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The Indispensable State[©]

IRWIN P. STOTZKY*

Two prominent themes resonate in Owen Fiss's considerable body of scholarship — the importance of an activist state to a democracy and the role of the judiciary as a significant part of state activism. In several of his writings,¹ Fiss justifies the need for an activist state by discussing and analyzing the democratic value of the First Amendment guarantee of free speech and the role of the state in furthering these free speech values. Fiss's argument, however, is not limited to free speech issues, but is meant instead to illuminate the broader issue of the role of the state in general. He employs the free speech debate as an important example of the state's and the judiciary's role in a constitutional democracy.

To Fiss, the Constitution is not a document that "distributes to future generations pieces of property in the form of rights."² Instead, it is a charter of governance that establishes democratic governmental institutions and sets forth in the Bill of Rights a set of principles and values that are to control these institutions. Freedom of speech is one of the most essential rights in a democracy. The adjudicative process is one of the major methods of transforming these rather abstract ideals, such as freedom of speech, into concrete rights. The role of the judge is to give meaning to our public values. Indeed, in Fiss's view, the adjudicative process plays an integral role in determining the quality of our social existence.

Fiss argues that the First Amendment guarantee of freedom of speech can be understood in two ways. It can be seen as a limit on state action. In that sense, it places a value on the autonomy of the citizen. Autonomy furthers public debate by allowing the individual to say what he wishes, free from state interference. Autonomy furthers public

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* Professor of Law and Director, Center for the Study of Human Rights, University of Miami School of Law. I wish to thank Alice E. Meyer for her excellent research assistance. As this article goes to press, a major crisis has again hit Haiti, forcing the democratically elected President, Jean-Bertrand Aristide, to resign under pressure from the United States and France and to flee Haiti. I have incorporated some of the recent events into this article.

1. See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); OWEN M. FISS, *The Idea of Political Freedom*, in *LOOKING BACK AT LAW'S CENTURY* 35 (Austin Sarat et al. eds., 2002); OWEN M. FISS, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986); OWEN M. FISS, *Why the State?*, 100 *HARV. L. REV.* 781 (1987).

2. Fiss, *Why the State?*, *supra* note 1, at 783.

debate, however, only when power is equally distributed in society so that all voices have an equal chance to be heard.

Freedom of speech can also be viewed as a means of achieving a larger political purpose — the production of the “uninhibited, robust, and wide-open”³ public debate that is an essential condition for democratic government. The public debate principle, however, does not create a presumption against state interference. As under the autonomy principle, individuals may say what they wish, free from state interference, but unlike the autonomy principle, action is not judged by whether it interferes with the autonomy of some individual or institution. Instead, action is now judged by its impact on public debate.

These two views of freedom of speech should work hand-in-hand. Ensuring the autonomy of the individual should be the means of bringing that public debate into being. It is this linkage between autonomy and democracy that accounts for the favored position of free speech in the Constitution as well as the rule against content regulation in First Amendment jurisprudence. The goal is robust public debate, and autonomy is the means to that goal.

In ancient Greece, and perhaps in early America, where the dominant social unit was the individual and power was distributed somewhat equally, autonomy might well have enhanced public debate and thus promoted democracy. “But in modern society, characterized by grossly unequal distributions of power and a limited capacity of people to learn all that they must to function effectively as citizens, this assumption appears more problematic.”⁴ The problem is basic. Today, public debate occurs on national television, radio, the press, and on the Internet. Effective public debate no longer takes place on street corners or in coffee houses. To participate in this discussion, one must have access to these national outlets, which are owned by private individuals who respond to market forces and pay little attention to the democratic needs of the society. The question then becomes whether the market, even one that is working perfectly, is the appropriate vehicle to ensure the proper working of democracy.

Fiss says it is not. He offers several reasons. Because the market privileges select groups, the opinions of those who have the capital to own a television station, newspaper, or radio station will almost certainly be aired. In addition, those groups that determine advertising budgets and those groups that respond to that advertising certainly will be favored. These groups might constitute a significant portion of the electorate, but they are not coextensive with the electorate. In Fiss’s

3. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

4. Fiss, *Why the State?*, *supra* note 1, at 786.

view, "[t]o be a consumer, even a sovereign one, is not to be a citizen."⁵ Moreover, the market also influences the content of the speech. The newspaper or television station has to remain in business, and so it must show a profit. This profit consideration will in large part determine what shows are aired and what stories are printed. A perfectly competitive market will produce stories or shows "whose marginal cost equals marginal revenue."⁶ People are more likely to watch reruns of old sitcoms and not as likely to watch documentaries or public interest shows. Showing reruns is thus a profitable and efficient use of resources. In that event, of course, commercial television will provide reruns of sitcoms. As Fiss makes clear, "there is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy, the structure of government, or the nature of society."⁷

What is needed, Fiss argues, is for the state to act as the corrective for the market. "The state must put on the agenda issues that are systematically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled."⁸ To put it another way, the state must pass out microphones so that excluded voices may be heard. Democracy requires it.

As Fiss acknowledges, there are serious problems with this approach. The state has no monopoly on virtue. There is certainly the risk that the state might prove self-serving in this regard, selecting only the views that are consistent with the state's position. Nevertheless, as Fiss argues, there are significant checks on state power. The private media almost certainly will attempt to provide an alternative voice. It well may be, however, that the state is the only institution powerful enough and thus capable of resisting the pressures of the marketplace.

Another potential problem with Fiss's argument is the danger of circularity.⁹ For example, in our constitutional history, one of the major state functions was to regulate business, but there was good reason to believe that business actually governed the state. Nevertheless, Fiss argues that this problem is overblown. It should be remembered that the state was the agent for effective social change during the Civil Rights Movement, and this experience leads Fiss to believe that the "elements

5. *Id.* at 787.

6. *Id.* at 788.

7. *Id.*

8. *Id.*

9. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL - ECONOMIC SYSTEMS* 201-21 (1977).

of independence possessed by the state are real and substantial.”¹⁰ This independence may not be complete, but it is nonetheless sufficient to make the theory of countervailing power viable. The judiciary also has a role to play in evaluating the intervention of the state to avoid the problem of circularity. Indeed, Fiss’s view relies heavily on the courts to carry the burden of ensuring rich public debate.

Even though there may be serious problems with Fiss’s views, his approach has one great virtue. The state is accountable to the citizenry; the market is not. When the state fails to provide the conditions necessary for democracy, the people can vote in new leaders. When the market fails, however, there is little or no recourse.

Fiss’s view of state activism has a number of implications for nations attempting to make the transition and consolidation to democracy. My own position is, however, both critical and accepting of Fiss’s views, but not necessarily in the expected manner.¹¹ Rather than arguing for the necessity of less state activism as most of Fiss’s critics would, I maintain that states, and particularly independent judiciaries in nations undergoing the transition process, must be substantially more activist in some areas, particularly in the “economic” sphere, than Fiss suggests. Indeed, because of the serious economic, political, and social problems confronting these nations, the only way of progressing from authoritarianism toward democracy may be through a powerful state activism.

Nevertheless, in determining the necessary degree of state activism in nations undergoing the transition process, the state must not be viewed as monolithic. To put it another way, in each nation, because of differences in political circumstances, social conflict, economic develop-

10. Fiss, *Why the State?*, *supra* note 1, at 791.

11. Robert Post, one of Fiss’s most recognized critics, criticizes such “collectivist” political speech theories for assuming that there is some proper conception of good political discourse outside of political debate itself. See ROBERT POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995). In several of his writings, Post argues that the primary value of free speech is to protect autonomy. To Post, autonomy is vital to collective self-determination because it resolves the conflict between individual and collective autonomy. It binds the individual to the collective. Without the interplay between collective and individual autonomy, the individual is alienated from the group, thereby defeating a primary goal of democracy. The state’s function is not to determine who can and cannot be part of the collective autonomy. In addition, in Post’s view, the autonomy theory better explains certain aspects of First Amendment jurisprudence than the public debate theory. For example, the public debate theory fails to address adequately the question of commercial speech. Finally, Post argues that Fiss’s arguments make little sense without full acceptance of the autonomy theory. Airing every argument would not, in fact, enrich public debate, but would confuse it by giving legitimacy to every silly theory. Post argues that autonomy is the only theory that justifies giving equal opportunity to individuals to participate in public discourse. This is because by doing so, individuals are treated with equal respect and are also bound to the collective. See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997).

ment and legal culture, the answer to the question of the right degree of state activism may also be different. Context is crucial.

The literature about democratic transitions, however, tends to lump all nations together. Part of the problem is a definitional one. The worldwide democratic revolution of the past three decades is often described as the transition to (or consolidation of) democracy.¹² This terminology, however, conceals a serious ambiguity because it often refers to two or more distinct situations. The first is a process of adjustments of norms or institutions toward the strictures of the democratic rule of law. There are, of course, varying stages of conformity. These stages include different levels of competition among an ideologically broad spectrum of political parties and differences in the development of an independent, non-corrupt judiciary that is able to interpret and enforce a bill of rights. The second describes a situation where liberal democratic institutions exist in full force, but their stability is not yet completely secured. In this second situation, prevalent in several nations, political, social, economic and cultural actions and other measures are being undertaken to achieve a necessary degree of consensus and social adhesion to these institutions. Unfortunately, while some of these actions have helped, others have hindered the success of the efforts. Moreover, serious problems in all spheres of public and private life have generally weakened rather than strengthened the consolidation process.

