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Order in the Court: Judicial Stability and Democratic Success in Haiti

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Order in the Court: Judicial Stability and Democratic Success in Haiti

ABSTRACT

Haiti faces many challenges in its attempt to build a stable, liberal democracy. Haitians have endured a legacy of chaotic and heavy-handed rule in recent decades, and the success of democracy in Haiti is both hoped for and doubted by Haitians and the international community. One reason for the doubts has been the failure of the Haitian government successfully to implement free and fair elections. Citizens and candidates are often hesitant even to participate in elections. Though both were tragic, neither the failed legislative and presidential elections of 2000, nor the subsequent coup d'état in 2004 that resulted in the ouster of President Jean Bertrand-Aristide were particularly unique in Haiti's history. In order for Haiti to implement elections in a manner that creates legitimate leaders and an engaged electorate, the rule of law and the order of the Haitian Constitution must be enforced.

This Note argues that while far from perfect, the Haitian judiciary has the potential to play the most vital role in the institutional stabilization and democratization of Haiti. As judges are not subject to election, Haiti's judicial system stands at an arm's length from the government's suspicious electoral practices. The judiciary has already achieved a relatively impressive level of competence as demonstrated in the Raboteau trial of 2000, and it is the most promising of Haiti's governmental institutions to foster the rule of law and electoral stability. Haiti is in a truly desperate condition and requires steps toward authentic democratization to put its government and its people on the road to success. Judicial implementation and enforcement of a potent and reasonable body of electoral and constitutional law is a good first step, and the Haitian judicial system may be able to lead the way to electoral success in Haiti.

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"For at the real heart of the battle for equality is a deep-seated belief in the democratic process. Equality depends, not on the force of arms or tear gas, but depends upon the force of moral right—not on recourse to violence, but on respect for law and order."

U. S. President Lyndon B. Johnson, 1965.¹

1. President Lyndon B. Johnson, "We Shall Overcome," Address Before the United States Congress, Washington, D.C. (Mar. 15, 1965), available at <http://www.usembassy.de/usa/etexts/speeches/rhetoric/lbjoerco.htm> (last visited Feb. 12, 2004).

I. INTRODUCTION

Both the democratization of Haiti and, more specifically, the enforcement of the existing Haitian Constitution are critical goals for the country's future and the fate of the larger region. Haiti faces a startling set of obstacles between its present condition and the stable democracy envisioned in 1987 when the Haitian Constitution was composed. While it is hard for a struggling country to set priorities following a *coup d'etat*, Haiti, with the help of the international community, must do so with an emphasis on priorities conducive to long-term progress. The most basic step in achieving real democracy is the existence of truly free and fair elections over time. This is especially true in Haiti where the specter of failed elections is recent and vivid. While progress on other issues such as health care, education, environmental rejuvenation, and crime prevention must not be tossed aside, electoral reform must be an essential priority for building Haitian democracy.

Support from the international community is essential to build a democratic and independent Haiti. Help must be given in a manner that fosters Haiti's eventual independence instead of assuring perpetual dependence. Haiti's executive and legislative offices are shrouded in a cloud of illegitimacy because of the questionable elections and appointments that have filled those offices or even left them vacant. The international community has been very critical of Haiti's electoral processes, and Haitians are generally so incensed and suspicious that opposing parties refuse to participate in elections, and citizens are wary to vote. Such suspicion of the voting process encourages dissatisfied Haitians to turn to violence rather than the ballot box in pursuit of change.

Though it is far from perfect, Haiti's most competent and legitimate governmental institution is the judicial branch. By empowering the courts and aiding their growth in both influence and expertise, the body of Haitian constitutional and electoral law can mature. Haiti's successful democratization will not be easy, and there are disagreements concerning the best way to achieve it, but in order to create a democracy, the government must be legitimately elected by the country's people. Paradoxically, the unelected, undemocratic judiciary is in the best position to begin charting Haiti's path toward electoral stability and, in turn, democratic legitimacy.

II. THE PROBLEM: HAITI'S DESPERATE CONDITION CREATES INFERTILE GROUND FOR TRUE AND LASTING DEMOCRACY

A. A Brief Account of Recent History

In 1804, in winning its freedom from French rule, Haiti became the world's first black republic.² Despite the fact that it has existed for two centuries, the recent history of the island country demonstrates anything but consistency and stability. In 1957, François Duvalier won Haiti's presidential election and began to take unfortunate steps to solidify, centralize, and concentrate his power, morphing his elected presidency into a military dictatorship buttressed by the support of a privileged elite.³ After François's death in 1971, his son, Jean-Claude "Baby Doc" Duvalier took over his father's position as well as his manner of rule, and Haiti's humanitarian and economic problems worsened.⁴ Baby Doc was ousted by a military coup in 1986, but little changed afterward; it was just "Duvalierism without Duvalier."⁵

The late 1980s saw the rise of grassroots movements seeking democracy. Though many powerful segments of Haitian society opposed it, a 1990 presidential election was held peacefully. Jean-Bertrand Aristide, a Catholic Priest who had been a voice of the democratic movement, won the election with sixty-seven percent of the vote.⁶ This election was promising given Haiti's tumultuous and divided history.⁷ One scholar has posited that in Haiti's 200-year existence, the people have only twice been "of one mind" about anything: the first time was in winning independence at the beginning of the nineteenth century, the second time was this election of Aristide.⁸

Once he took office, many accused Aristide of conducting his presidency more like a dictator than a democratic leader as he allowed Haiti's rural areas to rule themselves (or be ruled by local

2. Andrew S. Levin, *Civil Society and Democratization in Haiti*, 9 EMORY INT'L L. REV. 389, 413 (1995).

3. Leslie A. Benton & Glenn T. Ware, *Haiti: A Case Study of the International Response and the Efficacy of Nongovernmental Organizations in the Crisis*, 12 EMORY INT'L L. REV. 851, 857-58 (1998).

4. *Id.* at 859.

5. *Id.*

6. *Id.* at 861.

7. Irwin P. Stotzky, *On the Promise and Perils of Democracy in Haiti*, 29 U. MIAMI INTER-AM. L. REV. 1, 2 (1998).

8. *Id.*

strong-arms), did not trouble with having parliament confirm his military appointments, and availed himself of a foreign-trained personal security service.⁹ On September 30, 1991, Aristide fell victim to a military *coup*, was deposed, and left the country (he first went to Venezuela and then to the United States), and a new military regime took power.¹⁰ Though the Haitian people had managed to make a successful call for presidential elections, Haiti's weak political system, due to generations of inexperience and instability, was unable to support and sustain the democratic revolution, and the military government held power for three years.¹¹

In September 1994, the U.N. Security Council approved a military operation led by the United States to force the military government out and restore Aristide to power, but after a last-minute negotiating success by Jimmy Carter, the military leaders permitted the peaceful reinstatement of the democratic regime.¹² On October 15, 1994, Aristide returned to power, becoming the only democratically elected president to replace the very military regime that overthrew him.¹³

Because the Haitian Constitution forbids two consecutive presidential terms,¹⁴ Aristide gave way to a hand-picked candidate from his Lavalas Party, Rene Preval, who won the presidential election in 1995.¹⁵ While in office, Preval dismissed legislators without providing for new elections, and when elections were finally held in May of 2000, accusations of corruption, intimidation, and violence destroyed their legitimacy and incited passionate, long-lasting protest.¹⁶ Similarly, in the presidential election held in November of 2000, in which Aristide was elected to his second term, the U.S. State Department estimated that less than ten percent of the eligible electorate participated and that there were a wide variety of other irregularities.¹⁷ Aristide took office for his second term in February 2001, but because the legislative elections in May 2000 and the presidential election in November 2000 were widely perceived as

9. Benton & Ware, *supra* note 3, at 863-64.

10. *Id.* at 864.

11. Levin, *supra* note 2, at 441-42.

12. Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 204 (2000); Stotzky, *supra* note 16, at 3.

13. Stotzky, *supra* note 7, at 3.

14. HAITI CONST. art. 134.

15. Steve Chapman, *Restoring Democracy is Easier Said than Done*, CHI. TRIB., Dec. 7, 2000, at N29.

16. *Id.*

17. *Id.*

illegitimate, the entire government's legitimacy and stability came further into question both domestically and internationally.¹⁸

Despite the calls for remedial action, the election results were never addressed by Aristide though he often claimed an intention to do so, and the parliament limped through a term of criticism until most of the legislative terms expired in January 2004.¹⁹ After January 2004, anti-Aristide protests continued to spread, particularly in Haiti's northern regions, as rebels acted against police and elected officials from city to city.²⁰ The chaotic rebellion eventually rolled into the streets of the capital of Port-au-Prince with protesters demanding Aristide's resignation.²¹

Having run out of options and international support, Aristide and his wife left Haiti aboard a U.S. military aircraft early in the morning on February 29, 2004.²² After this, Aristide's second departure, rebels celebrated, but the violence did not stop. Over one hundred Haitians were killed in the rebellion and reports suggest that over three hundred have been killed in reprisal after Aristide's departure.²³ The United States has sent Marines to serve as a stabilizing force, and the current plan is for those Marines to hand over their role to a multi-national force under the United Nations on June 1, 2004.²⁴

The Chief Justice of Haiti's Supreme Court, Boniface Alexandre, was installed on March 1 to fill the void as interim president.²⁵ A U.S.-backed, seven-member council including Alexandre named former foreign Minister Gerard Latortue to the post of Prime Minister in the transitional government.²⁶ The legislature remains largely vacant.²⁷

18. See *Haitian Opposition Vows New Protests to Force Aristide to Resign*, N.Y. TIMES, Nov. 28, 2002, at A14 (explaining, "Mr. Aristide has been hamstrung since he took office in February 2001.").

