta Frente a la Sede de Ministerio de Trabajo [Haitians Protest in Front of the Ministry of Labor]*, LISTIN DIARIO (Jan. 20, 2013, 6:53 PM), <http://www.listindiario.com.do/la-republica/2013/1/19/262844/Haitianos-levantan-protestafrente-a-la-sede-de-Ministerio-de-Trabajo>. The protest lasted for one month and twelve days until the Dominican government, with the support of the Organización Internacional para las Migraciones (“OIM”), transported the Haitian workers back to San Cristobal, the municipality where they reside in the Dominican Republic to await the legal proceedings regarding their claims against the coconut processing company. Teófilo Bonilla, *Haitianos Desalojados de Ministerio Dicen Fueron Engañados*, EL NACIONAL (Jan. 22, 2013, 11:07 AM), <http://www.elnacional.com.do/nacional/2013/1/22/148353/Haitianos-desalojados-de-ministerio-dicen-fueron-enganados>; *Haitianos Levantan Protesta Frente a la Sede de Ministerio de Trabajo*, *supra*; *Haitianos Desalojados de Ministerio Dicen Fueron Engañados*, *supra*. One of the important issues of the protest was that the protestors

## 2. *How the Government is Addressing Noncompliance with Labor Laws*

Recently, the Dominican government, with the support of the IOM, developed two policies to help regulate foreign labor. First, on January 14, 2013, the Dominican government gave 220 visas and identity cards to Haitian temporary workers that guaranteed their legal and social security rights.<sup>159</sup> The majority of these migrants are agricultural workers previously employed irregularly in banana plantations in the northern part of the country.<sup>160</sup> Second, the Dominican Director of Migration said that 185 companies agreed to register all their foreign workers, about 7,385 individuals, with the Dominican government.<sup>161</sup> These steps are all part of establishing a broader plan of “circular migration” that the IOM has been pushing to implement in the country.<sup>162</sup>

“Circular migration” refers to the creation of migration policies that allow Haitian migrant workers to go to the Dominican Republic for a period of time to work and then return to Haiti to their families, instead of remaining in the country undocumented.<sup>163</sup> The plan intends to create a flow of migrants that will benefit both countries economically, encourage employers to pay the social security benefits of their workers while they are in the country, and allow Haitians to return to their families in Haiti after making some money to support them.<sup>164</sup> The plan has received funding from the IOM Migration Development Fund and the Canadian and United States governments.<sup>165</sup> These

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were sick and they did not have enough money to pay for their healthcare. *Cien Haitianos Acampan por Quinto Día en el Ministerio de Trabajo para Exigir Pagos*, LISTIN DIARIO (Dec. 18, 2012, 1:05 AM), <http://www.listindiario.com.do/la-republica/2012/12/18/259193/Cien-haitianos-acampan-por-quinto-dia-en-el-Ministerio-de-Trabajo-para>. A pregnant woman complained to the local newspaper that even though she was prescribed folic acid pills to take on a regular basis, she could only afford to buy five. Isabel Leticia Leclerc, *Reclaman Solución al Caso de Trabajadores Haitianos: Abogaron para que se Establezca en el País una Política Migratoria* [They Demanded a Solution to the Case of Haitian Workers: They Advocated to Establish a Migratory Policy in the County], LISTIN DIARIO (Jan. 10, 2013), <http://www.listindiario.com.do/la-republica/2013/1/9/261576/Reclaman-solucion-al-caso-de-trabajadores-haitianos>.

<sup>159</sup> Viviano de León, *Gobierno Regulariza Mano de Obra Extranjera en RD* [Government Regulates Foreign Work Force in DR], DIARIO LIBRE (Jan. 14, 2013, 9:04 PM), <http://www.listindiario.com.do/la-republica/2013/1/13/262065/Gobierno-regulariza-mano-de-obra-extranjera-en-RD>.

<sup>160</sup> Press Release, Int'l Org. for Migration, Dominican Republic Processes Temporary Labor Migrants (Jan. 15, 2013), available at <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2013/pbn-listing/iom-helps-dominican-republic-to.html>.

<sup>161</sup> *Gobierno Regulariza Mano de Obra Extranjera en RD*, *supra* note 159.

<sup>162</sup> Interview with Cy Winter, Chief of Mission, Int'l Org. for Migration, in Santo Domingo, Dom. Rep. (July 17, 2012).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Dominican Republic Processes Temporary Labor Migrants*, *supra* note 160.

measures taken by the IOM, which are designed to meet the reality of non-enforcement of labor laws in the country, intend to counteract the exploitation of an undocumented and disenfranchised group of Haitian migrants.

### *C. Effects of Inaccessibility: Delaying Care*

A trend among Haitian migrants is to delay seeking care until they are faced with a life-and-death matter.<sup>166</sup> As a result of the out-of-pocket costs that the uninsured must pay for healthcare, many Haitian migrants often delay seeking treatment until the point of an emergency.<sup>167</sup> Unless it is a severe case, migrants will often not be willing to sacrifice the transportation costs or time they could spend working when they know that they will not be able to afford the medicine prescribed or any follow-up care.<sup>168</sup>

Marie's narrative underscores the delayed care-seeking behavior that exists among Haitian migrant workers. Even though she knows she has a cyst that periodically causes her pain and bleeding, she has not yet sought an operation, simply because she cannot afford it.<sup>169</sup> Similarly, it is not uncommon for pregnant Haitian women to have their babies at home with the help of other women who live in their communities.<sup>170</sup> If there are complications, the woman will be taken to the hospital; otherwise, having the baby at home avoids associated costs.<sup>171</sup> Delaying care can likely result in patients having a more vulnerable condition due to advanced disease, which increases treatment costs and administrative work for hospitals.<sup>172</sup>

## IV. A DISCONNECT BETWEEN IDEALS AND REALITY

The 2001 health reform envisioned the creation of a universal healthcare system—yet twelve years later, the system remains weak as a result of lack of

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<sup>166</sup> Interview with Cameron Jones, Volunteer in Programs for Youth and Family, Centro Bono, in Santo Domingo, Dom. Rep. (July 18, 2011).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Interviews with anonymous Haitian Woman, *supra* note 1.

<sup>170</sup> See Focus Group with Haitian Men, *supra* note 139; Skype Interview with Gianni Dal Mas, *supra* note 63.