Latin American democracies are generally in transit to democracy in the latter sense.¹³ For example, in countries like Argentina and Chile, full liberal and democratic institutions are in place. The idea that social tensions and conflicts may coercively interfere with those mechanisms is not only a distinct possibility but has become an unfortunate reality.¹⁴ In several nations, Argentina in particular, the current economic crisis has caused a loss of confidence in all government institutions, including, of course, in the judiciary and in the rule of law itself. There are other

12. The question of whether nations remain in the transition toward democracy or have already completed the journey requires conceptual clarification as well as empirical corroboration. The complex question of when a democracy has been consolidated depends on justificatory theories of democracy and is intimately connected with the stability of a specific political system. All of these points raise extremely complicated questions, which depend for their explanations on the peculiar circumstances of each nation and on certain predictions, particularly about the stability, development and maturity of institutions. Analyzing these questions requires thorough research on the institutional structures of particular nations. Broad generalizations, however, can be made with some degree of certainty.

13. For a discussion of the different characterizations of the process of transition, see *TRANSITIONS FROM AUTHORITARIAN RULE: LATIN AMERICA* (Guillermo O'Donnell et al. eds., 1986); JUAN J. LINZ, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, AND REEQUILIBRIUM* (1978).

14. See discussion *infra* Part V.

countries, most dramatically Haiti, where democratic institutions have yet to develop, even though in the past several years serious attempts have been made to create, secure, and strengthen them.¹⁵

Whatever stage of democratic development a nation may be in, the transition to democracy remains a treacherous, difficult journey. In nations undergoing this transformation, economic, political and social stability has not yet been fully achieved. The corporatist political and social structures have not yet been transformed to allow the vast, under-privileged majority access to basic necessities that ensure a dignified life.¹⁶ Institutional structures of public life, such as a representative leg-

15. As I discuss below, these attempts to democratize Haiti have failed miserably for many reasons. During President Aristide's first exile, between 1991 and 1994, his administration drafted an elaborate set of plans to develop an infrastructure and to change the Haitian economic, political and social structures. The plans called for shifting the social balance of power away from the executive branch of government to civil society and local government. To do this, the government attempted to empower several components of civil society, such as political parties, labor unions, grass-roots organizations, cooperatives and community groups. The government also tried to create a vibrant private sector with an open foreign-investment policy.

The Aristide government's plan conceives of a sound macroeconomic policy that creates the proper environment for the private sector as one that eschews "foreign exchange controls, price controls, and other policy induced distortions." The Aristide Plan holds that the strategy implemented to realize these goals must:

- meet the basic needs and fully mobilize the human potential of the people of Haiti;
- demilitarize public life and establish the supremacy of legitimate civilian control over the military (and now, the former military);
- establish an independent judiciary;
- strengthen the institutional capabilities of Parliament, other autonomous institutions, and local governments to enable them to play a constructive and informed role in policy debates and implementation;
- limit the scope of state activity, and concentrate it on the mission of defining the enabling milieu for private initiative and productive investments;
- reduce the involvement of the central government in the commercial production of goods and services;
- redefine the relationship and the distribution of political authority between the central government and local authorities;
- improve the quality of public administration.

HAITI, STRATEGY OF SOCIAL AND ECONOMIC RECONSTRUCTION, (1994) (on file with author).

16. In Argentina, this is tragically the case. Only a few years ago, Argentina had a large middle class and the highest per capita income in Latin America. Today, at least sixty percent of the population of approximately thirty-seven million live in poverty, which is defined as having an income of less than \$220 a month for a family of four. The number of Argentines living in poverty has doubled since the end of 2001. Moreover, more than twenty-five percent of the population is now indigent, defined as having an income of less than \$100 a month for a family of four. See Larry Rohter, *Once Secure, Argentines Now Lack Food and Hope*, N.Y. TIMES, Mar. 2, 2003, at A6. As one Argentine has accurately described an increasingly large percentage of the population:

You see me here digging through the garbage — what else can I say? I have to choose between feeding my children or clothing them. If they don't have clothes, they can't go to school. My husband is too old to work now; he's in his 50's. In this country, once you reach 40 or 50, it's just time to die. And children are

islative branch, a competent, independent judiciary, and an executive branch that strictly adheres to its constitutionally imposed boundaries, must be developed and stabilized. The rule of law — and thus the fundamental guarantees of due process — has to become an accepted, basic requirement of public life and private social and economic interaction. All of this is necessary not only to protect human rights and the democratic process, but also to reach a satisfactory level of economic and social development. To put it another way, the resolution of each of these issues is intertwined and dependent on the others, even if they remain theoretically distinct. Indeed, for democracy to bloom and flourish, they must all be attacked simultaneously and successfully.

Another issue further complicates these already complex problems. These problems and their possible solutions simply cannot be successfully addressed without a justificatory theory of democracy. Such a democratic vision requires a continuous order of mutually assured and encouraged autonomy in which political decisions are manifestly based on the judgments of members of that order, who are, and are recognized as being, free and equal persons. Moreover, the expression of self-governing capacities must operate both within the formal institutions of

supposed to stop growing when they're 6 or 7. Today it's impossible to get milk for a baby! It takes me an hour, but sometimes I walk to the office of social services to see if they can help me. They never have anything. Now there are going to be elections. But why should we waste our time and energy to go and cast a vote? To elect another delinquent to office? There are times when I want to pick up and go, just pack everything up and leave here. I don't know where to.

Susan Gotthelf, *On Barely Getting By in Argentina*, N.Y. TIMES MAGAZINE, Sept. 1, 2002, at 33.

In December 2001, in response to the International Monetary Fund's (IMF) complaint that the Argentine government failed to impose fiscal austerity and its subsequent drastic action of cutting off Argentina's credit line, the Argentine government froze bank accounts and defaulted on its debt. Since then, the economy has shrunk approximately twelve percent, untold numbers of businesses have closed, and unemployment has risen to close to twenty-five percent. Hunger and near-starvation have struck particularly hard against the very young and very old, who are, of course, the most vulnerable. See Larry Rohter, *Once Secure, Argentines Now Lack Food and Hope*, N.Y. TIMES, Mar. 2, 2003, at A6.

With the election of a new president, however, there is hope for better times. For example, since Argentina's new president, Nestor Kirchner, a Peronist, took office on May 25, 2003, Argentina and the IMF have agreed to negotiate a new multiyear agreement. Horst Kohler, the managing director of the IMF, has described Kirchner in positive terms as a leader who has repeatedly said the growth of the Argentine economy takes precedence over both foreign creditors as well as the IMF itself. Indeed, Kohler said of President Kirchner, "I do think this vision should be implemented and that it will lead this country to strong growth and social cohesion." Larry Rohter, *Argentina Agrees to Talk Reform with I.M.F.*, N.Y. TIMES, June 25, 2003, at A10. In his short tenure, Kirchner has challenged every entrenched center of power and privilege in Argentina. He has attempted to purge the military and national police for corruption or human rights violations, pressured the chief justice of a corrupt supreme court to resign, attacked powerful business and labor interests, and attempted to bring the state intelligence apparatus under control. Even with these actions, problems remain quite serious. See Larry Rohter, *Cautiously, Argentines Warm to the 'K Style'*, N.Y. TIMES, June 29, 2003, at A16.

politics and in the affairs of daily life. The democratic order must satisfy the conditions of equal freedom and autonomy that give it definition.

It is clear that this movement from dictatorship to some form of democracy has not always run smoothly and that visions of democracy remain unclear, out of focus. There have been serious internal threats to fledgling democracies, retrenchments, setbacks and counterrevolutions leading to new authoritarian regimes, even if sometimes camouflaged as democracies. What role has and should the judiciary play in this democratic drama? Can courts, through their very independence, their constitutional adjudicative methods and their role as guardian of the people's rights, be a positive force in developing and consolidating democracies and thus a bulwark against a return to authoritarian rule?

In this essay, I argue that democracy cannot be created, consolidated, and perpetuated simply by a heroic judiciary in nations that have little historical experience with democracy, lack some or much of the required institutional infrastructure, have few material resources to work with, and lack the experimental agenda necessary to successfully complete this difficult mission. The barriers to a viable democracy remain high, particularly because there exists in many of these nations almost impenetrable cultural, economic, political and social complications represented by the peculiar history of each nation. In addition, the policies and actions of the world community, particularly those of the United States as represented, for example, by the economic policies of the World Bank and the International Monetary Fund (IMF), have had a dramatic and often negative impact on these nations. Moreover, the role of the judiciary, which is extremely important in this transition process, is also extremely complicated, and it depends crucially on a variety of factors over which the courts have little control. Nevertheless, in an activist state the judiciary can play a significant role in several areas, particularly in protecting the free flow of information to the people so that they can make informed choices and in checking some forms of excessive executive actions. Courts may also help create legal doctrines to liberate and equalize speech opportunities when private corporative powers monopolize the broadcast and print media. The judiciary can also play a significant role in helping the state create a transformative political economy. But judicial independence in several forms, and certain other judicial characteristics, such as the development of a constitutional adjudicative tradition, are crucial to the successful completion of this judicial task.

I proceed in the following manner: I begin by analyzing some of the difficulties nations face in the transition and consolidation process,

describe my view of a deliberative democracy that may help alleviate these almost intractable problems, and look at the judicial role in helping to secure a democracy, particularly its role in checking the executive and the private sphere by protecting freedom of speech and freedom of the press. I also discuss the role of the international community, particularly the role of the United States, in setting policies for the major international trade and monetary organizations, and thus affecting the development of these nascent democracies. Finally, I suggest some macro and micro changes, such as a new vision of a political economy and the breaking down of cultural barriers, that the judiciary and other state functionaries also may have a hand in achieving and that may lead to a more democratic society.¹⁷

I.