19. DeNeen L. Brown, *In Haiti, Two Sides and Bloodshed Between; Political Crisis Deepens as President's Supporters, Opposition Trade Accusations*, WASH. POST, Feb. 3, 2004, at A13.

20. Associated Press, *Rebels Take Over Haiti's Fourth Largest City*, N.Y. TIMES, Feb. 6, 2004, 2004 WL 59682389.

21. *Aristide Leaves Haiti Amid Chaos*, WALL ST. J., Mar. 1, 2004, at A3.

22. Peter Slevin & Mike Allen, *Former Ally's Shift in Stance Left Haiti Leader No Recourse*, WASH. POST, Mar. 1, 2004, at A1.

23. Associated Press, *Haiti's Prime Minister Chosen; Move by U.S.-backed Council is Step Toward Interim Government*, WASH. POST, Mar. 10, 2004, at A18.

24. Tom Weiner and Lydia Polgreen, *Haitians Again Relying on U.S. Military to Bring Peace*, N.Y. TIMES, Mar. 7, 2004, at A10.

25. Kevin Sullivan & Scott Wilson, *Aristide Resigns, Flies into Exile; U.S. Marines to Lead Peacekeeping; Haiti Wracked By New Round of Violence*, WASH. POST, Mar. 1, 2004, at A1.

26. Associated Press, *supra* note 23.

27. Brown, *supra* note 19.

B. Haiti's Desperate Condition

Haiti's problems are as startling in severity as they are in number. The country's inflation topped fifteen percent in 2000 and reached thirty percent in the last half of 2002.²⁸ Over sixty percent of the population is undernourished.²⁹ Haiti has the highest AIDS rate in the Caribbean.³⁰ Haiti is the poorest country in the Western hemisphere.³¹ Haiti has eight million people and fewer than one thousand doctors.³² Two-thirds of Haitians are illiterate, and the country's high schools enroll fewer than five percent of the eligible students.³³ Added to all of this is the fact that many of those responsible for the demise and lawlessness of today's Haiti remain in the country as do some 250,000 automatic weapons hidden or stashed throughout the country.³⁴ Stability is anything but certain. Haiti also has a rigid class structure that contributes to these other problems.³⁵ Even Haiti's land is in terrible condition: where Haiti was once twenty percent forest, it now has forestation levels of less than 1.5 percent, and this condition results in constant environmental destruction caused by erosion.³⁶ With problems such as these, Haiti proves a challenging case study for the potential success or failure of developing democracy in nations emerging from dictatorial rule.³⁷

C. The Absence of the Rule of Law

Perhaps what distinguishes Haiti most from other failed states is the extent to which even predictable parts of life are unpredictable there. While visiting Haiti in 1997, a Haitian friend shared a local proverb with me: "In Haiti, sometimes the sun comes up over here, sometimes it comes up over there." It is no wonder that due process, the rule of law, and respect for constitutional principles are struggling institutions and even low priorities in Haiti because such

28. *The Americas: Frustration Boils Over*, ECONOMIST, Nov 30, 2002, at 50.

29. *Id.*

30. Associated Press, *Aristide Poised for Election as Hopes Diminish for Haiti*, Nov. 21, 2000, available at <http://www.cnn.com/2000/WORLD/americas/11/21/haiti.elections.ap/> (last visited Feb. 12, 2004).

31. Irwin P. Stotzky, *Symposium on the Role of a Free Press and Freedom of Expression in the Development and Consolidation of Democracies in Latin America*, 56 U. MIAMI L. REV. 255, 283 (2002).

32. *Id.*

33. *Id.*

34. *Id.* at 286.

35. Stotzky, *supra* note 7, at 2.

36. *The Americas, Frustration Boils Over*, *supra* note 28.

37. See Stotzky, *supra* note 31, at 279 (stating that Haiti represents to an extreme degree the struggles faces by other former dictatorships striving toward democracy).

things flourish in stable, predictable societies.³⁸ Another Haitian proverb explains all too bluntly: "Law is paper; bayonet is steel."³⁹

While the thirty years of Duvalier dictatorship certainly deserves much of the blame for leaving Haiti in its current sorry condition, the blame for Haiti's inability to now right itself cannot entirely be placed on the Aristide government.⁴⁰ Though Aristide had many faults as President, it is not that administration's policies, but the magnitude of the difficulties inherent in steering such a country through a democratic transition that create the ultimate burden on Haiti's progress.⁴¹ An official human rights observer in Haiti throughout the late 1990s described some of the specific burdens that Haiti must shoulder:⁴² the historic place and operation of Haiti's justice system, the dominant presence of other high-priority issues, societal resistance to prosecution, inadequacies in law enforcement, and general insecurity among the people.⁴³ It is this set of cultural, practical, and institutional obstacles that make success of the rule of law in Haiti so difficult to achieve, no matter how much the government is willing to set policies toward that end.⁴⁴

Haiti's justice system has a multitude of problems: a long history of sluggishness, under-investment, archaic laws, exclusive jury pools, and a willingness to cater to the elite.⁴⁵ To the extent that Haitians desire an opportunity to address past wrongs, the Haitian system does offer two distinct benefits: no amnesty law and no statute of limitations.⁴⁶ Such a situation could allow Haiti and the international community to build on the rule of law not only to secure Haiti's future, but also to reconcile the past with respect to human rights violations, though moving toward common progress may be more important to the country.

The predominance of other high-priority issues in Haiti is perhaps the most daunting obstacle to Haiti's democratization.⁴⁷ Haiti's poverty, medical crises, economic struggles, and educational inadequacy all demand high prioritization in the allocation of Haiti's very limited resources.⁴⁸ Not only can the stability of law enforcement

38. IRWIN P. STOTZKY, *SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY* 208 (1997) (asserting that while the rule of law, due process, and constitutional stability are vital, they do not yet exist in Haiti).

39. See Stotzky, *supra* note 31, at 287.

40. See Concannon, *supra* note 12, at 209.

41. *Id.*

42. *Id.* at 201.

43. *Id.* at 209.

44. *Id.*

45. *Id.* at 210-13.

46. *Id.* at 213.

47. See *supra* notes 28-37.

48. See Concannon, *supra* note 12, at 214-15.

and the courts seem less urgent to many Haitians than these other issues, some observers feel that high profile, controversial trials can further damage stabilization efforts due to the passions they can evoke and the unrest they can cause.⁴⁹

Long term social and economic stability depends largely on governmental and judicial stability.⁵⁰ The current instability coupled with an inadequate and inexperienced law enforcement regime leaves Haiti without the general security required to foster the rule of law.⁵¹ The predominance of common crime and inadequate incarceration leaves Haitian judges, prosecutors, and potential jurors worried about concerns as basic as their own safety.⁵² The only conclusion to draw from the facts is that democratization in Haiti faces a dramatic uphill fight.⁵³ Problems such as Haiti's can even be exacerbated in the early stages of legitimate democratization as the threatened elite may work against stabilization, thus making the transition even more difficult and threatening the confidence of some citizens.⁵⁴ The ruling elite which has held so much power in Haiti in recent decades has a motive to stand in the way as well: a true free market economy, a more likely path for Haiti under true democracy (as well as an ingredient in Haiti's democratization in the chicken-egg relationship of democracy and capitalism), could threaten the control those elites have over Haiti's scarce markets and resources.⁵⁵

To add to the litany of problems disrupting Haitian progress, drug traffickers have entered the scene.⁵⁶ The U.S. report, which is issued yearly concerning the global drug trade, described Haiti as a "path of minimal resistance" for drug traffic due to corrupt officials, inadequate police, and weak democratic institutions.⁵⁷ Not only are the Haitian police forces inadequate, as recently as fall 2002, observers commented on the free reign enjoyed by armed leaders and

49. *Id.* at 215-16.

50. *Id.* at n.64.

51. *Id.* at 223.

52. *Id.* at 224.

53. It has been noted that "[w]hat combination of woes can be overcome [in creating a democracy] is unknown and probably unknowable. We can readily admit that for some, achieving stable democracy in the near term is unlikely." Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT'L L. 86 (2001) (emphasis added). If "for some" stable democracy is not achievable, perhaps Haiti is one of the "some," given the magnitude of its problems. The hope, of course, is that Haiti is a hard case and not an impossible one. While Haiti has been remarkably unstable and inconsistent, it has not been as dramatically violent as many other nations who are attempting democratization.