<sup>171</sup> *See id.*

<sup>172</sup> See, e.g., Natasja K. Jensen et al., *Providing Medical Care for Undocumented Migrants in Denmark: What are the Challenges for Health Professionals?*, 11 BMC HEALTH SERVS. RES. 154, 156 (2011), available at <http://www.biomedcentral.com/1472-6963/11/154> (“[U]ndocumented migrants often delay seeking treatment, implying that they are in a more vulnerable situation prior to the initiation of treatment due to more advanced disease.”).



funding and enforceability, coupled with a high corruption rate and misuse of funds. Part IV delves into some of the reasons that the Dominican Republic's ideals are divorced from reality. Subpart A, it describes the lack of funding that the government sets aside for the public health sector. Subpart B, it explores how government corruption might play a part in the way funds are distributed by health institutions.

### A. *Lack of Funding*

The National Health System in the Dominican Republic is based on the fundamental right to health of all persons stipulated in the country's Constitution, treaties, and laws.<sup>173</sup> Although these ideals sound plausible in theory, somewhere along the system, a high-risk and particularly vulnerable population of Haitian migrants is excluded from access and the optimal utilization of insurance-based or free public health services.<sup>174</sup> The problem does not seem to be one of structure, but rather, of feasibility, effective implementation, and enforceability.<sup>175</sup>

An important question then arises: Why are hospitals not implementing the law by providing free care to the uninsured who cannot afford to pay? Aside from their preference for insurance reimbursements, the answer likely falls on the need for extra funding.<sup>176</sup> Financing of public health services is provided partially by state taxes and social security contributions provided by private and public insurance.<sup>177</sup> To ensure decentralization of health interests and expenses, SESPAS is the institution in charge of disbursing all the funds to other health institutions, whether governmental or non-governmental, in an autonomous manner.<sup>178</sup> SESPAS comes up with a budget plan, which is revised and approved by the State.<sup>179</sup> The state then disburses the public health funds to SESPAS, which distributes them according to the specified budget plan.<sup>180</sup> In 2001, public expenditure for health accounted for more than nine

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<sup>173</sup> See *supra* Part II.

<sup>174</sup> See *supra* Part III.

<sup>175</sup> *Id.*

<sup>176</sup> See Rathe, *supra* note 15, at 14 ("If the government decided to cover the total remaining population in these two regimes today, it would have to distribute an additional US\$270 to US\$690 million . . .").

<sup>177</sup> Ley General de Salud No. 42-01 [General Health Law] art. 20, G.O. No. 10075, del 10 de marzo del 2001 (Dom. Rep.).

<sup>178</sup> *Id.* art. 12.

<sup>179</sup> See generally SECRETARÍA DE ESTADO DE SALUD PÚBLICA Y ASISTENCIA SOCIAL [SESPAS], PRESUPUESTO APROBADO AÑO 2010 § 2 (2010).

<sup>180</sup> *Id.* § 3.

percent of the national budget.<sup>181</sup> Between the years of 2004 and 2007, this percentage dropped and remained lower than two percent of the GDP.<sup>182</sup> For the Dominican government to cover the total remaining Dominican population who qualifies for subsidized insurance, it would need to distribute an additional US \$270 to \$690 million to SESPAS to distribute to the public health sector.<sup>183</sup> This number does not take into account undocumented migrants.<sup>184</sup> Thus, if the government wanted to cover the health costs of the actual population defined in the Constitution,<sup>185</sup> then it would have to account for the large number of undocumented Haitians living in the Dominican Republic and raise those figures significantly.

### *B. Corruption and Misuse of Funds*

Lack of adequate funding is not the only barrier to the successful implementation of a universal healthcare system. An underdeveloped country such as the Dominican Republic faces many structural obstacles that prevent equitable distribution of funds.<sup>186</sup> The country faces serious problems of government corruption, bribes, and concealment of information.<sup>187</sup> The poor administration of funds is a crucial problem in the Dominican public health sector. The following quote illustrates how politicians might also have an influence over the distribution of funds:

The public health sector and the education sector are the main government employers and are frequently used to reward political favors. Decisions are taken at a centralized level . . . Human resources are not adequately distributed . . . There are major problems with discipline, fulfillment of working hours, salary-related problems, all of which are reflected in constant strikes and lack of governance.<sup>188</sup>

Since undocumented Haitians do not pay taxes and or vote,<sup>189</sup> politicians have few incentives to invest in policies to help them, which affects the way funds

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<sup>181</sup> HEALTH SYSTEMS PROFILE, *supra* note 12, at 17.

<sup>182</sup> *Id.*

<sup>183</sup> Rathe, *supra* note 15, at 14.

<sup>184</sup> See Tarryn Mento, *High Numbers of Maternal Deaths Plague Health System*, WALTER CRONKITE SCH. JOURNALISM & MASS COMM., [http://cronkite.asu.edu/buffett/dr/health\\_care.html](http://cronkite.asu.edu/buffett/dr/health_care.html) (last visited Oct. 31, 2013).

<sup>185</sup> CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], *as amended* G.O. NO. 10561, enero 26 del 2010, tít. 2, art. 61 (Dom. Rep.).

<sup>186</sup> See Rathe, *supra* note 15, at 4.

<sup>187</sup> COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, *supra* note 23, at 2775, 2785.

<sup>188</sup> See Rathe, *supra* note 15, at 16.

<sup>189</sup> Fletcher & Miller, *supra* note 28, at 675.

are distributed and administered in the health system. Thus, the sociopolitical constraints of an underdeveloped country play a large role in the lack of enforcement of health laws.

## V. RECOMMENDATIONS

In 2001, healthcare reform in the Dominican Republic created a well-structured universal healthcare system intended to cover the healthcare of the country's entire population. However, this Comment demonstrates that, when it comes to Haitian migrants in the Dominican Republic, high out-of-pocket hospital costs and the lack of health insurance create insurmountable obstacles for migrants to afford care.

There are certain recommendations for improvement that do not require modification of the current healthcare system. Instead, these recommendations focus on developing ways to implement and enforce the existing system. To ensure a universal healthcare system, the Dominican Republic needs to provide timely access<sup>190</sup> to healthcare services for everyone, not just the rich minority of the population. Although it is unrealistic for a country with universal coverage to cover every health need of every individual,<sup>191</sup> there are ways to expand coverage. The country must strive toward a meeting point where the ideals of universal healthcare, access to healthcare, and the political and economic realities of an undocumented labor force intersect.