SOME MAJOR TRANSITIONAL PROBLEMS

There are a number of significant features of the consolidation of democracies that have taken place in Latin America and Haiti. The first significant feature of the consolidation is the fact that the process of democratization has taken place during some of the worst economic, social and political crises in the history of these nations. To generalize, these crises include the commission of massive human rights violations, such as murder, torture and rape. In Argentina, for example, from 1976 to 1983, a series of military juntas ruled the nation.¹⁸ They conducted what became known as a "dirty war" purportedly against leftist terrorism, resulting in the murders of anywhere from 9,000 to 30,000 mostly innocent people¹⁹ and started and lost a costly war with Great Britain over the Falkland/Malvinas Islands.²⁰ In Haiti, from 1991 to 1994, the military dictators murdered approximately 5,000 innocent people, brutalized, tortured and raped thousands, and terrorized millions of others.²¹

These crises also manifested themselves in enormous external

17. In analyzing all of the issues I raise in this paper, I use Argentina, Chile, and Haiti, to varying degrees, as the prime examples of my theories.

18. See Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. MIAMI INTER-AM. L. REV. 491 (1987).

19. The official estimate is 8,960. See NUNCA MAS: INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESPARICIÓN DE PERSONAS [NEVER AGAIN: REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED] 16 (9th ed. 1985); *Human Rights in the World: Argentina*, 31 REV. INT'L COMM'N OF JURISTS 1 (1983) (claiming the number of disappeared to be 15,000 due to underreporting); JUAN E. CORRADI, *THE FITFUL REPUBLIC: ECONOMY, SOCIETY AND POLITICS IN ARGENTINA* 120 (1985) (estimating the number of disappeared to be as high as 30,000).

20. See CORRADI, *supra* note 19, at 136-45.

21. See IRWIN P. STOTZKY, *SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY* (1997).

debts,²² hyperinflation, epidemics, extremely high rates of unemployment and the collapse of entire systems of social welfare. Initially, there was hope that these crises would change the economic and social structures and lead to more efficient schemes of production that would benefit all sectors of society. Instead, it appears that the crises have led to a new oligopolization that has greatly restricted the powerless sectors of society from obtaining the goods necessary to live a life of dignity.²³

Another prominent feature of the consolidation process is a failure by government and society to fulfill the requirements of the rule of law in both the formal and informal aspects of public and private life. This failure originally manifested itself in the concentration of power solely or primarily in the executive branch of government, leading to massive human rights abuses and a total disregard for other branches of government. It also manifested itself as corruption in public and private economic activities, non-observance of efficient economic norms and non-compliance with the most basic rules of social life, such as elementary traffic regulations. The failure to follow the rule of law also leads to the stunting of economic and social development.

The problem is further complicated by the fact that the people of these nations have failed to internalize the significance of the rule of law and thus the legitimacy of a constitutional system based upon it. Instead, the people of these societies manifest a belief in the importance of status or connections and reject universal standards of achievement and competition, which are, of course, necessary ingredients of a well-functioning democracy. The problem runs even deeper, however. The failure to follow the rule of law by government agents validates the failure of the people to believe in, live by, and endorse it.²⁴

A final, and even more insidious, obstacle than the other features nations face in the transition process, when attempting to create, solidify and consolidate democratic institutions, is the phenomenon of corporatism. Indeed, in some nations, for the transition process to succeed, the people must dissolve a network of de facto power relationships, which corporations create and jealously protect by taking advantage of the power vacuum left by representatives of popular sovereignty. In nations facing the corporative threat, such as Haiti, where there has never even

22. The Argentine military dictators left the country almost bankrupt with a staggering \$45 billion debt. See Peter Passell, *The Long Road to Argentina's Financial Disaster*, N.Y. TIMES, June 18, 1989, at A16.

23. Twenty years later, for example, Argentina finds itself in an even worse dilemma. See Santiago O'Donnell, *Argentina May Be Down But I Don't Plan to Get Out*, WASH. POST, Aug. 25, 2002, at B1.

24. This, I think, presents serious collective action problems that adversely affect economic, political and social development.

been a hint of a possibility for developing a democratic system of governance until very recently, these corporative power relationships have developed for a variety of historical and cultural reasons. The process is often transparent. Under the umbrella of authoritarian rule, a number of social organizations and groups representing particular interests sculpt a place for themselves after a bargaining process that includes their support for the present regime. In exchange for this support, these groups receive varying degrees of economic or political advantage. Such groups include the military, religious organizations, coalitions of entrepreneurs, trade unions and sometimes even the so-called independent press. Once democratic rule is established, of course, these groups stubbornly resist relinquishing their power to the representatives of the people.

The concept of corporatism has been the source of much confusion and specious theoretical differences.²⁵ The problem arises from two distinct meanings attributed to the word, one more traditional and the other more technical. In the more traditional sense, "corporatism" refers to the control exercised by the state over organizations and interest groups. A prime example is the control that prevailed in Hitler's Germany. The more technical meaning, and the one commonly used in the political arena, describes the supposedly opposite phenomenon: where these

25. For an interesting discussion of the concept of corporatism and its relationship to state and society in Latin America, see generally *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (James M. Malloy ed., 1977). See also RUTH BERINS COLLIER AND DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* (1991); HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT "ISM"* (1997); HOWARD J. WIARDA, *CORPORATISM AND NATIONAL DEVELOPMENT IN LATIN AMERICA* (1981); I. Bizberg, *Modernisation and Corporatism in Government-Labour Relations, in MEXICO: THE DILEMMAS OF TRANSITION* (N. Harvey ed., 1993); David Collier, *Trajectory of a Concept: "Corporatism" in the Study of Latin American Politics, in LATIN AMERICA IN COMPARATIVE PERSPECTIVE* 135-62 (Peter H. Smith ed., 1995); M. Victoria Murillo, *Union Politics, Market-Oriented Reforms, and the Reshaping of Argentine Corporatism, in THE NEW POLITICS OF INEQUALITY IN LATIN AMERICA: RETHINKING PARTICIPATION AND REPRESENTATION* (Douglas Chalmers et al eds., 1997); Ruth Berins Collier & David Collier, *Inducements versus Constraints: Disaggregating 'Corporatism,'* 73 AM. POL. SCI. REV. 967-86 (1998); N. CRASKE, *CORPORATISM REVISITED: SALINAS AND THE REFORM OF THE POPULAR SECTOR*, (Institute of Latin American Studies, Research Paper No. 37, 1994); Linn A. Hammergren, *Corporatism in Latin American Politics: A Reexamination of the Unique Tradition*, 9 COMP. POL. 443-62 (1977); Peter R. Kingstone, *Corporatism, Neoliberalism, and the Failed Revolt of Big Business in Brazil: Lessons from the Case of IEDI*, 40 J. INTER-AM. STUD. WORLD. AFF. 73 (1998); CLAUS OFFE, *SOCIETAL PRECONDITIONS OF CORPORATISM AND SOME CURRENT DILEMMAS OF DEMOCRATIC THEORY*, (Kellogg Institute, Working Paper No. 14, 1984); TIMOTHY J. POWER & MAHRUKH DOCTOR, *THE RESILIENCE OF CORPORATISM: CONTINUITY AND CHANGE IN BRAZILIAN CORPORATIST STRUCTURES*, (University of Oxford Centre for Brazilian Studies, Working Paper No. CBS-29-2002, 2002); HOWARD J. WIARDA, *Toward a Framework for the Study of Political Change in the Iberic-Latin Tradition: The Corporative Model*, 25 WORLD. POL. 206-35 (1973).

same organizations and interest groups acquire considerable influence over and exert persistent pressure against government decision makers. While defining this concept in such an explicit manner tends to place greater emphasis on one meaning to the exclusion of the other, the term actually encompasses both meanings when applied to most nations undergoing the transition process, particularly those in Latin America.

But this is not the whole of the matter. Latin American and Haitian corporatism does not rise to the level of the fascist institutional structure of legally sanctioned exclusive organizations or interest groups. Neither does it reduce itself to the pressure that interest groups apply on political entities in every pluralistic society; for example, when these groups lobby for or against legislative acts that may affect them. The Latin American and Haitian reality is considerably more complex. It includes variations of both features mentioned above. There is some control by the state over interest groups and organizations, and there are a variety of official and unofficial mechanisms that are used to alter their operation. Simultaneously, however, those organizations exert enormous pressure on government actors and agencies. This pressure allows the corporative forces to gain favored treatment of various kinds. Some of these privileges even amount to a legal monopoly of the interests represented in a way that approaches the fascist scheme. In many circumstances, however, the monopoly power of the corporative interests is unaccompanied by any significant influence of the state over these interest groups and organizations. In other situations, alternative legal or even constitutional privileges short of monopoly may be granted that shield the organization from the raw competitive forces of popular expression, such as a "free market." In addition, governments may grant favors in informal ways that in some cases amount to illegal, indeed corrupt, actions.

Corporatism is, unfortunately, very difficult to overcome. It is an insidious and powerful force. When the transition process is successful, and the authoritarian regimes are weakened or abolished and are replaced by liberal democracies, the corporative groups whose interests have been favored struggle to retain as many of their privileges as possible. These entities ferociously compete with the popular sector of society, which has recently entered or reentered public life. In many instances, while the people's entry or reentry overcomes their prior illegitimate exclusion, these very same corporative organizations reclaim their privileges and deny the people their rightful claims.