54. *See id.* at 88.

55. Ira Kurzban, *A Rational Foreign Policy Toward Haiti and How the Media Shapes Public Perception of Haiti*, 56 U. MIAMI L. REV. 405, 407-08 (2002).

56. *Id.* at 409 (describing the Haitian drug trade as causing "insecurity, corruption, and [a] threat to true national security"); *Haiti's Leader Calls U.S. Drug Charges Unfounded*, N.Y. TIMES, Feb 6, 2003, at A11.

57. *See Haiti's Leader Calls U.S. Drug Charges Unfounded*, *supra* note 56.

militiamen in Haiti's rural regions; such figures are prime candidates for unregulated, corrupt, or illegal arrangements with drug-traffickers.⁵⁸

III. THE GOAL: A STABLE DEMOCRACY

The Organization of American States has declared that representative democracy is an "indispensable condition for the stability, peace, and development of the region."⁵⁹ Creating such a system will be difficult, and it is not only the trajectory of life in Haiti that is at stake.⁶⁰ Democratic governments contribute to global stability, and to the extent that such is the case, disruptions of sovereign democracies threaten that stability.⁶¹ Consequently, those disruptions can hamper not only the stability that a particular state adds to the global picture, but allowing states to drift away from democratic success may also threaten the international trend toward democracy and the safety that flows from that trend.⁶² For the United States, another undesirable result of ineffective democracy in Haiti is the subsequent increase in Haitians seeking to immigrate to the United States when conditions in Haiti deteriorate.⁶³ For instance, on November 30, 2002, over two hundred Haitian refugees abandoned their boat and clamored onto a busy causeway near downtown Miami – the largest number of illegal Haitian immigrants in three years.⁶⁴ The current crisis has renewed the flood of Haitian refugees, the U.S.

58. *UN Expert Alarmed By Impunity Granted Armed Militias in Haiti*, AGENCE FRANCE PRESSE, Oct. 4, 2002, available at 2002 WL 23616899.

59. Karl J. Irving, *The United Nations and Democratic Intervention: Is "Swords into Ballot Boxes" Enough?*, 25 DENV. J. INT'L L. & POL'Y 41, 48 (1996).

60. See Elizabeth F. DeFeis, *Proceedings of the 2001 Symposium: International Elections Monitoring: Should Democracy Be a Right?: Elections – A Global Right?*, 19 WIS. INT'L L.J. 321, 321 (2001) (asserting that "democratic government...implies a lot more than participation in the political process or periodic and free elections. In addition to self-governance, democracy implies at least respect for human rights, the rule of law and an independent functioning judiciary.").

61. Douglas Lee Donoho, *Evolution or Expediency: The United Nations Response to the Disruption of Democracy*, 29 CORNELL INT'L L.J. 329, 364-65 (1996); see Fareed Zakaria, *Take the Lead in Liberia*, NEWSWEEK, Aug. 18, 2003, at 35 (explaining that "neglecting [countries teetering on the edge of anarchy] will not produce world war but might well produce failed states, regional instability, civil war, the spread of disease and even safe havens for terror groups."). See generally BRUCE M. RUSSETT & JOHN R. ONEAL, *TRIANGULATING PEACE* (2001).

62. Donoho, *supra* note 61, at 365.

63. See Benton and Ware, *supra* note 3, at 858 (stating that this has been a significant American concern for over 40 years).

64. John-Thor Dahlburg, *Haitians Held After Fleeing Ship*, L.A. TIMES, Oct. 30, 2002, at 8.

Coast Guard having intercepted hundreds during the course of the anti-Aristide uprising.⁶⁵

In the international context, democracy is not merely a preferred form of government; the right to live under democratic rule has been deemed an international right.⁶⁶ Logically, the necessity of “free and fair” elections is similarly viewed.⁶⁷ Democracy has become “the dominant political philosophy of the multilateral community.”⁶⁸ This consensus, as expressed in the 1993 Vienna Declaration on Human Rights from the U.N. World Conference on Human Rights, suggests that a state without democracy is a state in violation of its citizens’ human rights, and, subsequently, the international community has the right to foster democratization in such states⁶⁹ by helping to establish an electoral system representative of the will of the people.⁷⁰ The Haitian Constitution states that one of its purposes is to “implant democracy.”⁷¹ Haiti does not need help choosing democracy. It needs help with the actual “implantation.” The level of importance the international community attaches to the success of democracy justifies their lending struggling countries, such as Haiti, aid in reaching this goal.

Much of Haiti’s ruin is attributable to the thirty years of dictatorship under the Duvaliers from 1957 to 1986.⁷² While the overthrow of their tyranny stopped their dramatic damage, it is only permeable and trustworthy democratic rule that can start to fix things. As Irwin P. Stotzky has put it:

If Duvalierism impedes the creation of the rule of law, the weakness of democratic institutions keeps Duvalierism alive. The Haitian ‘problem’ is not merely political . . . Legitimacy of the state requires the participation of Haiti’s majority in deciding the fate of the country . . . Haitian democracy will have to develop in the rural areas and the city ghettos, or it will not be able to develop at all.⁷³

This statement correctly explains not only Haitians’ need for democracy but also the ways in which Haiti is inherently unfit for

65. Bill Frelick, *Denying Haiti’s Refugees*, WASH. POST, Mar. 6, 2004, at A19.

66. See generally Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

67. See Irving, *supra* note 59, at 47-48.

68. Barnes, *supra* note 53, at 86.

69. See Margaret Satterthwaite, *Human Rights Monitoring, Elections Monitoring, and Electoral Assistance as Preventive Measures*, 30 N.Y.U. INT’L L. & POL. 709, 716 (1998) (quoting Thomas Buergenthal).

70. See DeFeis, *supra* note 60, at 321 (explaining that a democratic government must be based on “the will of the people as expressed through free, open, and fair elections”).

71. HAITI CONST. pmb1.

72. See Brian Concannon, Jr., *Public International Law, Section V: Justice For Haiti: the Raboteau Trial*, 35 INT’L LAW 641, 641 (2001).

73. See STOTZKY, SILENCING THE GUNS IN HAITI, *supra* note 38, at 26-27.

such a transition.⁷⁴ A U.N. team monitoring Haitian elections in 1990 noted, in their first report, the absence of democratic traditions and the prevalence of totalitarianism and violence in Haiti.⁷⁵

In this condition, Haiti challenges both the notion that democracy can develop in recovering countries and the notion that recovering countries can develop democracy.⁷⁶ The challenge is that those things which allow democracy to function—multi-party systems, freedoms of association and expression, protection of human rights, a vital civil society, a free and competent press, widespread participation, and free and fair elections—are the products of democracy.⁷⁷ While the obstacles between Haiti and democratization used to be tyranny, torture, and corruption, the current obstacles come in the form of inexperience and incompetence in the machinery of democracy.⁷⁸ The challenge of reinvigorating the democratizing process is one for which Haiti needs the support of the international community, primarily with implementing free and fair elections.

Democratization will have to be successful if Haiti is to emerge from its current condition. Many who have studied this issue are hesitant to believe Haiti's democratization could occur.⁷⁹ However, optimism is an option; current developments suggest that several strong forces work in favor of democracy in states recovering from eras of conflict.⁸⁰ Namely, the current prestige and legitimacy that democracy enjoys and the familiarity of democratic principles (though not its intricacies) allow these recovering states to build on a working understanding of and confidence in the basic machinery of democracy.⁸¹ Also, democracy is generally associated with economic health, and such economic stability (or hope of it) only bolsters existing democracy and popular support for it.⁸² This issue of economic stability, though, can be a double-edged sword for a country in as poor an economic condition as Haiti, for if democracy does not result in economic prosperity, or at least reasonable improvement

74. *Id.*

75. Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in Fox & Roth, *supra* note 66, at 36-37.

76. See Stotzky, *supra* note 31, at 279 (asserting that Haiti represents to an extreme degree the struggles faced by other former dictatorships striving toward democracy).

77. See Satterthwaite, *supra* note 69, at 711.

78. See Stotzky, *supra* note 7, at 5 (explaining "the problems of an inexperienced and incompetent democracy with people yearning to assume the responsibilities of citizens").

79. See Barnes, *supra* note 53, at 86.

80. *Id.* at 87.