There are four steps that the Dominican Republic should take to increase healthcare coverage and access for its population. First, the national budget must allocate more funds to the public health sector. Second, the country needs to develop a mechanism that will lead to enforcement and proper implementation of such laws. This Comment will discuss two enforcement mechanisms that have been implemented in other Latin American countries: the *amparo* proceeding and the institution of the ombudsman. Third, public hospitals need to decrease reliance on direct payment for medical expenses and focus on prepayment. Fourth, the institution SIUBEN needs to be reformed to be more inclusive of the country's undocumented population.

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<sup>190</sup> WHO, *Executive Summary*, in THE WORLD HEALTH REPORT—HEALTH SYSTEMS FINANCING: THE PATH TO UNIVERSAL COVERAGE, at ix (2010) [hereinafter HEALTH SYSTEMS FINANCING].

<sup>191</sup> See *Message from the Director-General*, in HEALTH SYSTEMS FINANCING, *supra* note 190, at vii (“Trade-offs are inevitable, and decisions will need to strike the right balance between the proportion of the population covered, the range of services included, and the costs to be covered.”).

### A. *Allocating More National Funds to the Public Health Sector*

First, the Dominican Republic must budget more funds to its healthcare system, particularly its public health sector. According to WHO, the first and largest barrier that exists for healthcare access in developing countries is the limited availability of resources.<sup>192</sup> In 2006, the proportion of national health funds spent on public health was lower in the Dominican Republic than in other Latin American countries.<sup>193</sup> The highest proportions were seen in Cuba, at ninety-one percent, and Colombia, at eighty-five percent.<sup>194</sup> Even Haiti was at the top of the list with sixty-eight percent.<sup>195</sup> In contrast, the Dominican Republic only spent thirty-one percent of its total health funds on public health.<sup>196</sup> Although the Dominican Republic must increase its domestic efforts to increase funding for the public health system, it must also seek the support of the international community. Without international help, progress will be slow.<sup>197</sup> The Dominican Republic needs to invite as much international help and funding as possible for its public health system.<sup>198</sup>

Next, the Dominican Republic must increase its domestic efforts to increase funding for public health. In 2007, the country's public expenditure on health was lower than two percent of the national budget as compared to about nine percent in 2002.<sup>199</sup> To come closer to implementing the country's health laws on universal healthcare access, the Dominican government needs to allocate more funds to the public health system.<sup>200</sup> This can be achieved by increasing taxes on products that are harmful to health and on tourism.<sup>201</sup> Currently, the Dominican government finances public health services with tax money and social security contributions.<sup>202</sup> Pursuant to Articles 93(1)(a) and

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<sup>192</sup> *Executive Summary*, *supra* note 190, at xi.

<sup>193</sup> Rathe, *supra* note 15, at 16.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See HEALTH SYSTEMS FINANCING, *supra* note 190, at xii.

<sup>198</sup> See *id.* In 2011, the Dominican Republic received US \$234 million of total foreign aid mostly from European institutions, France, Spain, and the United States. *Dominican Republic*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], <http://www.oecd.org/dac/stats/DOM.gif> (last visited Nov. 2, 2013). Of this foreign aid, only ten percent was designated for the health sector. *Id.*

<sup>199</sup> HEALTH SYSTEMS PROFILE, *supra* note 12, at 17.

<sup>200</sup> See discussion *supra* Part IV.A.

<sup>201</sup> See *Executive Summary*, *supra* note 190, at 11.

<sup>202</sup> Ley General de Salud No. 42-01 [General Health Law] art. 20, G.O. No. 10075, del 10 de marzo del 2001 (Dom. Rep.); see *supra* Part IV.A.

243 of the Dominican Constitution, Congress has the power to raise and levy taxes as it determines to be proper.<sup>203</sup>

Having Congress impose higher taxes on health-harming substances—such as alcohol, tobacco, sugary drinks, and foods high in salt or transaturated fats—has the dual benefit of improving the health of the population through reduced consumption while raising more funds.<sup>204</sup> Opposition to such a tax would most likely come from domestic producers of sugar and cigars. However, because the domestic sugar and tobacco industries depend highly on Haitian labor, these producers should be convinced that the move would ultimately produce healthier workers.

A more effective way to increase funding for the public health sector is to increase taxes on tourism. Currently, the service sector is the Dominican economy's largest employer, and it is led by the tourism industry.<sup>205</sup> In 2010, a total of 4,125,000<sup>206</sup> tourists arrived in the Dominican Republic and spent US \$4.209 million.<sup>207</sup> Considering the vast impact tourism has on the country's economy, finding ways to increase taxes on tourism and tourism investment would allow the government to bring in more revenue and allocate more funds to the public health sector.<sup>208</sup>

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<sup>203</sup> CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], *as amended* G.O. NO. 10561, enero 26 del 2010, tít. 3, art. 93(1)(a), tít. 11, art. 243 (Dom. Rep.).

<sup>204</sup> *Executive Summary*, *supra* note 190, at xiii.

A 50% increase in tobacco excise taxes would generate US\$ 1.42 billion in additional funds in 22 low-income countries for which data are available. If all of this were allocated to health, it would allow government health spending to increase by more than 25% in several countries, and at the extreme, by 50%. Raising taxes on alcohol to 40% of the retail price could have an even bigger impact. Estimates for 12 low-income countries where data are available show that consumption levels would fall by more than 10%, while tax revenues would more than triple to a level amounting to 38% of total health spending in those countries. The potential to increase taxation on tobacco and alcohol exists in many countries. Even if only a portion of the proceeds were allocated to health, access to services would be greatly enhanced.

*Id.*

<sup>205</sup> THE WORLD FACTBOOK, *supra* note 33, at 217–18; *Dominican Republic-Economy*, ENCYCLOPEDIA OF THE NATIONS, <http://www.nationsencyclopedia.com/Americas/Dominican-Republic-ECONOMY.html#b> (last visited Feb. 23, 2013).

<sup>206</sup> *International Tourism, Number of Arrivals*, WORLD BANK, <http://search.worldbank.org/data?qterm=tourism%20in%20the%20Dominican%20Republic&language=EN> (last visited Feb 23, 2013) (follow hyperlink, click on “international tourism: number of arrivals,” then click on show “last 5 years”).

<sup>207</sup> *International Tourism, Receipts (Current US\$)*, WORLD BANK, <http://search.worldbank.org/data?qterm=tourism%20in%20the%20Dominican%20Republic&language=EN> (last visited Feb 23, 2013) (follow hyperlink, click on “international tourism: receipts (current US\$),” then click on show “last 5 years”).

<sup>208</sup> See James Mak, *Tourist Taxes*, in JOSEPH J. CORDES ET AL., THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 441–43 (2005); see also *Executive Summary*, *supra* note 190, at xiii.