Haiti is a particularly striking example of the devastation created by

corporatism.²⁶ During the most recent military dictatorship, between 1991 and 1994, the armed forces and their paramilitary civilian front — the attachés — assumed total power and influence over all aspects of life, and completely violated and destroyed any semblance of democratic practices and institutions. Indeed, the military forces consolidated their rule by ruthlessly suppressing Haiti's once diverse and vibrant civil society — a society that brought the promise of direct participatory democracy to a near reality. Besides killing, torturing and brutalizing approximately ninety percent of the population, the military systematically repressed all forms of independent association in an attempt to deny the Haitian people any organized base for opposition to the brutal dictatorship. Their goal was to push Haiti back into an atomized and fearful society reminiscent of the Duvalier era.²⁷ Their strategy was to make it impossible for Jean-Bertrand Aristide to transform his popularity into the kind of organized support necessary to exert civilian control over the army or even to create a democratic institutional structure necessary to aid in that endeavor should the international community succeed in returning Aristide to power. The cost to the Haitian people has been astronomical. The very civil society that Haiti needs to confront its desperate economic and social problems has nearly been destroyed.²⁸

When the international community returned Aristide to power in 1994, his government attempted to restore the armed forces to their proper constitutional role by prosecuting military officials who were involved in human rights violations.²⁹ But security is an absolute necessity to pursue this strategy. With approximately 250,000 automatic weapons cached around the country, however, the goal of diffusing military power has been extremely difficult to achieve. A recent incident illustrates the point. On December 17, 2001, a group of approximately thirty commandos equipped with sophisticated automatic weapons and grenade-launching rifles stormed the National Palace and occupied it for

26. For a discussion of Haitian history and culture that analyzes many of the problems of the transition process, including corporatism, see STOTZKY, *supra* note 21.

27. Francois ("Papa Doc") Duvalier ruled Haiti with an iron fist between 1957 and his death in 1971. He reportedly murdered between 40,000 and 60,000 of his fellow Haitians. His son, "Baby Doc," ruled Haiti from 1971 through 1986. See BERNARD DIEDERICH & AL BURT, *PAPA DOC: HAITI AND ITS DICTATOR* (1986); JAMES FERGUSON, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS* (1987). See also George DeWan, *Reigns of Terror*, *NEWSDAY*, Oct. 26, 1993, at 24.

28. The recent overthrow of the Aristide government, which occurred on February 29, 2004, was largely caused by the lack of material resources, including people with the necessary education and training needed to make a democracy work. See Irwin P. Stotzky, Address at Colloquium: Human Rights & Haiti, sponsored by several departments at Princeton University, most prominently the Program in Latin American Studies and the Woodrow Wilson School of Public and International Affairs (Feb. 20, 2004) (on file with author).

29. For a discussion of the moral, legal and political problems associated with prosecuting human rights violators in these circumstances, see STOTZKY, *supra* note 21.

five hours before being routed by Haitian security forces.³⁰ Over the next three years, these former Haitian army members continued their violent attacks against the Aristide government using these cached weapons. These attacks were a major cause of the destabilization of the Aristide government.

Another corporative power, the Catholic Church, has played both positive and negative roles in the lives of these nations. The Church hierarchy in Haiti, for example, has for years sided with the military and the economic elite. During the military rule, the Church hierarchy exerted great influence over the regulation of matters of private life and the purity of social customs. For example, while the vast majority of Haitians are Roman Catholics, almost all Haitians privately practice Vodoun, the major Haitian folk religion. Publicly, however, the elites associate Vodoun with evil. Indeed, successive Haitian authoritarian governments persecuted many individuals who openly practiced the religion. The persecution has been encouraged and even generated by the hierarchy of the Catholic Church.

Not surprisingly, the Vatican is the only nation to have recognized the political legitimacy of the 1991 military coup, and the Church hierarchy has consistently opposed Aristide, a former Catholic priest, and any type of real democratic reform. Local churches, however, have long helped the people of Haiti by nurturing populist groups in the rural areas. For example, the Catholic Church has long sponsored literacy programs for the peasants.

The entrepreneurial sector constitutes another corporative source directed at the democratically elected government. It seeks to obtain a variety of privileges and protective measures while preserving those previously secured. In Haiti, as in other nations, this corporative force has attempted to boycott many measures designed to achieve progressive levels of taxation.³¹ This elite class has ruled Haiti for the 200 years

30. The commandos were former members of the military. At least three people were killed and several were seriously wounded. See, e.g., Michelle Karshan, *Details on the Attempted Coup D'Etat: Attack on Haiti's National Palace on December 17, 2001*, AGENCE HAITIENNE PRESSE, ASSOCIATED PRESS and HAITI PRESS NETWORK, Dec. 2002. These same forces are responsible for much of the violence leading up to Aristide's overthrow. Indeed, Guy Philippe, one of the so-called leaders of the violent rebellion, is allegedly the architect of the December 17, 2001, attack on the National Palace. BBC News, *Guy Philippe: The Rebellious Soldier* (Mar. 4, 2004), at <http://news.bbc.co.uk/1/hi/world/americas/3495944.stm>.

31. Indeed, when President Aristide first took office in 1990, he met with representatives of the elite families, almost all of whom can be classified as members of the entrepreneurial sector, to discuss the payment of taxes. He told them that one of the most serious problems in Haiti was the failure of those who earned their fortunes in Haiti to pay taxes. In point of fact, throughout the history of Haiti, the elites simply refused to pay taxes. Aristide then stated that his government would not attempt to collect taxes owed in the past, but from this date forward, he expected those people to pay taxes. The representatives of the elite families essentially told Aristide that he

since its independence, using the state resources as its personal bank account and keeping the vast majority of Haitians in a state of extreme poverty, even slavery.³²

Fortunately, positive changes in the corporativist structures of these nations have taken place. Presently, the armed forces have lost power and influence in some countries in Latin America and generally have been more accepting of democratic practices and institutions. In Haiti, during the first term of Aristide's presidency, the armed forces were literally dissolved. The former Haitian army became a fifty-person marching band. Nevertheless, former military officials continued to create havoc from 1994 through today. They formed criminal gangs, mounted military attacks against the National Police Headquarters, Parliament and the Presidential Palace, and assassinated several newly elected senators and approximately eighteen newly trained members of the National Police Force.³³ On December 17, 2001, they even attempted a coup d'état by attacking the National Palace.³⁴ Over the next several years, they continued to commit violent acts to destabilize the Aristide government.³⁵ Finally, on February 29, 2004, they suc-

would not be in office long enough to collect taxes. Approximately three weeks after that meeting, Aristide was overthrown by a military coup. Interviews with Jean-Bertrand Aristide, in Port-au-Prince, Haiti, (Nov. 8, 1993 to Dec. 1997). Under René Preval's government, which served from 1996 through 2001, taxes on the elites and the middle class were slowly beginning to be collected. For example, those who import automobiles are now sometimes required to pay the import tariffs. Nevertheless, tax collection remains sporadic and inconsistent. Corruption of public officials is a continuing problem.

32. Ironically, Haiti is the product of a revolution against slavery and colonialism. It emerged as a nation in 1804, after a thirteen-year struggle against France that resulted in the destruction of the French colony of Saint Dominique. Almost immediately after independence, the Haitian elites attempted to recreate the plantation economy, treating the rural masses in much the same way the French colonial oppressors had treated them. The former slaves, however, simply refused to return to a state of slavery. Instead, they settled as small peasants on land that they had bought or reconquered from the state, or that had been abandoned by large landowners. The urban elites then devised a dual strategy to counter this situation.

The first part of the plan was economic. The elites used the fiscal and marketing systems of the country to create wealth-producing mechanisms for themselves. They became traders, politicians and state employees. They prospered by living off the peasants' labor. Taxes collected by the import-export bourgeoisie at the urban markets and customhouses — paid solely by the peasants — provided the entire source of government revenues. The elites then took over the state and used the state revenues as their personal bank accounts.

The second part of the plan was political. The strategy was to isolate the peasants on small mountain plots and keep them away from politics. It was a brilliant but corrupt strategy. The peasants, who unknowingly subsidized the elites, had no say whatsoever in how the state was to be run. For analysis of these points, see STOTZKY, *supra* note 21; see generally, MICHEL-ROLPH TROUILLOT, *HAITI, STATE AGAINST NATION: THE ORIGINS AND LEGACY OF DUVALIERISM* (1990).

33. See STOTZKY, *supra* note 21.

34. The coup d'état attempt proved unsuccessful. See Karshan, *supra* note 30. It was simply a precursor to the more successful 2004 coup d'état that followed.

35. Many of these acts took place in the rural areas of Haiti, resulting in the murders of at least 25 people. These murders were committed by armed commandos identifying themselves as

ceeded in overthrowing the democratically elected government.

In several nations, the Catholic Church is reluctantly ceding its claim that the state should enforce the Church's vision of private, personal life. In other nations, however, the Church refuses to occupy a more limited public role. In addition, in many of these nations, the influence of trade unions has been hobbled by unemployment and by the decline of the welfare state – a decline that sometimes alienates and harms those normally aligned with the government.

The great enigma, which is directly related to the economic and social crisis, is whether the previously dominant economic groups have retained their power, or even increased it, by exchanging their positions as privileged contractors of the state for positions as owners and thus monopolistic providers of the recently privatized public services. In Haiti, the question has a rather unusual twist: whether the previously dominant entrepreneurial groups remain powerful or have been reduced to puppets of the military during the dictatorship, and, if they now retain power during the transition period, whether they will reassert it or yield some of it to the people. During most of Haiti's history, the military did the bidding of the elite classes by protecting their economic monopolies and brutally suppressing the vast majority of the poor. In turn, the rich paid off the dictators.

During the 1991-94 coup period, however, circumstances changed dramatically. The military took over the country's ports and landing strips, thus enabling its high-ranking officers to prosper in the illicit drug trade. More important, the military increasingly prospered through its control of state monopolies. Alarm over these incursions into the economy led the economic elite to support, however tentatively, the return of Aristide to office. The question remains, however, what role the economic elite will play now that the 1991-94 military dictatorship is over, two successive democratic governments have come to power and the second Aristide administration has been removed.