81. *Id.*

82. *Id.*

from the status quo, the system may lose the confidence of the people, and hence, its own legitimacy.⁸³

If it is to succeed, Haiti may require a renewed commitment from the international community to ensure the success of democratization.⁸⁴ Even after a set of free and fair elections, residual corruption, elitist control, and deadlock can degenerate into pre-democratization hostilities.⁸⁵ In the interest of lasting peace, the U.N. and other international entities need to foster new democracies by offering formal oversight to ensure the proper and effective administration of new governments.⁸⁶ This may involve rather specific segments of Haitian society and public administration being buttressed by international support.⁸⁷ While such involvement is important to create enough stability for a new democracy to succeed, buttressed success should not be confused with self-sufficiency, and the Haitian government needs to be independently stable and confident before taking complete control of those operations.⁸⁸

It has been noted that “[t]o bring democracy to Haiti . . . [e]conomic, political and social stability must be assured . . . so that the less privileged classes, which make up over 90 percent of the Haitian people, can enjoy basic necessities that make up dignified life.”⁸⁹ That stability, the argument goes, comes through strengthening, stabilizing, constraining, and training the three branches of the Haitian government to allow the rule of law and due process to prosper.⁹⁰ The remainder of this note argues that for the emergence of a strong and legitimate, yet limited, central government, the stabilization, empowerment, and training of the judicial branch in particular presents the most promising next step to promote Haitian democratization.

After viewing Haiti’s laundry list of serious and threatening problems, one cannot help but wonder where to start. Despite diverse ills concerning economics, education, law enforcement, and health care, if the road to recovery is also the road to democracy, then free, fair, and inclusive elections, the fundamental essential element of

83. *Id.*

84. See Karl J. Irving, *The United Nations and Democratic Intervention: Is “Swords into Ballot Boxes” Enough?*, 25 DENV. J. INT’L L. & POL’Y 41, 42 (1996) (stating that “[q]uick to declare success and move on, the international community has, in the process, virtually ignored problems of public administration”).

85. *Id.* at 42-43.

86. *Id.* at 43-44.

87. See *id.* at 51, 52 (explaining that, in other nations, support groups have aided in operations such as mail, schools, hospitals, animal control, interim judiciaries, and training for lawyers, judges, and magistrates).

88. *Id.* at 52 (explaining that in Somalia, the transitional government was not provided with adequate implementation of election details, or power distribution, and such led to disastrous conflict).

89. Stotzky, *supra* note 7, at 3.

90. *Id.*

democracy, must be the starting point in Haiti. With the current state of governmental instability and electoral confusion, it is Haiti's judicial system—a broken but promising vessel—that, through competent and empowered application of a reasoned body of constitutional and electoral law, could serve as the most promising agent of stability, order, and the rule of law.

IV. WHERE TO START: LEGITIMATE, FREE, AND FAIR ELECTIONS

A. *Elections Are the First and Most Essential Step toward Haiti's Democratization*

Caribbean leaders at a December 2002 summit in Cuba convened to address (among other things) Haitian electoral issues, and they issued a joint statements saying, “[e]lections are the only means to a legitimate government” in Haiti.⁹¹ In 1993, Boutros Boutros-Ghali, who was Secretary General of the United Nations at the time, stated that “democratization cannot be separated . . . from the protection of human rights.”⁹² Democratization is essential for Haiti on the most basic level, and elections are an essential ingredient in that transition.⁹³ If democracy is the answer to interrupting and redirecting Haiti's destructive trajectory, the nation must create a system of legitimate, inclusive, informed elections. Such a success could spur Haiti's government and its people toward the development of other institutions critical to any liberal democratic society—the rule of law, due process, effective law enforcement, and civil liberties, to name only a few.⁹⁴

Some scholars and observers argue that the first step to successful democratization is an economic one, not an electoral one. The point can certainly be made that “capitalist growth is the single best way to . . . create an effective and limited state” while “the absence of free and fair elections should be viewed as one flaw, not the definition of tyranny. Elections are an important virtue of governance, but they are not the only virtue.”⁹⁵ The necessity of free-

91. Associated Press, *Haiti a Step Closer to Legislative Vote*, *Caribbean Group Says*, MIAMI HERALD, Dec. 10, 2002, at 7A.

92. World Conference on Human Rights, *The Vienna Declaration and Programme of Action* (June, 1993), at 17.

93. See DeFeis, *supra* note 60, at 321 (explaining that free elections which carry the will of the people are the earmark of democratic rule).

94. *Id.*

95. FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 76, 156 (2003) (stating that without a moderately empowered and

market economics and the stable and empowered electorate it creates is a critical issue in any useful discussion about building democracy, and the discussion about Haiti is no exception.⁹⁶ It is also true that strategies for democratization “must be guided by a realistic understanding of the politics of the transition. Naively pressuring . . . states to hold instant elections can lead to disastrous results.”⁹⁷

Such cautions are well-founded, but the establishment of free and fair elections and the rule of law are particularly urgent priorities in Haiti because of the country’s particular and unique history.⁹⁸ While many democratizing countries must make a transition from an era of stern authoritarian rule, Haiti is attempting to make a transition from, above all, chaos. The recent collection of questionably elected officials has only served as a symbolic discouragement and a practical impediment to establishing the kind of order and confidence in democracy that Haiti needs for economic and every other kind of development.⁹⁹ The most recent *coup* has again proved that, to many Haitians, violence is a more desirable and effective route to change than peaceful political opposition. Haitian history is also rife with examples of electoral failure.¹⁰⁰ Just demonstrating that free and fair elections are *possible* is a prerequisite to Haitian public confidence and participation in democratization.

In order for democratic elections to be effectual in aiding Haiti’s progress, certain essential conditions must be fostered. Two such conditions are sufficient contestation in elections and sufficient inclusiveness in structuring the electorate.¹⁰¹ If either the opportunity for opposing views and representatives to compete for the support of the electorate or the ability of the population to be a part of the electorate are threatened or infringed, democracy as a whole will cease to function.¹⁰² The Haitian Constitution guarantees a democracy “which entails ideological pluralism and political rotation,”¹⁰³ but contestation is a very real problem in Haiti because many of the competing parties are so suspicious of Haitian elections

influential populous—a bourgeoisie—even elections can lead to more dictatorial, illiberal regimes).

96. The question of economic reform and development in Haiti is beyond the scope of this Note, but it is not the author’s position that the issue of economics is not of the highest importance.

97. JACK SNYDER, *FROM VOTING TO VIOLENCE* 16 (2000) (citing the tragedy in Burundi as an example: after elections in 1993, ethnic strife led to upheaval and the killing of thousands).

98. See *supra* notes 2-58.

99. See *id.*

100. See *infra* notes 122-135 and accompanying text.

101. Barnes, *supra* note 53, at 88-89.

102. See *id.*

103. HAITI CONST. pmb1.

that they refuse to participate.¹⁰⁴ Meaningful voting and meaningful democracy depend on "equal participation and rational discourse among all segments of the populous."¹⁰⁵ It is at least a significant benefit for the future of Haitian democracy that political parties already exist.

Another consideration must be the ways in which Haitian elections are organized in view of creating long-term equality of representation and legitimacy.¹⁰⁶ Having a proportional body elected not merely by a nation-wide plurality or majority (akin to the U.S. Congress) ensures that while citizens of a particular region may not be a majority or plurality, they are nonetheless adequately represented.¹⁰⁷ That the Haitian Constitution calls for two representative bodies similar to the two houses of the U.S. legislature addresses this concern.¹⁰⁸ Fair and equitable division of electoral districts and the subsequent quality and accuracy of representation, though, is of little value even when the constitution provides for it, if the current reality does not.¹⁰⁹

Practical problems aside, Haiti's 1987 Constitution envisions a well-crafted, limited federal government and a system of representative elections. These guarantees provide an adequate basis for judicial enforcement. The country's territory is divided into (from smallest to largest) Communal Sections, Communes, and Departments (of which there are nine), each of which maintain councils of elected representatives that see to issues of local provision and local government.¹¹⁰ The Haitian government, like the government of the United States, is divided into three branches: legislative, executive, and judicial.¹¹¹

The national legislature is composed of two bodies: the House of Deputies and the Senate.¹¹² Members of the House of Deputies (numbered at least seventy) are elected by direct suffrage from smaller municipal electoral districts for terms of four years, the whole membership of the house being up for election every four years.¹¹³ The Senate, also elected by direct suffrage, is elected at the Department level, and each department is represented by three

104. Michael Norton, *Haiti Misses Deadline for Next Election*, MIAMI HERALD (AP), Nov. 5, 2002, at 6A.

105. Stotzky, *supra* note 7, at 4.

106. See Barnes, *supra* note 53, at 95.

107. See *id.* at 95-96.

108. HAITI CONST., art. 88.

109. See Barnes, *supra* note 53, at 95-96.

110. HAITI CONST. art. 61-80.

111. *Id.* art. 59.

112. *Id.* art. 88.