Currently, individual tourists are taxed directly for entry and exit fees into the country and indirectly through hotel and other service fees.<sup>209</sup> To remain in the Dominican Republic for a thirty-day period, the entry tax for tourists is US \$2, and the exit tax is US \$20.<sup>210</sup> This fee is low compared to the fees charged by South American countries like Paraguay, Argentina, Bolivia, and Brazil.<sup>211</sup> The Dominican Republic should increase the entry fee while still keeping the prices competitive with those of other countries that rely heavily on tourism. The Dominican Republic could increase the entry fee by at least US \$60 and still be competitive.<sup>212</sup> If the Dominican Republic increases the entry fee, it should not charge an exit fee. By not charging an exit fee, tourists' last memory will not be the fee they had to pay at the airport before leaving the country.

Another popular way to increase revenue through tourism is by charging a hotel occupancy tax, which is a sales tax levied on occupied hotel rooms. A hotel occupancy tax would be effective because it is mostly borne by nonresident tourists and not locals,<sup>213</sup> unlike the ten percent tax that both tourists and non-tourists currently pay on restaurant and bar service.<sup>214</sup>

In addition to increasing taxes for individual tourists and hotels, the Dominican Congress should modify the taxes that tourism investors and

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<sup>209</sup> See *Travel Information: FAQs*, DOMINICAN REPUBLIC MINISTRY OF TOURISM, [http://www.godominicanrepublic.com/rd/index.php?option=com\\_content&view=article&id=56&Itemid=80&lang=en](http://www.godominicanrepublic.com/rd/index.php?option=com_content&view=article&id=56&Itemid=80&lang=en) (last visited Feb. 23, 2013).

<sup>210</sup> *Id.*

<sup>211</sup> Katherine Martinez-Carter, *New Fees for Visiting South America*, BBC TRAVEL: PASSPORT BLOG (Oct. 29, 2012), <http://www.bbc.com/travel/blog/20121022-new-fees-for-visiting-south-america>. Paraguay only permits six countries' citizens to obtain a *Visa en Arribo* (Visa on Arrival)—Australia, Canada, United States, New Zealand, Republic of China (Taiwan), and Russia—citizens of other countries must apply before arrival at the Paraguayan Embassy in person. *Visas*, EMBASSY REPUB. PARA. U.S., [http://www.embaparusa.gov.py/v2/index.php?option=com\\_content&view=article&id=1290&Itemid=618](http://www.embaparusa.gov.py/v2/index.php?option=com_content&view=article&id=1290&Itemid=618) (last visited Nov. 2, 2013). The fee for a *Visa en Arriba* for an American citizen is US \$160 and “will only be valid for the maximum period of ninety (90) days.” *Id.* Argentina charges Americans a “reciprocity fee” of US \$160, which is not a visa and is valid for ten years. *Consular Section: Reciprocity Fee for US Citizens*, EMBASSY ARG. WASH., D.C., <http://embassyofargentina.us/embassyofargentina.us/en/consularsection/news.htm#entry> (last visited Nov. 2, 2013). Bolivia and Brazil require visas for Americans of US \$135 and US \$160, respectively. Decreto No. 24423, 29 de noviembre de 1996, Decreto Supremo Relativo al Régimen Legal de Migración [Supreme Decree Concerning the Legal Regime of Immigration] tít. 5, art. 29(2), GAC. OF. NO. 1963, del 2 de diciembre de 1998 (Bol.); *Traveling to Bolivia*, EMBASSY U.S. LA PAZ, BOL. (Nov. 7, 2007), <http://bolivia.usembassy.gov/service/bolivian-visas/tourist-visas.html>; *Visa Fees*, CONSULATE GEN. BRAZ. WASH., <http://www.conbrasil.org.ar/CONSBRASIL/emolumentos.asp> (last visited Nov. 2, 2013).

<sup>212</sup> *Id.*

<sup>213</sup> See Mak, *supra* note 208, at 441–43.

<sup>214</sup> DOMINICAN REPUBLIC MINISTRY OF TOURISM, *supra* note 209.

developers must pay. *Ley 158-01* on Tourism Incentives defines tourism investors and developers broadly as any person or company domiciled in the Dominican Republic who builds hotels, resorts, restaurants, arenas, theme parks, golf courses, aquariums, or any other establishments pertinent to touristic activities in Dominican territory.<sup>215</sup> *Ley 158-01* creates large exemption schemes for tourism investors,<sup>216</sup> schemes that “generate little revenue and burden business.”<sup>217</sup> For example, *Ley 158-01* relieves tourism developers of all national and municipal taxes for ten years from the date of termination of the construction project.<sup>218</sup> Similarly, it completely exempts domestic companies that invest in tourism of all taxes related to rent, construction permits, imports, and national or international financing.<sup>219</sup> It also allows people to deduct twenty percent of their annual profits from their taxable income as long as they invest this extra twenty percent in some project related to tourism.<sup>220</sup>

By creating these types of broad exemptions, the Dominican government deprives itself of substantial tax revenue.<sup>221</sup> Decreasing or limiting the amount of tax exemptions these investors are allowed would increase the country’s tax revenue, providing that funds could be used for improvement of the public health sector.<sup>222</sup> One limitation that this intervention could face is that a drastic reduction of tax exemptions for tourism developers might adversely affect the quality of the local tourism industry. For this reason, gradually decreasing tax exemptions—from ten to five years, for example, or only relieving domestic companies of eighty percent instead of 100 percent of taxes on rent—might be a more subtle move that could still help bring in more revenue to allocate to public health.

Taxes will not increase without strong opposition. The Dominican Republic has already been making moves to increase taxes on alcohol and tourism. In October 2012, the government proposed tax reform that would,

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<sup>215</sup> Ley de Incentivo Turístico No.158-01 [Tourism Incentives Law], art. 3, G.O. NO. 10104, del 24 de abril del 2001 (Dom. Rep.).

<sup>216</sup> See generally *id.*

<sup>217</sup> Laurent Corthay & Jan Loeprick, *Taxing Tourism in Developing Countries: Principles for Improving the Investment Climate Through Simple, Fair, and Transparent Taxation*, in 14 BUSINESS TAXATION 1 (World Bank, Investment Climate in Practice Rep. No. 59819, 2010).

<sup>218</sup> See Ley de Incentivo Turístico No. 158-01 [Tourism Incentives Law], art. 7 (Dom. Rep.).

<sup>219</sup> See *id.* art. 4.