It is clear from this brief discussion of corporatism that one of the main obstacles facing a nation undergoing the transition to democracy is the interpenetration of corporative power relations, which are remnants of previous populist and authoritarian stages. The corporative actors, however, do not necessarily play the same role in each nation. For

former soldiers of the disbanded Haitian army. On May 6, 2003, for example, a group of up to twenty armed men reportedly attacked the Peligre hydroelectric dam in the lower Central Plateau, the country's largest power source. Two civilian security agents were killed. The attackers escaped and reportedly stole a hospital vehicle and identified themselves as former FADH (the Haitian army) soldiers. Press Release, Amnesty International, Haiti: Abuse of Human Rights: Political Violence as the 200th Anniversary of Independence Approaches, 7-8 (Oct. 8, 2003), at <http://web.amnesty.org/library/index/engamr360072003>.

example, the Catholic Church does not function in Haiti as it does in Argentina, and trade unions hold different positions in Haiti than in Brazil. But the script is nevertheless repeated in each country because the formal creation or reestablishment of democratic rule is simply not sufficient to destroy the corporative power relationships built up during the dictatorship periods. The corporations try to preserve their power relations and privileges through the transition, generating different types of crises, such as a military or economic threat, which exert tremendous pressure on the fragile democratic system.³⁶ Democratic-minded governments appear unable to deal effectively with this phenomenon. Indeed, these citadels of power are insidious.

II.

DELIBERATIVE DEMOCRACY

The best means for countering this corporative power is to create a polity governed by universal and impersonal principles where individual citizens, who are not permanently identified with any particular set of interests but preserve the capacity to adopt different ones, make choices through a process of public justification and dialogue. In practical terms, this requires broad popular participation in governmental decision-making and its consequent actions, led by strong participative and ideologically committed political parties and parliamentary bodies. These parties and parliaments must themselves, of course, be internally democratic, open and disciplined.

These conclusions are based on a particular vision of democracy that demands the utmost respect for the autonomy of each individual. In this view, autonomy consists of the exercise of self-governing capacities, such as the capacities of understanding, imagining, reasoning, valuing and desiring. Free persons have, and are recognized as having, such capacities. In a political order dedicated to serving the conditions of free deliberation for its members, those members can legitimately expect that order not only to permit, but also to encourage the exercise of such capacities — that it permit and encourage autonomy. Indeed, one of the hallmarks of liberal democracy is the notion of the citizen, who is not identified with any particular interest, but who is free to choose among competing interests and has an equal voice in expressing his choice.

This ideal of the autonomous individual as a paradigm for democracy rejects the view that democracy is simply a conglomeration of interested individuals and groups working in conjunction with the econ-

36. This is exactly what has been occurring in Haiti for the past several years. See Irwin P. Stotzky, *Democracy and International Military Intervention*, in *DEMOCRACY AND HUMAN RIGHTS IN LATIN AMERICA* 125 (Richard S. Hillman et al. eds., 2002).

omy or merely a mechanism for replacing elites. I³⁷ and many others, most prominently Carlos S. Nino,³⁸ have elsewhere attempted to explain democracy as a regimented mode of the practice of moral discourse by which we try to solve conflicts in the light of universal, general and public principles that would be accepted in ideal conditions of impartiality, rationality and knowledge. This, the argument goes, makes democracy morally superior to other systems of government. Democracy substitutes simple majoritarian decision for the requirement of a unanimous consensus in the common and non-regimented practice of moral discourse. But this is not completely sufficient. This substitution weakens the force of the prescription that the result of the procedure is morally valid because it would be accepted under ideal conditions (given the functional equivalence between unanimity and impartiality). Nevertheless, democracy preserves some epistemological value because the need to justify one's decision to others in order to gain their support generates a tendency toward impartiality. This impartiality, in turn, makes it more reliable than other decision processes, such as individual reflection.

This epistemic view of democracy presupposes that individuals, who are basically moral persons, are its natural agents and that the freedom and equality of their intervention in the democratic process should be preserved and expanded. This is not the case when corporations control the polity and assume the role of intermediaries. Moreover, this conception of democracy as a substitute for moral discourse presupposes that the primary objects of decision in the democratic process are not crude interests but principles that legitimize a certain balance of interests from an impartial point of view. While it is possible that discourse may have its genesis in crude interests, for those interests to garner majority agreement, advocates must win support and justify their positions. Thus, the dialogue requires participants to reach for principles beyond their crude interests. They must reach for principles from an impartial point of view. In addition, dialogue respects and fosters autonomy. Again, this is not the case when corporations control the polity and assume the role of intermediaries. It follows, therefore, that corporations, which agglutinate people around common interests and not around moral views about how to deal with common interests, cannot be the protagonists of the democratic process.

Corporative entities in transitional societies maintain and even

37. See STOTZKY, *supra* note 21; Irwin P. Stotzky, *Creating the Conditions for Democracy*, in *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* (Harold Hongju Koh & Ronald C. Slye eds., 1999); Irwin P. Stotzky, *Establishing Deliberative Democracy: Moving from Misery to Poverty with Dignity*, 21 U. ARK. LITTLE ROCK L. J. (1998) (the 1998 Ben J. Altheimer Lecture).

38. See, e.g., CARLOS S. NINO, *ÉTICA Y DERECHOS HUMANOS* (1984). Nino was the main proponent of this epistemic view of democracy.

increase their power whenever democracy departs substantially from the strictures of the original practice of moral discourse. When this occurs, public debate becomes restricted and debased, the power of participants actually to influence people becomes grossly unequal, and the participation of interested people becomes narrower and weaker. Thus, in order to strengthen the democratic power of common citizens against that of corporations, it is crucial to broaden and deepen popular participation in political discussion and decision-making.

Furthermore, the mechanisms of representation, necessary in large and complex societies, are prone to be subverted by corporative power. This subversion can be caused by several factors. There is the possibility of corruption of the individual representatives, their indifference or even antipathy toward the people they represent when corporations oppose the people's positions, and the apathy of the people represented. For these reasons, it is essential to widen the ways of direct participation by the people whose interests are at issue. This is, of course, a difficult task. Nevertheless, it is possible to do this through general procedures like referenda, popular consultation or through decentralized decisions that allow the concerned people to participate directly.³⁹

Moreover, the vision of democracy as a regimented modality of discussion of moral principles to regulate conflicts allows us to qualify the liberal rejection of any intermediary between the individual and the state. Indeed, in a large, complex society, some institutions must protect the individual against the awesome power of corporatism. The most likely candidates are political parties, but only when those parties are the standard for or represent the basis of fundamental principles of political morality. They are indispensable in a modern and large society, not only because they nurture those principles in professional politicians who purport to put them into practice if duly elected, but also because they exempt individuals from justifying their votes before each other on the basis of principles. In this view, it is sufficient to vote for a party that organizes its programs on the basis of public, general and impartial principles.

The deterioration of the role of political parties in favor of corporations occurs when the importance of parliament, the national arena for these parties, is severely eroded. Unfortunately, the integrity of parliament is often diminished by corporative forces in the transition and consolidation processes. Corporations prefer to exert pressures and achieve agreements in the private offices of the administration rather than in the noisy, pluralistic, and more public parliamentary corridors. In addition,

39. Courts, of course, may play a central role here.

administrations tend to preserve some of the practices inherited from previous authoritarian governments.

Strengthening political parties and the parliamentary institutions in order to protect the democratic system against corporative power, however, will work only to the extent that these institutions do not become transformed into corporations themselves. Unfortunately, this corporative transformation occurs often, particularly when parties weaken their ideological commitment, fail to promote debates on essential questions of public morality, block channels of participation, operate through methods of patronage and clientelism, or resort to personalism and caudillism. If this happens, these parties and parliaments tend to develop elites with distinctive interests who are likely to become aligned with members of traditional corporative groups in a manner inimical to democratic principles. This also causes other dangerous distortions. When parties become corporations, parliament becomes weakened by the lack of diverse views held by different representatives, by a discourse that is both ideologically vacuous and detached from the experiences and interests of the people represented, and by a general appearance of opacity and self-service.

To alleviate or even avoid this danger, political parties and parliament must be fortified. This can be achieved by opening the parties to broad popular participation, promoting permanent political debates within them, perfecting internal democratic mechanisms for selecting party leaders and candidates, and giving a public accounting of the reasons for significant actions, such as how funds are to be managed. It is also important that the electoral system combine the need for promoting party cohesion and ideological identity with the need for the voter to identify with individual representatives, rather than simply voting for the party slate. A mixed electoral system incorporating proportional representation with individual candidate selection may satisfy both needs. This concept can be extended to parliamentary procedures, which should combine party discipline with a degree of autonomy for individual representatives.

III.

COURTS, DEMOCRACY AND FREEDOM OF SPEECH AND PRESS

From this discussion, it is clear that courts have an important, if somewhat limited, role to play in checking the executive and helping to stabilize and consolidate institutional structures that champion individual participation and democracy. Again, however, that role depends on particular visions and versions of democracy and on particular aspects of each nation. Nevertheless, some generalizations do make sense.

As I have argued, these nations are in varying stages of democratic development. Thus, to understand the role of the judiciary, it is crucially important to determine the basic characteristics of democracy. A preliminary definition and discussion of democracy, therefore, makes some sense.

Democracy is an exercise — and an experiment — in collective self-governance in which the sovereign power resides in the people as a whole and is exercised either directly by them⁴⁰ or by their representatives — usually officials elected by them. In modern societies, of course, elected officials generally exercise this power in the name of the people. That means, among other things, that the state must be responsive to the needs, desires and interests of those people.