113. *Id.* art. 89, 90, 92.

senators.¹¹⁴ Like U.S. senators, Haitian senators are elected to six-year terms, and one-third of the seats are up for reelection every two years.¹¹⁵ Haiti's president, head of the executive branch, is elected to a five-year term by a nation-wide majority vote.¹¹⁶ Presidents cannot serve in two consecutive terms, but can serve in two (but no more than two) non-consecutive terms.¹¹⁷

The legitimacy of elected officials depends upon the sufficient participation of the electorate. Fair and full participation is only the first hurdle though, because to truly participate in democracy in the intended sense, the electorate must be sufficiently educated and steady to make legitimate choices and ward off candidates who tend toward demagoguery or tyranny.¹¹⁸ A civil society strong enough to defeat an oppressive regime does not always translate into a political society strong enough to maintain legitimate democratic rule: such is the danger in Haiti.¹¹⁹ Democratic rule must involve an electorate whose influence and support forces candidates to represent their needs; a stronger education system and a competent and free press can help achieve those ends.¹²⁰ James Madison wrote that in order for democracy to succeed, two conditions must exist: a government capable of governing, and an electorate capable of controlling the government.¹²¹ That is Haiti's predicament: while there must be a starting point for progress, it is impossible truly to isolate any one variable from other necessary girders of the democratic framework. One goal—stability—is particularly essential, and the courts can contribute greatly to the pursuit of it.

B. Recent Electoral Failure

In May 2000, under then-president Rene Preval of Aristide's Lavalas party, Haiti held legislative elections that were tainted by accusations of corruption, intimidation, and violence that destroyed their legitimacy and incited passionate and long-lasting protest.¹²² Despite the controversy, the scheduled presidential election was held in November 2000, and Aristide, who under the Haitian Constitution could only serve a second term after sitting out a term, ran for and "won" reelection.¹²³ As in May, the election was questionably

114. *Id.* art. 94.

115. HAITI CONST. art. 95.

116. *Id.* art. 134.

117. *Id.*

118. See DeFeis, *supra* note 60, at 321 (explaining that even free and fair elections do not always result in democratic rule).

119. Andrew S. Levin, *supra* note 2, at 441.

120. *Id.*

121. *Id.* at 409.

122. See Chapman, *supra* note 15.

123. *Id.*

officialated and furiously boycotted, and estimates suggested less than ten percent participation by the eligible electorate.¹²⁴ Aristide took office for his second term in February 2001, but the disputed legislative elections in May 2000 and the presidential election in November 2000 hurt his, and the entire government's, legitimacy and stability, and the controversy spawned a multitude of negative international responses.¹²⁵ For instance, the United States withheld over \$500 million in economic aid, and the OAS and United Nations became so incensed that they withdrew or threatened to withdraw a significant amount of their support.¹²⁶ In June 2001, the OAS General Assembly cited the strengthening of Haitian democracy in the context of this electoral failure as one of the most pressing issues in the western hemisphere.¹²⁷ Though Aristide survived for a few years, furor over these failed elections was one of the driving forces behind the coup that toppled him on the last day of February 2004.¹²⁸

This electoral crisis is not Haiti's first.¹²⁹ The *coup*-era elections of 1993 were essentially shams because they were regularly boycotted by all but the ruling party.¹³⁰ Even after "democracy" was restored to Haiti, the problems persisted. In June 1995, Haiti held elections for all positions below the president, but administrative problems and other objections required three rounds of voting to reach the eventual outcome.¹³¹ Even then, most of the parties other than Aristide's Lavalas party refused to participate in the second and third rounds in protest to the irregularities at the polls.¹³²

In November 2002, a student demonstration in protest to the current electoral debacle was purposely organized on the fifteenth anniversary of another tragic election.¹³³ That election, in 1987, was Haiti's first in the post-Duvalier era: the election was interrupted

124. *Id.*

125. See *Haitian Opposition Vows New Protests to Force Aristide to Resign*, N.Y. TIMES, Nov. 28, 2002, at A14 ("Mr. Aristide has been hamstrung since he took office in February 2001.").

126. *The Americas, Frustration Boils Over*, *supra* note 28, at 50 ("America and others have conditioned resumption of aid dollars on resolution of objections to the May 2000 elections.").

127. *OAS General Assembly Addresses Democracy in Haiti and Venezuela – Supports dialogue in both nations*, Press Release from Federal News and Information Dispatch, Inc., June 5, 2002, available at 2002 WL 25969162 (last visited Feb. 12, 2004).

128. Associated Press, *supra* note 20.

129. See Andrew S. Levin, *supra* note 2, at 443 (discussing Haiti's electoral troubles in June of 1995).

130. See Benton & Ware, *supra* note 3, at 872.

131. Levin, *supra* note 2, at 443.

132. *Id.*

133. Marika Lynch, *A Flood of Discontent Rises Around Aristide*, MIAMI HERALD, Nov. 30, 2002, at 1A.

when citizens waiting to cast their votes at a high school were attacked with firearms and machetes by army and paramilitary objectors.¹³⁴ In the end, fifteen voters were killed while waiting in line, and the elections were suspended.¹³⁵ The history of resistance to electoral consistency in Haiti is very real and very troubling. Because of this history, Haitians need to see proper elections work in their country in order to believe that they can happen.

C. Important and Unfinished Business

The most pressing question for Haiti right is how to install a legitimately elected government. The *coup* has not solved the problems created by the 2000 elections and has added to the number of vacant high-level offices. Aristide is gone now, but the largely vacant legislature remains as do doubts about the possibility of fair elections.

The flawed elections of 2000 spawned constant protest, held up more than \$500 million dollars in international aid, and contributed to a *coup*.¹³⁶ The OAS had set many deadlines for the Haitian government to make progress toward remedying the electoral stalemate, but Haitian officials never responded to those challenges.¹³⁷ The U.S. Embassy in Port-au-Prince had said that parliamentary elections to validate the 2000 elections were Haiti's only solution.¹³⁸ The Bush Administration has had harsh words regarding the Haitian refusal to address the flawed elections: "Haiti is turning into a non-country."¹³⁹ While Aristide insisted repeatedly that he intended to hold elections in the first half of 2003, he never did, and the OAS said that the Haitian government did not do enough to convince opponents to participate in the new elections,¹⁴⁰ a criticism those opposing groups made as well citing inadequacies in security and freedom of speech.¹⁴¹ Aristide said in November 2002 that, "[t]he best resolution to this crisis is to form an electoral council and hold new elections."¹⁴² He was right, but it never happened.

134. *Id.*

135. *Id.*

136. *The Americas, Frustration Boils Over*, *supra* note 28, at 50 (explaining that America and others have conditioned resumption of aid dollars on resolution of objections to the May 2000 elections).

137. See Michael Norton, *supra* note 104, at 6A (highlighting Haiti's failure to meet a November 2002 deadline).

138. Lynch, *supra* note 133, at 1A.

139. *Id.*

140. *Haiti a Step Closer to Legislative Vote, Caribbean Group Says*, MIAMI HERALD, Dec. 10, 2002, at 7A.

141. *Aristide: Opponents Should Vote*, MIAMI HERALD, Jan. 2, 2003, at 7A.

142. See *Haiti: Aristide Proposes New Elections*, N.Y. TIMES, Nov. 29, 2002, at A22.

Much of the opposition had refused to participate in new elections unless Aristide resigned.¹⁴³ Now that Aristide is gone, Haiti must find a way to engage those opposing groups and create an electoral system that will lend credibility to those it puts in power.

As pressing as the current crisis is, the real problem is a systemic one requiring a comprehensive systemic solution and not something that can be solved with a one-time fix. That solution can come most effectively and most legitimately from enforcement and application of Haiti's existing constitutional provisions concerning proper elections and the protection of democratic liberties.¹⁴⁴ In short, Haiti needs the rule of law. The entity that can most effectively and most legitimately interpret and apply the constitutional and electoral law of the country, the judicial branch, is Haiti's most promising source of strong, domestically oriented progress toward free and fair elections and, ultimately, successful democratization.

V. HAITI'S MOST PROMISING TOOL: THE JUSTICE SYSTEM AND ITS ROLE IN CREATING AND ENSURING PROPER ELECTIONS WITHIN HAITI'S CONSTITUTIONAL FRAMEWORK

A. How the Haitian Justice System Can Serve as a Cornerstone for Electoral Stability

With help, Haiti's judicial system could be the catalyst to real democratic transition in Haiti. Through the administration of justice, Haiti could further four important developments necessary for successful Haitian elections: encouraging opposing participation, deterring corruption, creating public confidence, and fostering democratic liberties.

The legitimacy of Haiti's president and of Haiti's legislature depends on the legitimacy of the elections that put them in office.¹⁴⁵ While restoration of those offices is the ultimate goal, there is only one branch of government whose legitimacy does not depend on adequate elections: the judicial branch.¹⁴⁶ Thus, it is the lone institution that the people of Haiti may "lean on" without suspicion that electoral corruption put it there. The unelected Haitian

143. *The Americas: Haiti: Antigovernment Protests Continue*, N.Y. TIMES, Dec. 4, 2003, at A5.

144. HAITI CONST. arts. 24, 28, 31, 88, 89, 94, 95.

145. *See id.* arts. 88, 134 (providing for judicial appointment rather than election).