<sup>220</sup> *Id.* art. 4(c), pfo. ii.

<sup>221</sup> Corthay & Loeprick, *supra* note 217.

<sup>222</sup> *Id.*

among other things, increase the tax on alcoholic beverages an extra ten percent.<sup>223</sup> The proposal faced opposition from the *Asociación de Hoteles y Turismo de la República Dominicana*, which in large part sells all-inclusive packaged vacation deals that include unlimited alcohol consumption.<sup>224</sup> The tax increase is awaiting approval from Congress, but the *Asociación de Hoteles y Turismo de la República Dominicana* says that increasing taxes would hurt their competitiveness with other international markets and harm tourist-based development.<sup>225</sup> For this reason, any tax increase imposed needs to be high enough to contribute more funds to the public health sector but still be subtle enough to maintain the competitiveness of the Dominican tourism industry.

### *B. Creating Enforcement Mechanisms to Implement the Existing Healthcare System*

Even if the Dominican government collects more revenue to allocate to the public health system, this revenue still runs the risk of being misused in an underdeveloped country.<sup>226</sup> The Dominican Republic needs to create an effective mechanism for the implementation and strict enforcement of the country's health laws. Subpart B.1 explains the *amparo* proceeding currently in place in the Dominican Republic and calls for its reform. Subpart B.2 then urges the country to urgently appoint an ombudsman to serve as the country's official protector of human rights.

#### *1. The Amparo Proceeding*

Although the Dominican Republic currently has an *amparo* proceeding in place, Haitian migrants have difficulty bringing private causes of action under the existing system. Even when institutions and advocacy groups bring actions on behalf of migrants, the procedural requirements have prevented them from bringing successful suits.<sup>227</sup> The Dominican *amparo* proceeding needs to be

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<sup>223</sup> EFE, *Advierten de Impacto en el Sector Hotelero de la Reforma Fiscal: Hoteleros Afirman que Propuesta Contradice Objetivos del Gobierno de Aumentar Llegada de Turistas* [They Warn the Hotel Sector of the Impact of the Tax Reform: Hoteliers Claim that Proposal Contradicts the Government's Objectives of Increasing Tourist Arrivals], DIARIO LIBRE (Oct. 11, 2012, 7:33 PM), [http://www.diariolibre.com/reformafiscal/2012/10/11/i355360\\_advierten-impacto-sector-hoteler-reforma-fiscal.html](http://www.diariolibre.com/reformafiscal/2012/10/11/i355360_advierten-impacto-sector-hoteler-reforma-fiscal.html).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See discussion *supra* Part IV.C.

<sup>227</sup> See Sentencia [S.] No. TC/0123/13, 4 July 2013, Tribunal Constitucional, Santo Domingo Oeste [TC] [Constitutional Tribunal of the West Region of Santo Domingo] 4 July 2013 (Dom. Rep.); Yamalie Rosario, *Tribunal Rechaza Recurso por Estudiantes Hijos de Ilegales* [Court Rejects Appeal by School Children of



reformed to have less stringent requirements for institutions to bring actions on behalf of undocumented individuals.

The proceeding known as *amparo* in Latin America is an “extraordinary judicial remedy conceived specifically for the protection of constitutional rights.”<sup>228</sup> It is an action that may be brought against both the State and individuals for violating a person’s constitutional rights.<sup>229</sup> The 2010 Dominican Constitution contains an article granting all persons the right of *amparo*,<sup>230</sup> but *Ley 137-11* provides the statutory requirements for an *amparo* action.<sup>231</sup>

The *amparo* action requires the plaintiff’s injury to be “actual,”<sup>232</sup> “manifestly arbitrary or illegal,”<sup>233</sup> and a threat of an “imminent character.”<sup>234</sup>

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*Illegals*], DIARIO LIBRE.COM (Aug. 2, 2012, 12:00 AM), [http://www.diariolibre.com/noticias/2012/08/02/i346401\\_tribunal-rechaza-recurso-por-estudiantes-hijos-ilegales.html](http://www.diariolibre.com/noticias/2012/08/02/i346401_tribunal-rechaza-recurso-por-estudiantes-hijos-ilegales.html).

<sup>228</sup> ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA, A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 1 (2009).

<sup>229</sup> *Id.* at 295. The *amparo* proceeding in Latin America was first introduced in Mexico in 1857 and then spread across all of Latin America. Constitución Federal de los Estados Unidos Mexicanos de 1857, tít. 3, arts. 101–02, 11 de marzo de 1857 (Mex.); BREWER-CARIAS, *supra* note 228, at 4.

<sup>230</sup> See CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], *as amended* G.O. NO. 10561, enero 26 del 2010, tít. 2, art. 72 (Dom. Rep.).

<sup>231</sup> Until the 2010 Constitution, the Dominican Republic was the only country that regulated the action by statute; all other countries expressly set forth *amparo* proceedings in their constitutions. BREWER-CARIAS, *supra* note 228, at 5, 152; CONSTITUCIÓN DE LA REPÚBLICA DE GUATEMALA [CONST. REP.] 11 December 1879, tít. II, art. 34, *as amended by Ley Constitutiva de la República de Guatemala*, 5 November 1887 (Guat.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE EL SALVADOR [C.P.] 25 August 1886, *as amended by Leyes Constitutivas de la Republica Del Salvador* [C.R.] tít. II, art. 37; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [C.P.] tít. V, art. 29, 14 October 1894 (Hond.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tít. XXII, art. 159, LA GACETA, DIARIO OFICIAL [L.G.] 17 FEBRUARY 1912 (Nicar.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 121, de 16 de julho de 1934 (Braz.); CONSTITUCIÓN DE LA REPÚBLICA DE PANAMA [CONST. REP.] tít. XV, art. 189, 2 January 1941 (Pan.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [C.P.] tít. IV, art. 48, 7 November 1949 (Costa Rica); CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA [CONST. REP.] tít. III, art. 75, 23 de enero de 1961 (Venez.); CONSTITUCION POLITICA DEL ESTADO DE BOLIVIA [C.P.] tít. II, art. 19, 2 February 1967 (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PARAGUAY [C.P.] tít. art. 77; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR [C.P.] 1967, art. 15; CONSTITUCIÓN POLÍTICA DEL PERU [C.P.] 1979, art. 295; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 24; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86; Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

<sup>232</sup> BREWER-CARIAS, *supra* note 228, at 262. “[A]ctual” means that, at the moment of filing the action, the harm or threat must be presently occurring. *Id.*

<sup>233</sup> *Id.* at 267.