Democratic theory is based on a notion of human dignity. The argument is that as beings by nature worthy of respect, adults must enjoy a very large degree of autonomy, a status largely derived in the modern world by people being able to share in the governance of their own community. Because direct rule is unfeasible for a large mass of people, most can share in the process of self-governance only by delegating authority to freely chosen representatives.

There is, of course, much more to democracy than the holding of periodic elections and representative government. A real democracy often more vaguely denotes a social state in which all of the people have equal rights without heredity or arbitrary differences of social rank or privilege. The social and economic conditions supporting a viable representative democracy are extremely complex, but only a few formal institutional conditions are necessary to categorize a state as democratic. These minimal institutional requirements include the popular election of representatives, by universal suffrage in districts of approximately equal population for limited terms to institutions that allow those representatives to govern, free entry of citizens for candidacy to electoral office, and freedom of the press, expression, communication and association so that the people can be informed and can try to persuade others to join them. These conditions and institutional arrangements, in turn, require a multitude of ancillary rights.⁴¹ Together, they create an open market of political ideas to allow the people to choose candidates and form groups to express common interests.

Moreover, for democratic theory, what makes governmental decisions morally binding is the democratic process, where the people freely

40. Modern examples are hard to find. The best examples are the small republics of antiquity, such as ancient Athens.

41. What those rights may be requires an analysis of theoretical issues of the most complicated kind.

select representatives who debate and enact policies and who later stand for reelection, and where administrators enforce that policy. A coherent theory of representative government does not necessarily claim that citizens possess equal capacity to understand the issues or the suggested policies or options. It does require, however, a belief that most adults can recognize their own self-interest, join with others who share those interests, and choose among candidates and policies. This suggests an optimistic belief that citizens, if given the opportunity, can and will develop the skills, arts and habits needed for a life of responsible deliberation and decision-making.

The chief check against tyranny in democratic theory is the strongly held belief that the people will not deliberately tyrannize themselves. Instead, the theory suggests that they will attempt to select officials who will not enact oppressive laws and that they will vote out of office those who do. Popular participation is esteemed not only for its positive effect of expressing individual autonomy but also for its negative effect of stopping governmental incursions into individual rights.

Some democratic theorists claim a second check against tyranny in a democracy stems from the way democratic politics operates in modern large and diverse nations. Because the majority of the people have little concern for most political issues, the argument goes, there is generally a low level of involvement in politics. This allows coalitions of minorities to form temporary alliances and to trade support among themselves on different issues. Moreover, since political cleavages are rarely cumulative, a particular interest group is not likely to be permanently allied with one set of groups against a second permanent coalition.

Democratic theorists do not claim that these checks on authority always protect the citizens' liberty or even prevent public officials from acting independently to create public policy. Rather, they argue that such checks force public officials to mediate among competing interests. Officials will be wary of oppressing any group for fear it will become part of a future winning coalition. Democracy may even force people, on a moral level, to respect competing interests as a form of justice.

Finally, there is another limitation. A valid law cannot simply reflect prejudice against minorities by placing burdens principally or solely on them. This limiting principle flows from the premises that the people as a whole are sovereign and that majority rule is no more than a decision-making arrangement. This principle leads to complex questions of how to determine when a particular law makes valid distinctions and when it unconstitutionally (invidiously) discriminates against a group of people, and who can legitimately make this determination – the

people, their elected representatives, or the judiciary, usually non-elected officials.

A slightly thicker version of democracy than the bare-bones institutional arrangements I suggest above requires an environment of personal security for people to pursue their desires and their professions, to move about freely, and to explore new ideas and modes of living. An even thicker version of democracy means, among other things, the building of vibrant institutions of justice and law and the full blooming of civil society. A truly vibrant democracy suggests an opportunity and an ability for the people to create and participate in a broad range of political parties, an engaged and highly competent and independent media, independent labor unions, and nongovernmental organizations such as women's groups, all of which encourage political and social participation.⁴²

In exercising the sovereign prerogative of self-governance in modern societies, the people necessarily depend on certain institutions to evaluate government policies and to provide information and analysis about the positions of politicians competing for office. Today, the organized press, particularly the broadcast media, is the major institution that performs this informative and evaluative function in democratic nations. To perform this democratic function, however, the press must be protected both from the state and from private threats. To put it another way, the press needs a large degree of independence from the state, but also needs help from it. Although most proponents of free speech would deny or indeed find certain aspects of this view dangerous, even deplorable, the state can be both an enduring friend and an enemy of the press. This is especially true in developing democracies.

The view that real freedom of speech may mean that the state has to interfere to liberate and equalize speech opportunities is premised on a democratic theory of free speech, one that emphasizes social, rather than individualistic values.⁴³ Under this theory, free speech is intended to

42. There is even more complexity. The concept of constitutionalism and its relationship to democracy adds another wrinkle to judicial decision-making. See, e.g., CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); Stanley N. Katz, *Constitutionalism and Civil Society*, The Jefferson Lecture, University of California at Berkeley (Apr. 25, 2000) (unpublished manuscript on file with author).

43. The alternative view sees freedom of speech as the necessary context of any meaningful concept of liberty, not in an instrumental sense, but in a constitutive sense that a society of silenced but "otherwise free" persons is unthinkable outside a religious retreat. Freedom of speech is seen as a constitutive part of personal autonomy and as a basis for self-expression and self-fulfillment. This view makes its appeal to the individualistic ethos of modern society that is inherent in modern popular and political culture. Another model of free speech, prevalent in the United States, is the "marketplace of ideas" paradigm. Proponents of this model claim that truth or the most illuminating perspective or solution can be discovered through the process of debate, free from any kind of governmental interference. See John Milton, *Areopagitica*, in *AREOPAGITICA AND OTHER PROSE*, WRITINGS BY JOHN MILTON (W. Haller ed., 1927).

broaden the terms of discussion so that the people become aware of the issues before them and of the most compelling arguments on all sides. The state has the burden of ensuring and nurturing a public freedom. In theory, this will allow all citizens to pursue their goals fully, freely, and perhaps even to make the morally correct decisions.

Democracy, as a system in which the majoritarian opinion is validly binding insofar as all of the people concerned have participated in both the discussion and in a collective decision, is the natural substitute for the mechanism of informal discussion and unanimous consensus. This system allows for the adoption of new decisions at particular times. If this does not occur, the status quo will prevail, even if it is favored by only a minority. Majority rule is not the functional equivalent of impartiality: The majority may be openly biased against a minority. Nevertheless, when all people concerned freely and equally participate in the process of deliberation and decision, democracy preserves some of the epistemic value inherent in the process of informal discussion and unanimous consensus. Democracy, based on this process, includes a dynamic of collective action and tends toward the adoption of impartial solutions.

This does not mean that democratic solutions are always correct; it means only that they are generally more likely to be right than solutions adopted by any other procedure. To put it another way, the democratic method of collective decision-making is more reliable than the procedure of isolated individual reflection in reaching morally correct solutions to intersubjective moral issues. For example, dictators have acted on the basis of their own reflections on intersubjective moral matters and have had the power to enforce their decisions. The results of this process have, of course, been disastrous. In addition, however wise and well-meaning an individual may be, it is unlikely that he could represent the real interests of others better than they could themselves by directly participating in the process of discussion and decision.

The epistemic value of democracy varies with the degree to which its underlying conditions are satisfied. Those conditions depend on the openness of the debate and the degree to which people equally participate in, and support, the final decision. There is, of course, a threshold at the lowest degree of satisfaction of those conditions below which the epistemic value of the process is so feeble that it begins to be surpassed by the value of the process of individual reflection.

Reliable and objective information about the relevant issues is a critical factor in the validity of such a democratic process in the manner I have suggested. Indeed, in my view, democracy is a system that allows the people the freedom to choose the form of life they wish to live. As Owen Fiss argues, democracy presupposes that this choice is

made against a background of public debate that is, to use the phrase Justice Brennan made famous, "uninhibited, robust, and wide-open."⁴⁴ Freedom of speech and freedom of the press thus play a very crucial role in a democracy. Such freedom is "the matrix, the indispensable condition of nearly every other form of freedom"⁴⁵ and indeed of the democratic process itself. This is where the judicial role is perhaps most significant in a democracy. The courts must foster, protect and encourage freedom of speech and freedom of the press, in the broadest sense, to help inform the people. Therefore, Fiss's view of an activist state makes immense sense here.

To perform its democratic functions, the press needs to be completely independent from the state in several ways. One of the major forms of independence is strictly economic. The print media (newspapers and magazines) and the broadcast media (radio and television) must be privately owned. If the press is economically dependent on the state, the information available to the people could be limited only to the state's views. State officials would be able to hire or fire journalists or broadcasters who did not report the news in line with the state's views and to replace them with their own people who would necessarily follow the "party line." The judiciary must exercise its power to keep the state from making the press economically dependent on it and from punishing the press by imposing severe taxes on it. This is, however, an extremely difficult task and may even be an unconstitutional task in some nations. Nevertheless, it is an important judicial function if democracy is to develop and be secured.

A second and related form of independence from the state is almost exclusively "legal." Legislation must be enacted, and judicial doctrines must be developed, to limit the state's capacity to silence government critics through criminal or civil actions.⁴⁶ Seditious libel cannot exist as

44. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

45. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). There are several senses in which this is true. First, this freedom is clearly essential to self-government, through which real freedom is defined, realized and secured. Second, it is vital to publicize, and hence root out, violations of other rights against the majority. If a society does not allow a vigorous and real freedom of speech and press, the government could simply silence those whose rights it invaded. Finally, such freedom is the necessary context for any meaningful concept of liberty.