146. *Id.* arts. 174, 177.

judiciary, which is not ultimately accountable to the electorate,¹⁴⁷ through promoting electoral and constitutional justice in Haiti, could serve to empower the electorate and ensure a system in which the Haitians have confidence in their power over the institutions that govern them. According to Christopher Eisgruber:

A good way to guard against minority rule is to make sure that all public officials owe their offices, directly or indirectly, to a fair vote of the entire electorate. That is one reason why free elections are indispensable to democracy. But it does not follow that the best institutions to represent the people will always be the one that is the most thoroughly majoritarian.¹⁴⁸

In Haiti, the best institution to represent the people is the one that stands for order in the face of chaos: the courts.

The fact that the Chief Justice of Haiti's highest court, Boniface Alexandre, is serving as the interim President could do further damage to public perception of the Haitian judiciary's impartiality.¹⁴⁹ Hopefully, Alexandre will be a stabilizing presence, but judges and courts should avoid being associated too closely with the often wayward and corrupt executive branch. If the courts are to be a stern and fair authority competent to establish the rule of law, the Haitian people cannot suspect that the judicial branch is worthy of the same suspicion and distrust as the other branches of the central government. Alexandre's performance while holding office could go a long way in promoting or damaging the stature of the judicial system.

1. Encouraging Participation

A large part of the quandary of the current electoral standoff is the suspicion-filled electoral boycotts by many would-be participants.¹⁵⁰ Because of corruption and lawlessness in past elections, potential candidates and parties are hesitant to participate in future elections. Not only do they fear another unfair election, but they also fear being left with no judicious way to remedy such an unjust election and the bogus authority such an election confers on the winner. If opponents knew not only that elections would be well monitored, but also that those who sought to corrupt the process could be effectively prosecuted, it would encourage confidence and participation. Opponents would be able to believe that they would have a fair chance of winning and that such a system would provide

147. See *id.* art. 177 (providing that Supreme Court justices are appointed for life).

148. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF GOVERNMENT* 50 (2001).

149. See Weiner and Polgreen, *supra* note 24.

150. See Michael Norton, *supra* note 104 (explaining that more than 20 opposition parties refused to choose candidates for the electoral council).

in legal action an effectual remedy to rigged elections as opposed to the remedy many would-be opponents currently use: to not participate at all. For now, the only effective grievance against a disputed election is to boycott the next one.¹⁵¹ Being able to challenge the results of a previous election and participate in the next election would be preferred by the potential participants and beneficial to the system.

2. Deterring Corruption

This second point, deterring corruption, builds largely off of the first but is more directly related to the actions of incumbents or would-be corrupt candidates and parties. Just as with any criminal or civil penalty, the prospect of potent and forceful oversight and review of election practices and procedures, in both the civil and criminal contexts, would deter individuals, parties, and officials from meddling illegally in the electoral process.¹⁵²

3. Creating Public Confidence

Vital to a democracy's legitimacy is the public's confidence in the system and the government it provides. In Haiti today, such confidence is impossible because the regular elections called for by the constitution are not held.¹⁵³ Each time, controversy swirls around the elections, and often they are boycotted or sometimes not held at all.¹⁵⁴ When elections are held at irregular intervals, the public cannot help but be quite suspicious of just how democratic their government is. Citizens become hesitant to vote, hesitant to participate, and hesitant to put their hopes or their efforts into political action. For a growing democracy in need of popular support, confidence, and participation, the appearance of dictatorship and corruption is almost as destructive as the real thing.

Evans Paul, a former mayor of Port-au-Prince, Haiti's capital city, leads an opposing political party and recently characterized his cause as preventing "the establishment of an Aristide dictatorship in

151. See *id.* (stating that the boycotts of these opposition parties demonstrate the inadequacy of procedures of redress after an election, because even though they would prefer the existing regime to be replaced, the opposition resists taking part in elections).

152. It is evident that this is a necessary and justified purpose for reform. See Chapman, *supra* note 24 (explaining that chief among the allegations concerning the failed 2000 elections are claims that incumbents and election officials rigged the elections).

153. See *supra* notes 122-44.

154. *Id.*

Haiti.”¹⁵⁵ With goals so basic as these at the political forefront, many Haitians do not trust the democratic accountability created by today’s electoral process and are forced to fight, rather than trust, elected officials.¹⁵⁶ Such an attitude in the electorate can lead to hesitancy or apathy when it comes time to vote. Yet by the most basic democratic principles, participation by the electorate is essential. In fact, the Haitian Constitution lists “to vote in elections without constraint” not just as a right, but as every citizen’s civic obligation.¹⁵⁷

4. Fostering Democratic Liberties

While elections are the most basic and most vital component of a democratic society, the democratic environment is about much more than just elections. Democratic liberties are both the product of democracy and the means by which democracy operates. The more the Haitian courts can do to enforce and give substance to Haiti’s constitutional liberties, the more the byproducts of those liberties will fertilize the quality of social discourse and representation in Haitian elections.¹⁵⁸ The Haitian Constitution explicitly protects individual liberty,¹⁵⁹ freedom of expression,¹⁶⁰ freedom of conscience,¹⁶¹ and freedoms of assembly and association.¹⁶²

The guarantee of such freedoms is often not honored in today’s Haiti. For example, in reference to freedom of speech, actual protection of what media remains in Haiti is bleak.¹⁶³ Louis Joinet, a French lawyer who served as an official U.N. observer, said in October 2002, “tomorrow the critical journalist will have no other choice in Haiti but self-censure, exile or death . . . the press, and generally the freedom of opinion and of expression, are the targets of persecution.”¹⁶⁴ Only if the Haitian justice system adequately protects fundamental liberties by prosecuting the persecutors and interpreting the constitution so as to protect the rights of citizens can a truly democratic climate settle on Haitian dialogue and elections. Such a democratic climate is both a cause and effect of free and fair elections.

155. *Haitian Opposition Vows New Protests to Force Aristide to Resign*, *supra* note 125.

156. *See supra* notes 122-44.

157. HAITI CONST. art. 52.

158. *See Satterthwaite*, *supra* note 69, at 711.

159. HAITI CONST. art. 24.

160. *Id.* art. 28.

161. *Id.* art. 30.

162. *Id.* art. 31.

163. *UN Expert Alarmed By Impunity Granted Armed Militias in Haiti*, *supra* note 58.

164. *Id.*

B. *The Raboteau Trial: Proof of Judicial Competence?*

On November 9, 2000, a Haitian court reached verdict in the six-week Raboteau trial convicting sixteen of the twenty-two defendants in custody in addition to multiple defendants tried in absentia.¹⁶⁵ The trial was not only significant in size and complexity but also in gravity.¹⁶⁶ The Raboteau massacre was a serious crime and a serious failure of the rule of law in Haiti, but its importance was exaggerated because the massacre had become a symbol for all the human rights violations that took place under the military *coup* leadership.¹⁶⁷

Raboteau, a small fishing village in Haiti, was the scene of a horrific massacre in late April 1994.¹⁶⁸ The military dictatorship following the 1991 *coup* which ousted President Aristide sought to silence revolutionary action, and Raboteau was a village known for a grassroots movement advocating the return of President Aristide and the return of democracy to Haiti.¹⁶⁹ On the dawn of April 22, military and paramilitary troops carried out a planned attack on the shantytown, breaking into homes and ambushing escape routes.¹⁷⁰ While the exact death toll was unknown because the troops did not allow relatives to have access to the bodies and some were tossed into the sea, at least a dozen were killed and many others were wounded, tortured, imprisoned, and beaten.¹⁷¹

The trial was remarkable given the state and reputation of Haiti's judicial system. The justice system left over from the Duvalier era had neither the capacity or the desire to handle matters involving the complex or the controversial.¹⁷² According to observers and commentators, the trial was fair to both sides, well-orchestrated, well-organized, and subsequently well-received by national and international onlookers.¹⁷³ The U.N. Human Rights Commission's Independent Expert on Haiti, Adam Dieng, said that the Raboteau trial was "a huge step forward" for the Haitian justice system that

165. Concannon, *supra* note 72, at 64.

166. *See id.* at 643 (explaining that "the Raboteau massacre became the leading symbol for the dictatorship's repression, and its prosecution a key indicator of Haiti's progress in reforming its justice system").

167. Ellen Lutz & Katherine Sikkink, *International Human Rights Law in Practice*, 2 CHI. J. INT'L L. 1, 27 (2001).

168. Concannon, *supra* note 72, at 642.

169. *See id.*; *see also* Lutz & Sikkink, *supra* note 167, at 27.

170. Concannon, *supra* note 72 at 642; Lutz and Sikkink, *supra* note 167, at 27.

171. Concannon., *supra* note 72, at 642.

172. *Id.* at 641.