<sup>234</sup> *Id.* at 284.

The Dominican *amparo* action requires all three elements.<sup>235</sup> A violation of a person's right to health all three requirements. First, if at the moment an action is brought, an undocumented migrant worker is still being denied healthcare because of his or her ability to pay, then the plaintiff's injury is considered to be "actual."<sup>236</sup> Next, denying healthcare to a person because of his or her inability to pay is "manifestly arbitrary or illegal" because it violates the Dominican Constitution and the decision is most likely made arbitrarily by a public hospital employee.<sup>237</sup> Finally, a violation of the right to health is "a threat of an imminent character" because a person's medical condition, if not treated timely and properly, may lead to more severe health consequences. The law also establishes that the final *amparo* decision must "determine the conduct to be accomplished," which means the decision rendered is binding and must be enforced.<sup>238</sup>

In theory, all persons in the Dominican Republic, including undocumented Haitians, should be able to bring an *amparo* action against the State if it violates their human rights.<sup>239</sup> Yet—despite the proceeding's success in most Latin American countries as a means to protect human rights<sup>240</sup>—Haitian migrants in the Dominican Republic and their descendants have not seen the same success in the Dominican Republic.<sup>241</sup>

In June 2012, for example, nine civil rights organizations brought an *amparo* action on behalf of more than 100 descendants of Haitian migrants.<sup>242</sup>

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<sup>235</sup> Ley Orgánica del Tribunal Constitucional y de los Procedimientos Constitucionales No. 137-11 [Law on Constitutional Court Organization and the Constitutional Procedures], art. 65, G.O. No. 10622, del 15 de junio del 2011 (Dom. Rep.).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> BREWER-CARIAS, *supra* note 228, at 379.

<sup>239</sup> Law 137-11 states that any and all persons have the right to demand protection of their individual human rights through the *amparo* action. Ley Orgánica del Tribunal Constitucional y de los Procedimientos Constitucionales No. 137-11, art. 67 (Dom. Rep.).

<sup>240</sup> BREWER-CARIAS, *supra* note 228, at 1.

<sup>241</sup> Sentencia [S.] No. TC/0123/13, 4 July 2013, Tribunal Constitucional, Santo Domingo Oeste [TC] [Constitutional Tribunal of the West Region of Santo Domingo] 4 July 2013 (Dom. Rep.); *Tribunal Rechaza Recurso por Estudiantes Hijos de Ilegales*, *supra* note 227. "Descendants of Haitian migrants" refers to the sons and daughters of undocumented Haitian migrants who were born in the Dominican Republic but do not have a Dominican *cédula*. *Tribunal Rechaza Recurso por Estudiantes Hijos de Ilegales*, *supra* note 227.

<sup>242</sup> Sentencia [S.] No. TC/0123/13, 4 July 2013, Tribunal Constitucional, Santo Domingo Oeste [TC] [Constitutional Tribunal of the West Region of Santo Domingo] 4 July 2013 (Dom. Rep.); *Dominico-Haitianos Depositán Recurso Amparo Contra la JCE: 40 de los Demandantes Forman Parte del Grupo Reconoci.do* [Haitian-Dominicans Deposit Amparo Appeal Against the JCE: 40 of the Applicants are Part of the Reconoci.do Group], DIARIO LIBRE (June 23, 2012, 6:26 PM), <http://www.diariolibre.com/noticias/>

The complaint argued that a provincial government violated their human rights by not issuing them Dominican *cédulas* in violation of their fundamental right to nationality, even though they were born in Dominican territory.<sup>243</sup> As a result of not having a Dominican *cédula*, the plaintiffs could not enroll in school, which is a direct violation of the constitutional right to education.<sup>244</sup> Even though *Ley 137-11* states that all real and legal persons may bring *amparo* actions, this *amparo* action was rejected by the court, which claimed that because the particular institutions that brought the action on behalf of Haitian migrants, were not properly incorporated in the Dominican Department of Justice, the institutions lacked standing to bring *amparo* actions.<sup>245</sup>

Migrants depend on the help of nongovernmental organizations and other institutions and advocacy groups to bring *amparo* actions on their behalf.<sup>246</sup> Without their aid, undocumented migrants simply do not have enough knowledge of the Dominican legal system or financial capacity to hire attorneys to bring lawsuits or *amparo* actions for violations of their human rights.<sup>247</sup> The procedural requirements to bring *amparo* actions in the Dominican Republic need to be reformed to be less stringent for institutions to bring *amparo* actions on behalf of individuals.

Instead of facilitating the process, in 2010, the Dominican legislature made it even more difficult for migrants to bring *amparo* actions by requiring plaintiffs to exhaust all other recourses or judicial means to challenge the act or omission that violated their human rights.<sup>248</sup> The *amparo* action can be redeemed if the Dominican legislature reforms *Ley 137-11* to facilitate the suits by institutions on behalf of individuals without having to exhaust all other legal remedies first.<sup>249</sup> Only then could Haitian migrants, whose right to health is being violated, bring actions against the State for the imposition of judicial remedies.

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2012/06/27/i341721\_dominico-haitianos-depositan-recurso-amparo-contra-jce.html; *Tribunal Rechaza Recurso por Estudiantes Hijos de Ilegales*, *supra* note 227.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *See id.*

<sup>247</sup> *See* Interviews with anonymous Haitian Woman, *supra* note 1.

<sup>248</sup> Ley Orgánica del Tribunal Constitucional y de los Procedimientos Constitucionales No. 137-11 [Law on Constitutional Court Organization and the Constitutional Procedures], art. 70, G.O. No. 10622, del 15 de junio del 2011 (Dom. Rep.); Napoleón R. Estévez Lavandier, *En Directo—La Accion de Amparo en el PLTC-SR*, DIARIO LIBRE (Feb. 15, 2013, 12:01 AM), [http://www.diariolibre.com/noticias/2011/02/15/i279780\\_directo-accion-amparo-pltc.html](http://www.diariolibre.com/noticias/2011/02/15/i279780_directo-accion-amparo-pltc.html).

<sup>249</sup> *Id.*

If the Dominican Republic does not reform the *amparo* action, it should at least appoint an ombudsman to initiate *amparo* actions on behalf of these individuals, as explained below.