46. The media can be not only irresponsible but also quite dangerous. In Rwanda, for example, three Rwandan news media executives are on trial on charges of genocide and incitement to genocide through their use of radio broadcasts and newspapers. The defendants are accused of using their media outlets to spread ethnic hatred, to demonize the Tutsi and to persuade people to kill the Tutsi and moderate Hutu. Their trial is examining the issue of the role of the news media in the massacre of more than 800,000 people in Rwanda in 1994.

The case is the first of its kind since 1946, when a Nazi publisher of an anti-Semitic weekly (*Der Stürmer*) appeared before the Nuremberg tribunal. At that time, the charge of genocide did not yet exist. Nevertheless, the Nazi publisher was sentenced to death. The Rwandan trial is

a valid legal doctrine in a democracy. The press and other government critics cannot be prosecuted for libeling the state. In addition, defamation actions by public officials for criticisms leveled against performance of their public duties must be severally restricted. Even these minimal requirements are not easy to develop. Indeed, in the United States, where freedom of speech is said to reign supreme, the Supreme Court did not officially declare the crime of seditious libel to be unconstitutional nor severely limit defamation actions by public officials against critics of their public performance until 1964.⁴⁷

The concept of seditious libel strikes at the very heart of democracy. Political freedoms end when government, particularly the executive, can use its power and its courts to silence its critics. The supporting argument is not the mild one that there must be some leeway for criticism of the government. The argument is rather that defamation of the government is a completely incompatible, indeed impossible, notion for a democracy. The presence or absence in the law of the concept of seditious libel determines and defines a democratic society. A society may or may not treat such concepts as obscenity or contempt by publication as legal offenses without necessarily harming its democratic nature. If it makes seditious libel a crime, however, it is simply not a free society, no matter what its other characteristics. Thus, one of the most crucial judicial functions — perhaps one of its major democratic functions — is to strike down seditious libel laws as being violations of democratic rule.

Another form of independence, one that requires positive state action, is the physical integrity of governmental critics. Reporters and publishers must be protected from physical violence. Unfortunately, this continues to be a serious problem in developing democracies. Between 1992 and 2001, for example, 389 journalists were killed in the line of duty, and almost all of them were murdered in direct reprisal for their reporting.⁴⁸ “Of the 389 journalists killed on the job, only 62, or 16 percent, died in cross fire during an assignment, while 298, or 77 percent, were targeted for their work.”⁴⁹ There is more bad news. In ninety-five percent of the cases, those who kill journalists do so with

expected to set international standards for the limits of free speech. It certainly will raise the issue of whether journalists should exercise self-restraint or even self-censorship during periods of severe crises. See Marlise Simons, *Trial Centers on Role of Press During Rwanda Massacre*, N.Y. TIMES, Mar. 3, 2002, at A3.

47. *Sullivan*, 376 U.S. at 292.

48. Press Release, Committee to Protect Journalists, Journalism's Terrible Toll: CPJ Releases New Statistics, (June 4, 2002), at http://www.impunidad.com/pressreleases/iapa_news6_4_02_2E.html.

49. *Id.*

impunity.⁵⁰ But the problem is even more complicated than it first appears. Much of the violence propagated against governmental critics is either overtly or covertly sponsored by the state. Nevertheless, pressure from the United States, its allies, the international community, the United Nations, the Organization of American States and international human rights institutions may be helpful in reducing the violence and in deterring future threats. The judiciary must use its investigative powers to solve these human rights crimes. Courts are the institutions charged with protecting the democratic role of the press, and such international pressure may help them carry out this duty.

One other serious problem with private ownership of the press is the impact that private aggregations of power have on the performance of the press's democratic function. While it is vital to have a privately owned communications industry, it is equally important to recognize that the industry is constrained by its own economic structure. As Fiss makes clear, media owners operate commercial ventures and seek to maximize their profits and to minimize their costs and losses.⁵¹ Indeed, their decisions on what news to report and how to report it are almost exclusively determined by their wish to make a profit and thus to avoid a loss. The quest for profits may cause the press to avoid vigorous and effective criticism of government officials, their public actions, the positions and actions of candidates for office, and private corporative interests because airing such reports would harm its own economic interests. For example, particular government policies may increase the profits of the press but may have negative effects for the majority of citizens or for particular groups of citizens.

Part of the problem of media inadequacy in providing accurate, important, democratically required information to the public is caused by what has become popularly known as the "media monopoly." This is not only a problem in developing democracies but also in well-developed democracies. Indeed, it is a striking, dangerous phenomenon in the United States. For example, many people are surprised to discover that while at the end of World War II, eighty percent of the daily newspapers in the United States were independently owned, by 1989 that number was reversed, with eighty percent owned by corporate chains.⁵² With each passing year, the number of controlling firms has shrunk. For example, by 1984 some fifty corporations controlled most of the media outlets in the United States, but by 1993, the number of corporations

50. *Id.*

51. See FISS, *THE IRONY OF FREE SPEECH*, *supra* note 1, at 52; FISS, *Why the State?*, *supra* note 1.

52. BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 4 (5th ed. 1997).

controlling those outlets had dropped to less than twenty.⁵³ In 1996, the number of media corporations with dominant power in society was closer to ten.⁵⁴ In 2002, with the recent merger of Time Warner Communications and America Online, the number is even smaller.⁵⁵ Because of government deregulation in the early 1980s and industry consolidation in the 1990s, these ever-dwindling numbers of big media owners are setting the agenda and regulating political and social discourse in the United States.⁵⁶ In addition, there are many cities in the United States without a major newspaper or with only one major newspaper, and the three major networks hold a privileged position in capturing viewers. In other nations, the monopoly power of certain corporative forces is even more pronounced.⁵⁷ Again, as Fiss's work makes clear, there is a gap between market-determined speech and dem-

53. *Id.* at xxiii.

54. *Id.*

55. The trend to increase the power of fewer corporations to control more of America's local press, television, and radio, may finally be meeting some resistance. In May 2003, the Federal Communications Commission (FCC), over the protests of 750,000 viewers and readers, voted to concentrate the power to decide what the citizens hear, see, and read, in both hard news and entertainment, in the hands of an ever-shrinking media elite. See Stephen Labaton, *A Media Rule By the F.C.C. Is in Jeopardy in the House*, N.Y. TIMES, July 23, 2003, at C1; William Safire, *Localism's Last Stand*, N.Y. TIMES, July 17, 2003, at A27; William Safire, *Big Media's Silence*, N.Y. TIMES, June 26, 2003, at A31. In the name of "foster[ing] a vibrant marketplace of ideas", the FCC vote would now permit a television network to own stations that collectively reach forty-five percent of the national audience — up from thirty-five percent — and also would permit cross-ownership of newspapers, television and radio stations. Press Release, Federal Communications Commission, FCC Sets Limits on Media Concentration (June 2, 2003), available at <http://www.fcc.gov>. However, on September 3, 2003, the United States Court of Appeals for the Third Circuit in Philadelphia issued a surprise injunction blocking the FCC from imposing the new rules. *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388, 2003 WL 22052896 (3d Cir., Sept. 3, 2003). Andrew Jay Schwartzman, the attorney who argued for the injunction, said, "This decision is bad for democracy, and bad for broadcast journalism." Stephen Labaton, *U.S. Court Blocks Plan to Ease Rule on Media Owners*, N.Y. TIMES, Sept. 4, 2003, at A1. The following day, a Senate committee unanimously approved a spending measure with a provision that would block the proposed ownership rules. The lopsided vote made it likely that the measure would be approved by the full Senate. Stephen Labaton, *Senate Panel Acts to Block TV Ownership rule*, N.Y. TIMES, Sept. 5, 2003, at C1. Finally, on September 16, 2003, by a vote of 55 to 40, the United States Senate approved a resolution to repeal all proposed regulations. The vote was only the second time in history that the Senate had used a parliamentary procedure known as a resolution of disapproval to veto an action by a regulator. Stephen Labaton, *F.C.C. Plan to Ease Curbs on Big Media Hits Senate Snag*, N.Y. TIMES, Sept. 17, 2003, at A1.

56. See generally BAGDIKIAN, *supra* note 52, chs. 1-3, 13.

57. I believe, however, that this way of analyzing the issues, as a question of monopoly power, while important, is insufficient to explain fully the media's failures to accurately and fully report the issues, and not necessarily because the advent of cable and other new information technologies have increased the number of players. Rather, the market should be seen as a broad, information gathering forum. Thus, the relevant market includes all informational sources — newspapers, radio, television, the Internet, magazines, books, journals, movies, group meetings, and even one-on-one conversations. Even this broader market view does not provide enough democratically necessary information.

ocratically determined speech (the coverage and reportage that would be chosen by a people assembled in some imaginary democratic convention).⁵⁸ Clearly, the market is an imperfect reflection of what people want and what democracy may require.

The major reason for this gap is that the profit motive creates incentives for media executives not only to maximize revenue but also simultaneously to minimize costs. One way to maximize revenue is to target audiences in terms of their purchasing power and susceptibility to advertising. Media executives, therefore, determine the content and manner of the material they present to the "public" based on the needs of their advertisers. After all, they must be sure that what they report in their broadcasts or newscasts helps rather than harms the sales of the advertised products. One way of minimizing costs is to stay away from high-cost newsgathering activities, such as any serious analysis and reporting by the United States media about the democratic revolution in Haiti.⁵⁹ By slighting the reporting of high-cost news stories and tying the content of their reporting to specific market segments, media executives fail to live up to the democratic role of the press.