173. *Id.*

proved it was capable of effectively prosecuting human rights cases, often the hardest kind of cases.¹⁷⁴

As encouraging as the Raboteau trial has been, it has also proven to be but one working cog in a still broken wheel. Mario Joseph, a prosecutor in the case, said after the verdict, "I'm very satisfied because 22 people were tried and of those 16 were found guilty, and of those, 12 will stay in jail for the rest of their life."¹⁷⁵ Yet, on August 3, 2002, a massive jailbreak in Gonaives freed 159 prisoners including some of the most notable convicts from the Raboteau trial.¹⁷⁶ Such events demonstrate that *all* the arms of the government need to be in working order for the rule of law to actually exist: fair prosecutions without secure jails, or secure jails without fair prosecutions, fail to bring Haiti significantly closer to the stable rule of law. The Haitian government has been prone to counteract the rule of law in many other ways, including condoning vigilante justice, failing to prosecute many crimes, and allowing (and participating in) threatening treatment to those who speak in opposition to the current leadership.¹⁷⁷

The jailbreak in Gonaives serves as a metaphor for the problems facing Haitian democracy. Perhaps a stronger metaphor is the fact that on the day the Gonaives jail was leveled, the courthouse was also burned to the ground.¹⁷⁸ The law is under attack. Much as a good prosecution seems useless without a good jail, elections can seem useless when there is no educated electorate, and the rule of law can seem irrelevant when there is little food or healthcare.¹⁷⁹ That said, there is certainly no solution without some effort, and the Raboteau trial is an example of the progress that can be made by starting with the courts and the rule of law.¹⁸⁰

C. *The Recent Judicial Rebuilding Lessons in Kosovo and East Timor*

As daunting as the task of building a comprehensive and competent judiciary may be in Haiti, there are examples of the

174. U.N. Press Release, *Raboteau Verdict in Haiti a Landmark in Fight Against Impunity; But Case Not Yet Finished Says UN Independent Expert* (Nov. 20, 2000), available at <http://www.unog.ch/news2/documents/newsen/hr00090e.html> (last visited Feb. 12, 2004).

175. Trenton Daniel, *Military Officers Convicted in Landmark Trial in Haiti*, at http://www.africana.com/DailyArticles/index_20001128.htm.

176. *Mass Jailbreak Empties Haiti Prison*, Aug. 3, 2002, at http://www.news.ninmsn.com/World/story_36678.asp.

177. Human Rights Watch, *Human Rights Watch World Report 2002: Haiti*, at <http://www.hrw.org/wr2k2/americas7.html>.

178. *UN Expert Alarmed by Impunity Granted Armed Militias in Haiti*, *supra* note 67.

179. *See id.*; *see also* Stotzky, *supra* note 31, at 283 (explaining Haiti's health woes).

180. *See* Concannon, *supra* note 72, at 641; UN Press Release, *supra* note 183.

efficacy of well-employed efforts to do just that in other contexts. In late 1999, the United Nations established temporary governments in Kosovo and East Timor, and the new governments were charged with the task not only of rebuilding the judiciary virtually from scratch, but also of rebuilding almost the entire public sector, everything from healthcare to education, airports to utilities.¹⁸¹ Needing to establish a legal framework in which to carry out all of these tasks as well as to deal with criminal activity and other immediate legal problems, there were plenty of issues to address.¹⁸² Specifically problematic for the judicial reconstruction was that most courthouses had been burned, and records, supplies, and other resources were not available; most crucial, though, was the desperate shortage of adequately trained judges and lawyers.¹⁸³ Throughout the process, the United Nations kept local ownership of the new judiciary a top priority. When not enough domestic judges for the entire region could be located, the choice was made to have those judges travel rather than employ international, non-local individuals.¹⁸⁴ Training those individuals was not a simple task either. While technical training was a large part of the work, the United Nations also prioritized the "crucial role of the judiciary in society and the benefits of a culture of law."¹⁸⁵

The efforts of the temporary governments in East Timor and Kosovo to reestablish judicial order, appoint lawyers and judges, recreate a correctional system, and devise and implement a body of applicable law have been fairly successful.¹⁸⁶ This shows that rebuilding a judicial framework amid daunting circumstances is possible, and it is an encouraging development for the situation in Haiti. While Haiti's troubles are different than those in East Timor and Kosovo, East Timor and Kosovo serve as good proxies for what Haiti faces in rebuilding and legitimizing its own judiciary. Haiti is not in the state of absolute destruction that East Timor and Kosovo were. Haiti has a constitution, elected officials, and, though limited, some history of judicial effectiveness to lean on.¹⁸⁷ In large part, that makes Haiti's judicial rebuilding a less desperate task, yet in some ways it will be even more difficult. Haiti has to overcome a pervasive cultural trend of lawlessness and corruption. Haiti also has to deal with some forces that resist the stabilization that democracy will

181. Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L. L. 46, 47 (2001).

182. *Id.* at 50.

183. *See id.* (stating that a comprehensive search in East Timor resulted in only 10 qualified lawyers).

184. *Id.* at 54.

185. *Id.* at 55.

186. *Id.* at 60.

187. *See discussion supra* notes 181-85.

bring. While international sympathy was a significant force in favor of supplying aid to East Timor and Kosovo, that sympathy in Haiti's case has turned largely into international frustration; Haiti has had so many chances and has failed so many times.¹⁸⁸

Regardless of the differences, some issues are identical. Chief among them is the fact that rebuilding any society requires a stable judicial structure and requires that international aid be given in a manner that allows for domestic ownership and ultimate control over the judicial system. East Timor and Kosovo do not demonstrate that the task is easy, but they do demonstrate that with the right principles, significant progress is a realistic goal.

D. *The Role of the International Community*

Haitians have to learn how effectively to monitor legitimate elections, and the courts have to get the support and training to continue their progress. If history is to provide the example, those solutions will not come primarily from within Haiti; it has not thus far. It must come—in some form—from the international community. Haiti recognizes this, as it was the first independent national government to request U.N. oversight of elections solely to validate their legitimacy.¹⁸⁹

An effective answer could come from adopting some of the strategies discussed by the International Criminal Court (ICC). The ICC, while offering a forum for international trials (typically for cases concerning human right violations), recognizes the desirability of national trials as opposed to international ones.¹⁹⁰ Not only do national trials contribute to the feeling of domestic legitimacy in the eventual result of the case, but important cases also put a spotlight on the nation's justice system and force it to operate at its highest levels when the world's eyes are watching.¹⁹¹ In order for developing nations realistically to administer their own national trials, they have

188. See *supra* notes 122-35; Caribbean Update, Vol. 19, *U.S. Trade Package for Haiti*, Apr. 1, 2003 (attributing the loss of international financial support to the fact that "the international community has become increasingly frustrated with the slow pace of reform" in Haiti).

189. Franck, *supra* note 75, at 36.

190. Concannon, *supra* note 12, at 229; see Rome Statute of the International Criminal Court, art. 7, July 17, 1998, U.N. Doc. 32/A/CONF. 183/9, 37 I.L.M. 999, 1004 (1998).

191. See Concannon, *supra* note 12, at 229 (describing domestic human rights trials as serving as both "a carrot and a stick" in that they improve the result in the particular case at hand, but also improve the domestic judicial infrastructure); see Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 475 (2000) (explaining that the ICC seeks to complement and strengthen rather than replace domestic courts, stepping in only when domestic courts are unable or unwilling to address a matter).

to have sufficient numbers of legally trained personnel. The ICC actively recruits lawyers and prosecutors to train them, but it has been proposed that the ICC should recruit lawyers from countries in need of judicial training, have them work and train with the ICC, and then return to their home country to help administer justice domestically with the training gained in the international context.¹⁹² The goal of the initiative would be to use international prosecution to create domestic competency to deal with even large-scale trials at home, and thus “narrow the gap” between domestic and international prosecution and adjudication.¹⁹³

Ironically, by providing an international stage for human rights prosecution, the ICC attempts to make its own existence less necessary in the process. Any aid strategy in Haiti must have the same goal. While the ICC is not designed to get involved in election issues, the strategies which it explores to mature the legal infrastructure of developing countries could be very beneficial in the area of election monitoring and enforcement. Any actual interpretation and enforcement of constitutional or electoral law must come from the Haitian courts, because elections—more than criminal prosecutions and more than virtually any other issue—depend on domestic approval for legitimacy. That said, the U.N. or the OAS, which are already deeply involved in election monitoring in developing countries, should employ the service of election and judicial officials from countries in need of such expertise like Haiti. Such a program could increase the effectiveness of elections in developing democracies and thus increase the effectiveness of the democracies themselves. Powerful, successful democracies with an expressed interest in spreading democracy could help themselves by training election and legal officials. For instance, if the United States helped Haiti with legitimate elections and democratization, such aid would help create a government that U.S. policies suggest would require less help and oversight by the U.S.¹⁹⁴

Under such “teach-a-man-to-fish” logic, treating the human rights, poverty, environmental, and economic issues in Haiti may be necessary, but it is a temporary solution and not something capable of dealing with the country’s “hunger”. Creating a legitimate democracy

192. Concannon, *supra* note 12, at 230.

193. *Id.* at 232.