## 2. *Appointing an Ombudsman*

The Dominican Republic urgently needs to appoint an ombudsman. Since 1985, the institution of the ombudsman has played a key role in Latin America for the protection of human rights by acting as a watchdog for government authorities through a system of checks and balances.<sup>250</sup> The institution of the ombudsman is a mechanism used to control the abuses by authorities and private individuals.<sup>251</sup> It was implemented in Latin America in response to institutional weakness and serious violations of human rights.<sup>252</sup> It is often more effective than courts because it is not subject to formalities or legal restrictions, it does not charge a fee, and it is independent of other state bodies.<sup>253</sup> The majority of countries in Latin America have an ombudsman, but the Dominican Republic is not one of them.<sup>254</sup> In February 2001, the Congress of the Dominican Republic adopted *Ley 19-01* creating the Office of the Ombudsman; however, twelve years have passed and the first ombudsman has not yet been named.<sup>255</sup> The 2010 Constitution also contains provisions outlining the Dominican Office of the Ombudsman, known in Spanish as *El Defensor del Pueblo*, yet this position remains empty.<sup>256</sup>

In general, the ombudsman receives citizens' complaints against public administration and issues resolutions on the basis of these complaints.<sup>257</sup> The institution can even initiate enquiries into past human rights abuses.<sup>258</sup> By having a functioning ombudsman, Haitian migrants would have a legal recourse to protect their human rights, including their right to health. Once the Dominican Republic finally decides to appoint an ombudsman, it must model

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<sup>250</sup> Lorena Gonzalez Volio, *The Institution of the Ombudsman. The Latin American Experience*, 37 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS [REVISTA IIDH] 119, 199, 220, 223 (2003).

<sup>251</sup> Gonzalez Volio, *supra* note 250, at 223.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 223–24.

<sup>254</sup> *Id.* at 224.

<sup>255</sup> Ley que Crea el Defensor del Pueblo No. 19-01 [Law Establishing the Ombudsman], G.O. No. 10072, [Feb. 1 2001] (Dom. Rep.); Gonzalez Volio, *supra* note 251, at 224 n.14.

<sup>256</sup> CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.R.D.], *as amended* G.O. No. 10561, enero 26 del 2010, tít. 8, art. 190–92 (Dom. Rep.); Gonzalez Volio, *supra* note 251, at 224 n.14.

<sup>257</sup> Fredrik Ugglå, *The Ombudsman in Latin America*, 36 J. LATIN AM. STUD. 423, 424 (2004).

<sup>258</sup> *Id.* at 425.

the institution after the ombudsmen institutions that have been successful in other countries.<sup>259</sup>

To be effective, the Dominican ombudsman must be an independent and autonomous agency.<sup>260</sup> Being autonomous helps the ombudsman resist efforts from the government and political parties that may attempt to exert influence over the institution's actions,<sup>261</sup> especially in a country with a high corruption rate like the Dominican Republic.<sup>262</sup> It is important that ombudsmen have enough funds and that they be able to administer them autonomously.<sup>263</sup> One popular way to ensure appropriate funding has been to attract international support for this office, which the Dominican Republic should strive for as well.<sup>264</sup> Ombudsmen should be easily accessible and cheap, and they must be able to issue resolutions and initiate court action.<sup>265</sup>

In the Dominican Republic, the ombudsman could be a means for undocumented Haitian migrants to bring *amparo* actions. The Dominican ombudsman could cooperate closely with local human rights nongovernmental organizations to help Haitian migrants defend their human rights in the Dominican Republic.<sup>266</sup> Usually the ombudsman cannot create binding resolutions, but by working cooperatively with prosecutors and the judicial system, the ombudsman could influence other state organs to act on its behalf.<sup>267</sup> The ombudsman could also engage in proactive work, such as educating the population on human rights and proposing legislation to ameliorate the protection of these rights.<sup>268</sup> The official could even spread the word among the undocumented Haitian population that they have legal recourse in Dominican law with regards to their right to health.

A foreseeable issue is that other sectors, regions, or bureaucrats will not comply with the resolutions of the ombudsman or that the institution will lack political will.<sup>269</sup> To ensure against noncompliance, other Latin American

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<sup>259</sup> See *id.* at 423.

<sup>260</sup> *Id.* at 427.

<sup>261</sup> *Id.*

<sup>262</sup> See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, *supra* note 23, at 2775.

<sup>263</sup> Uggla, *supra* note 257, at 435.

<sup>264</sup> *Id.* at 448. The most successful ombudsmen tend to be the ones with the largest foreign contributions to their overall Budget. *Id.* This correlation is evident in Honduras, Peru, Bolivia, and Colombia. *Id.*

<sup>265</sup> *Id.* at 425, 427.

<sup>266</sup> See *id.* at 439.

<sup>267</sup> *Id.* at 428, 442.

<sup>268</sup> *Id.* at 443.

<sup>269</sup> *Id.* at 440–41.

countries have constructed legislation to make disobedience or lack of collaboration with the ombudsman a crime similar to the obstruction of justice.<sup>270</sup> The Dominican Republic should follow the footsteps of Colombia and Costa Rica, for example,<sup>271</sup> and pass legislation that makes obstruction with the work of the ombudsman a crime subject to firing or criminal sanctions.

It is time for the Dominican Republic to appoint the ombudsman it promised its people in 2001. An ombudsman, if properly supported, can help protect the right to health of Haitian migrants. The ombudsman can also serve as an avenue for migrants to bring *amparo* actions against the government. The country could even assign a healthcare ombudsman to be in charge of overseeing that the country's health laws are effectively carried out.

### *C. Decreasing Reliance on Direct Payments and Focusing on Prepayment*

Another way the Dominican Republic should ameliorate healthcare access for undocumented and uninsured migrants is by relying less on direct payments at public hospitals and shifting the focus to prepayment schemes.<sup>272</sup> In 2007, the percentage of patients who issued direct payments for health treatment in the Dominican Republic was thirty-six percent.<sup>273</sup> Having to pay for care on the spot discourages low-income, undocumented migrants from seeking care when they are faced with the choice of paying for health services or paying for essentials such as food or education for their children.<sup>274</sup> According to WHO, a more robust finance system can be established when the direct payment of health service falls to fifteen to twenty percent of total health expenditures.<sup>275</sup>

The health institutions that manage the public health budget need to pay medical providers and hospitals in advance for treatment, medications, and consultations of the poor and uninsured.<sup>276</sup> The purpose of such a reform is to reassure medical professionals and institutions that they will be reimbursed for

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<sup>270</sup> See, e.g., Ley No. 1818 del 22 de diciembre de 1997, Ley de Defensor del Pueblo [Ombudsman Act] tít. IV, art. 27, GAC. OF. NO. 2047, 23 de diciembre de 1997 (Bol.); Gonzalez Volio, *supra* note 251, at 245.