194. State Dep’t Press Releases & Documents, *State Department Official Reviews U.S. Priorities in the Americas—Curtis Struble says problems in region are not intractable*, 2002 Federal Information & News Dispatch, Inc., Feb. 27, 2003 (quoting Curtis Struble, Assistant Deputy Secretary of State explaining that democracy is “at risk in Haiti” and that U.S. and OAS support of young democracies in the region helps sustain development and stability). See generally BRUCE M. RUSSETT & JOHN R. ONEAL, *supra* note 61.

would do so. The fear of subsequent Haitian dependence would not be a controlling one in this case: a stable democracy is one that depends on international aid less – not more. Haiti itself illustrates the point. Haiti is anything but stable, yet it has received more than \$300 million from the United States alone in the last four years and now requires U.S. Marines to calm the streets.¹⁹⁵ International help with elections, in that they would lead to a more independent Haiti, would serve the same temporary purpose as the ICC.¹⁹⁶

Haiti needs to utilize the aid of the international community to implement sufficient democratic rule, but the Haiti of tomorrow needs to be one that is self-sufficient and self-directing. Maintaining this balance is difficult as it requires “reconciling the demands of rapidly evolving principles of substantive international law, such as self-determination, democratic governance and the promotion of human rights, with states’ almost atavistic impulses to preserve their sovereign prerogatives.”¹⁹⁷ Unless the legitimacy and necessity of stable, constitutional rule is internalized by the Haitian people, democracy can only be applied to, not flow from, their society and voters.¹⁹⁸

There is no question that Haitian judges need training and, apparently, it can be done effectively. Certainly it is no coincidence that the judge who presided over the Raboteau trial graduated at the top of his class from Haiti’s *École de la Magistrature*, a training academy for Haiti’s judges and prosecutors.¹⁹⁹ But it will take much more than one courtroom of well-trained lawyers and judges to give Haiti even a moderately sufficient legal infrastructure.²⁰⁰ The goal for the justice system in Haiti should be to build courts not merely competent to deal with massive controversy and complexity, but also to build a comprehensive, stable judicial structure as a component and catalyst of a more trustworthy and consistent governmental structure. This will help ease the country’s unrest and create a stable system in which crime is punished, the constitution is enforced, elections are legitimate, and the rule of law is respected. The courts

195. Lino Gutierrez, *Haiti and Development Assistance*, Remarks at the Inter-American Dialogue Conference, Washington, D.C. (May 22, 2002), at <http://www.state.gov/p/wha/rls/rm/10416.htm>.

196. See Lutz & Sikkink, *supra* note 167, at 28-29 (explaining that “in supporting the establishment of an international criminal court, Latin American democracies feel no threat to their sovereignty because criminal cases over which their national tribunals have jurisdiction will not end up before the world court,” and the more competent the legal systems of these democracies become, the more cases will be within their competence).

197. Donoho, *supra* note 61, at 331.

198. Stotzky, *supra* note 9, at 4.

199. See Concannon, *supra* note 72.

200. STOTZKY, *supra* note 38, at 81 (asserting that Haiti’s judicial system is “less developed than that of virtually any nation that has attempted” to create a democracy).

certainly can not create that situation alone, but they can be a driving force.

It is similarly important that the Haitian police and security forces be trained in more effective, and perhaps less aggressive, tactics to keep the peace. Such attempts have not always been accepted by the Haitians, however, as in the fall of 1993 when the U.S.S. Harlan County, filled with U.S. soldiers and engineers coming to train the Haitians and help rebuild their infrastructure, arrived at the docks in Port au Prince.²⁰¹ A mob stormed the dock and prohibited the ship's entry, and a day later, it turned around.²⁰² Haiti must be willing to accept help, and that help must be offered in a way that encourages Haitian acceptance. As contradictory as self-sufficiency and dependence on other countries may seem on the front end, it is hard to imagine that Haiti will become more democratic and more self-sufficient without accepting some foreign assistance.²⁰³ A U.S. State Department official explained the relationship between international aid and Haiti's own responsibilities, saying that while international support and funding is important "so too is the exercise of effective leadership and political will by the Haitian government."²⁰⁴

U.N. Security General Kofi Annan summed up the situation well: "It's going to take time, it's going to take lots of hard work, and we should not expect to do a Band-Aid job for two years or so and then turn around and leave, only to have to return."²⁰⁵ Annan aptly described the process of supporting democratization in Haiti as a "long haul."²⁰⁶

E. A Note of Caution

While Haiti's struggles and obstacles create an undeniable need for international support, the world must resist taking an overly paternalistic or disrespectful approach to Haiti's governmental evolution, something some feel has already happened.²⁰⁷ It must be

201. Benton & Ware, *supra* note 3, at 877.

202. *Id.*

203. See Donoho, *supra* note 61, at 331.

204. See State Dep't Press Releases & Documents, *Turmoil Said to Reflect Haiti's "Increasingly Complex" Situation*, Federal Information & News Dispatch, Inc., Sept. 8, 2003, at 2003 WL 2050112 (quoting Peter DeShazo, deputy assistant U.S. Secretary of State for Western Hemisphere Affairs).

205. Associated Press, *supra* note 30.

206. *Id.*

207. See Kurzban, *supra* note 55, at 410 ("The Haitian government should be treated with the dignity and respect that any democratically elected government deserves . . . [W]e need to find constructive ways to help the [Haitian] government on its own term, not ours."). Interestingly, since Aristide's ouster, Kurzban—Aristide's

remembered that Haiti's democracy has only been in continuous existence since 1994, and democracy takes time to fully develop.²⁰⁸ Even Aristide admitted recently, "[w]e are in the process of learning democracy in Haiti."²⁰⁹

Those that warn of such a problem of paternalism warn of a relevant danger. If what is in the world's interest and the Haitians' interest is a truly independent Haiti,²¹⁰ then the Haitian government and the Haitian Constitution must be the ultimate authorities in their own land. However, Haiti should not be left to make all the mistakes and learn all the lessons on its own time and its own dime. The most important way these concerns should affect the world's policy toward democratization in Haiti is to give technical assistance, academic training, and improved and necessary resources, but allow Haiti to ultimately determine its own course, the substance of its own policies, and the contours of its own constitution in a system that reflects the will of the people.²¹¹ This approach is especially necessary with respect to the judiciary. The key is for the court to develop a uniquely and genuinely Haitian body of law which has its roots and authority in its own constitutional system. But in order for that to happen, training, infrastructure, and national aid must stabilize things for long enough and give the system the tools to build what they need.

VI. CONCLUSION

There is no doubt that Haiti is a country in need of help. The key is to give Haiti the kind of help that ultimately leads not to dependence, but to independence. The recent departure of President Aristide presents both distinct challenges and specific opportunities for the progress of Haitian elections. Establishing a true and lasting democracy in Haiti is the way to establishing truly independent Haiti. Through empowering and supporting the Haitian judicial system, the democratization process and the promotion of free and fair elections can be initially built from Haiti's most promising and most protecting arm of the domestic government. While the goal of

lawyer—has advocated restoring Aristide to the presidency. Peter Slevin, *U.S. Assembles Peacekeeping Coalition in Haiti; Aristide Says American Troops Ousted Him Against His Will*, WASH. POST, Mar. 2, 2004, at A12.

208. *Id.* at 408.

209. Marika Lynch, *U.S. Team Pessimistic After Haiti Visit*, MIAMI HERALD, Jan. 27, 2003, at 5A.

210. Donoho, *supra* note 61, at 364-65.

211. See Kurzban, *supra* note 207, at 410. While Kurzban is perhaps more adamant about how much deference and autonomy Haitian government should have in its own democratization, he agrees that aid in the form of technical expertise and needed resources are more appropriate than developing policy or cultivating opposition parties to challenge Lavalas at the ballot box. *See id.*

effective democratization through legitimate elections in Haiti must be pursued with long-term optimism, there must be some basic stabilization in order for any progress to be possible. A recent declaration by a multitude of Haitian civil service organizations declared that for "any credible and democratic electoral process in Haiti" to take place, certain conditions must be met, such as a legitimate freedom of assembly, the dismantling of corrupt and powerful gangs, the release of political prisoners, and the assured safety of journalists.²¹² Through judicial assurance of these freedoms and the commitment and ability to assure reasonable interpretation and enforcement of electoral and constitutional law, the Haitian courts can provide a meaningful step down the road to truly independent democratization. Haitians crave the rule of law and legitimized leaders, and the courts can help to produce both of those things.

In 1856, Abraham Lincoln said of the United States that "the ballot [was] stronger than the bullet."²¹³ The task for the Haitian judiciary and the Haitian government at large is to work to make the same statement true in Haiti.

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212. Ira Lowenthal & Clotilde Charlot, *Diverse Interests Must Work Together*, FT. LAUDERDALE SUN-SENTINAL, Jan. 13, 2003, at 17A.

213. JONATHON SNELLING, *STRANGER THAN THE BULLET; AN UNCONVENTIONAL HISTORY OF THE VOTE* (2002).

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