<sup>271</sup> In Colombia, obstruction of the ombudsman is punishable by firing and criminal sanctions. Gonzalez Volio, *supra* note 251, at 245. Under Costa Rican law, it is a crime of disobedience and public administration employees who are warned and still do not comply are suspended or fired. *Id.* at 245–46.

<sup>272</sup> See HEALTH SYSTEMS FINANCING, *supra* note 190.

<sup>273</sup> Rathe, *supra* note 15.

<sup>274</sup> HEALTH SYSTEMS FINANCING, *supra* note 190, at 12.

<sup>275</sup> See *id.* at 15–20.

<sup>276</sup> See *id.* at 12–14

the expenses incurred as a result of taking in poor and uninsured as patients. The funds used for the prepayment approach would be raised through taxes,<sup>277</sup> as explained in Subpart A. This is the method that has been more successful in other countries with universal healthcare systems.<sup>278</sup>

Because the funding for public health comes in large part from employers' social security contributions, and employers in the informal market do not always contribute their share of payments to these insurance funds, it is important the contributions be compulsory so that employers and the rich and healthy do not opt out.<sup>279</sup> This requires closer monitoring, supervision, and enforcement of sanctions to employers who do not comply with labor laws that require social security contributions for the healthcare of their workers.<sup>280</sup>

One limitation of this prepayment approach is that it might lead to abuse of the system. For example, illegal drug users will spend their money on drugs and then benefit from healthcare for free. To prevent against abuse of the system, public hospitals should make note of those patients found with drugs in their system and require them to pay higher out-of-pocket costs and inform SIUBEN so that they are disqualified from any government subsidies. Notifying SIUBEN of any drugs users who should be disqualified from receiving any benefits could have the double benefit of preventing abuse of the system and also providing an incentive for drug users to quit if they want subsidized healthcare.

Reducing reliance on direct payments and focusing on the prepayment approach will lead to stricter enforcement of the health law that requires public hospitals to issue free care to those who cannot afford to pay.

#### *D. Reforming the Institution SIUBEN*

As previously discussed, Haitian migrants are excluded from receiving government-subsidized insurance through the institution SIUBEN because they do not possess a Dominican *cédula*.<sup>281</sup> Reforming SIUBEN could help facilitate the access of migrants to healthcare centers. This Comment does not propose including all poor and undocumented Haitians in such a policy because the institution is already overburdened and such a move could raise

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<sup>277</sup> *Id.* at 4.

<sup>278</sup> *Id.* at 12.

<sup>279</sup> *Id.* at 13.

<sup>280</sup> *See id.*

<sup>281</sup> *See* discussion *supra* Part III.A.

strong opposition from direct taxpayers and low-income Dominicans who do not qualify for SIUBEN benefits.

A better way to reform SIUBEN would be to establish a system of vouchers and refunds for transportation, consultation, and treatment costs.<sup>282</sup> Instead of granting migrants government-subsidized insurance, migrants could either apply for financial assistance before attending the hospital, or in the case of emergencies, request refunds for expenses after-the-fact.

For this reform to work effectively, the vouchers and refunds would have to be easily accessible to migrants. In practice, this reform would ameliorate some of the financial burdens Haitians face, but it would also likely face some limitations. Currently, qualifying for SIUBEN benefits is a complicated process—low-income Dominicans must either be identified through periodic surveying of poor communities or, if they want to actively seek insurance coverage, they must travel to the SIUBEN regional office or fill out an application online.<sup>283</sup> Applying online assumes access to computers and Internet, which the majority of undocumented Haitians does not have and cannot afford. For the reform to work effectively, SIUBEN would have to establish centers near or inside public hospitals that low-income Dominicans and Haitians could easily access to ask questions or request vouchers or reimbursements to cover their health costs. Again, if patients are found to have drugs in their system, they would not qualify to receive such vouchers or refunds to prevent abuse of the system.

To conclude, the Dominican Republic needs to focus on implementing and enforcing the universal healthcare system it established in 2001. Providing adequate funding is the key to enforcing health laws. Once enough funding is achieved, an effective mechanism for enforcing human rights must be implemented. The *amparo* proceeding must be reformed to facilitate the process for institutions to bring legal actions on behalf of undocumented migrants. On top of having an *amparo* proceeding, an ombudsman must be urgently appointed to further ensure against the violations of the fundamental right to health. To ensure compliance at a regional level, health institutions need to pay public hospitals in advance so that they have an incentive to provide free healthcare to the poor and uninsured. Otherwise, public hospitals will not comply if they worry they will not be reimbursed for their expenses.

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<sup>282</sup> See HEALTH SYSTEMS FINANCING, *supra* note 190, at 14.

<sup>283</sup> *Solicitud de Inclusion*, *supra* note 112.



Lastly, reforming the institution SIUBEN to provide healthcare vouchers and refunds for undocumented Haitian migrants could alleviate some of the financial burdens migrants face when seeking care. All of these efforts, if followed, will bring the country several steps closer to establishing an inclusive universal healthcare system.

While these are all short-term solutions, in the long run, the most effective solution to improve the health access of migrants would be to amend the current migration laws to provide a more feasible system of regulating Haitian migrant workers. The current migration laws create insurmountable barriers for migrants and employers to comply with the documentation process and to contribute adequate social security payments for their Haitian laborers that help fund the costs of their medical care.<sup>284</sup>

### CONCLUSION

The disparate health realities that many undocumented Haitian migrant workers face in the Dominican Republic will continue to exist. This population is in need of timely access to healthcare because they live and work in poor conditions that predispose them to disease. Despite the country's efforts to establish an inclusive health system through its laws, those who implement the laws lack the will and intent to enforce them. As a result of underfunding, systematic exclusion of undocumented immigrants from government subsidies, and employers who do not follow labor and social security laws, the Dominican Republic is far from making strides on its promise of providing universal healthcare system it purports to construct through its laws. Haitian migrants often find themselves unable or unwilling to seek the care they need because of financial or social barriers. If the country wants to move in the right direction, it needs to create policies that favor the inclusion of migrants and other poor, vulnerable groups in the National Health System. Consequently, the creation of such policies favors the general population as a whole, especially in regards to communicable diseases that gain footholds amidst deep pockets of poverty. If the Dominican Republic seeks a universal healthcare

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<sup>284</sup> See discussion *supra* Part II.A.

system, it must seek reform that addresses the reality endured by its poorest residents so they may enjoy the rights already enshrined in law.

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