In addition, another perhaps even more serious problem with a market-driven system is the incestuous nature of the relationship between the media and political actors. For example, in the United States and in developing democracies, the media receive large amounts of money for advertisements from politicians running for office.⁶⁰ More insidiously, establishment media representatives have close personal relationships — sometimes too close — with government officials.⁶¹ Indeed, many media types, after serving in high government posts, return to highly paid media positions.⁶² These relationships sometimes cause them to

58. See generally FISS, *THE IRONY OF FREE SPEECH*, *supra* note 1.

59. For a well-argued criticism of the reporting of Larry Rohter, the New York Times reporter who has covered Haiti since July 1994, see JACK LULE, *DAILY NEWS, ETERNAL STORIES: THE MYTHOLOGICAL ROLE OF JOURNALISM* 147-71 (2001).

60. See Online Newshour, *Candidates Deluge New Hampshire Voters With Campaign Ads Ahead of Primary* (Jan. 22, 2004), at http://www.pbs.org/newshour/media/media_watch/jan-june04/newhampshireads_01-22.html ("The price tag of the campaign ad blitzkrieg has reached towering heights.").

61. William Safire, a Pulitzer Prize winning New York Times columnist, is often criticized for his close friendship with Israeli Prime Minister Ariel Sharon and has been labeled "a mouthpiece for Sharon." See Aina Kristiansen, *Safire Analyzes Washington, Bush's 'Heavyweights'*, CAROLINA COMMUNICATOR, July, 2002, available at <http://www.jomc.unc.edu/carolinacommunicator/archives/july2002/safire.html>.

62. For example, George Stephanopoulos, former Director of Communications for the Clinton/Gore campaign and Senior Advisor to the President for Policy and Strategy, is now the anchor of *This Week with George Stephanopoulos* on ABC television. Dee Dee Myers, former White House Press Secretary with the Clinton Administration is now a Contributing Editor to *Vanity Fair* magazine. William Safire of the New York Times was once a speechwriter for Richard Nixon.

slight publicly important stories.⁶³ It also implies that members of the press are less likely to condemn public officials with whom they have a personal relationship for violating the public trust.

For these reasons, reporters tend to rely too heavily on official government sources, report stories tardily, and, in the advanced industrial nations, fail to do the hard work necessary to understand the problems of nations undergoing the movement from authoritarianism to democracy. An excellent example of all these problems is the disreputable reporting of Haiti by the United States media over several decades. Most of the mainstream United States media see "Haiti through the prism established by racist Hollywood movies since the 30's."⁶⁴ Many of these problems stem from a lack of understanding about Haitian history and culture. Moreover, many of these reporters cannot speak Creole, the only language that every Haitian can speak and, since 1994, the official language of Haiti.

National reporters in developing democracies are prey to the same inadequacies. To do a democratically necessary, credible job, a journalist must be engaged, suspicious of government-controlled information, intent on verifying the accuracy of all information he obtains, and have knowledge and understanding of the culture and history of his nation. All of this requires a real commitment to the vision of the importance of a free press to democracy and absolute support from the media executives for fulfilling this role.

What, if any, solutions to these problems exist? Are there any governmental institutions that can right the balance so that the people can be properly informed on important public issues? Under the democratic theory of free speech I have suggested, the state may, indeed must, sometimes be called upon to counteract the impact that private aggregations of power — corporative powers — have on the freedom of the press and freedom of expression so necessary for a viable democracy to flourish.

63. The Kennedy years are a prime example. As one author makes clear:

For the most part, however, the Kennedy White House used the goodwill of the press to keep Kennedy's misdeeds in the shadows. Kennedy was a master at giving favored reporters such as Benjamin Bradlee of Newsweek the illusion of friendship and just enough access to satisfy their desire to be on the inside of events without making the journalists real players.

LEWIS L. GOULD, *THE MODERN AMERICAN PRESIDENCY* 131 (2004).

64. Jean Jean-Pierre, *How the Major U.S. Media Are Undermining Democracy*, 56 U. MIAMI L. REV. 413, 417 (2002). For examples of inadequate and indeed sloppy reporting in Haiti, particularly the inadequacy of the mainstream media's reporting on the United States government's failure to act in accordance with its publicly stated goal of helping to create a stable environment for democratic reform in Haiti, see Irwin P. Stotzky, *On the Promise and Perils of Democracy in Haiti*, 29 U. MIAMI INTER-AM. L. REV. 1 (1998).

ish.⁶⁵ I believe that, once again, the judiciary plays a crucial role in helping the citizenry obtain the necessary information to make informed choices on important public (and private) issues.

In many cases, instrumentalities of the state will try to stifle free and open debate. In other instances, however, the state may have to act to further public debate where private interests are stifling speech and thus interfering with the creation and maintenance of a democracy. Fiss's view of strong state activism to support a free press resonates here. The state may have to allocate public resources — pass out microphones — to those whose voices and views would not otherwise be heard in the public square. This may even entail silencing the voices of some in order to hear the voices of others. There may be no other way to get the relevant information to the people. This democratic theory of free speech and press can help nations succeed in their quests for democratization, but only if the press is diligent in fighting for and protecting those rights. The press, in turn, must rely on the courts so the media can perform their Fourth Estate function.

IV.

THE ROLE OF THE PRESS: A CLOSER LOOK

Several countries in Latin America, to varying degrees, have a relatively open and diverse press that often engages in a dynamic and even acrimonious debate on issues of public importance. But journalists in these countries frequently face physical harm for their work from state officials and state-sponsored thugs. In addition, a variety of laws and constitutional clauses adversely affect freedom of speech and the press and are narrowly interpreted and strictly enforced by the judiciary, leading to great harm for the hope of democratic development. In this section, I trace some of these laws and the role the judiciary has played in limiting freedom of speech and press, principally using Chile and Haiti as examples.

The laws at issue as well as the actions of the judiciary in these nations are reflective of most of the Latin American nations striving for democracy. The lack of judicial activism and the formalistic interpretations of these laws demonstrate the weaknesses and problems of relying on the judiciary to help create the necessary conditions for a vibrant democracy to bloom. The court's actions also demonstrate the promise of a judicial system that strongly promotes democratic development.

In Chile, unlike many other nations in Latin America, journalists and opposition figures do not generally face physical harm, but public

65. Sometimes the press is a dangerous corporative force itself.

debate is a far cry from being "uninhibited, robust, and wide-open."⁶⁶ In point of fact, such debate is often muted, limited and timorous, as if uninhibited expression is either somehow dangerous to society or personally risky to the speaker. Since the return of democracy to Chile in 1990, when Augusto Pinochet stepped down from power, violations of freedom of expression are directly traceable not simply to repressive actions by the executive branch, but to laws that fail to protect essential democratic values and hamper the discussion that democracy demands. Such violations are also caused by the mind-set and methods of the judiciary when interpreting these laws against the background of constitutional and democratic demands.

Chile, like many Latin American nations with civilian systems of law, has traditionally been a society with an overenthusiastic respect for the formalities of the written law. The jurisprudential tradition is to view the judge's role in the most formal terms. His job is to apply the law in its most literal sense. Consequently, the judiciary is extremely reluctant to interpret laws in light of the underlying concerns, such as the preservation of democratic values and international human rights principles.⁶⁷ Indeed, judges appear to believe that their role is simply a technical one, and that it does not include any political or moral responsibility.⁶⁸

Several major areas of legislation in these Latin American nations are particularly harmful to an open, democratic society that honors freedom of expression. In Chile, as in almost every Latin American nation, there are at least two areas of legislation that are extremely harmful to a free society. The first, known as *descato* (contempt) laws, restrict political criticism of public officials and their policies by prohibiting expressions that are considered offensive to senior officials in public positions (state institutions).⁶⁹ The second area concerns a range of laws that strictly limit the public's right of access to government-controlled infor-

66. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

67. Many of the laws adversely affecting freedom of expression have their roots in the nineteenth century and were refined and developed in the 1930s and during the Cold War era. While progress to repeal or amend these laws in the legislative bodies has been extremely slow, senior judges, with very few exceptions, have only superficially addressed the constitutional or underlying human rights principles involved in these statutes.

68. See Jorge Correa Sutil, *The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 89 (Irwin P. Stotzky ed., 1993).

69. For a compilation of these laws, see JAIRO LANA, *FREEDOM OF THE PRESS AND THE LAW* (1999). Of the twenty-four countries covered by this study, seventeen countries have insult law provisions. They include:

Bolivia:	CÓDIGO PENAL art. 162 (Bol.)
Brazil:	CÓDIGO PENAL arts. 141, 331 (Braz.)
	LEYS DE IMPRENSA, art. 23 (Braz.)

mation far more strictly than the right of freedom of expression and democracy demand.

Constitutional protection of the right to freedom of expression is limited in both areas. The right to honor and privacy,⁷⁰ like freedom of expression,⁷¹ is guaranteed in the Chilean Constitution's Bill of Rights. Paragraph 4, listed in the Bill of Rights, guarantees:

Respect for and protection of private and public life and the honor (*honra*) of the individual and his family. Violation of this precept, committed through a mass medium, whereby a false deed or action is imputed unjustifiably causing harm or discredit to an individual or his family, shall constitute a crime and shall be punished as determined by law. However, the mass medium may claim exception by proving, before the corresponding court, the truth of the imputation, unless it should constitute in itself a libel against private individuals. Furthermore, the proprietors, editors, directors and administrators of the respective mass medium shall be jointly responsible for the appropriate indemnifications.⁷²

Chile:	LAW ON STATE SECURITY, art. 6(b) (Chile) (repealed 2001). <i>See infra</i> note 89.
	CÓDIGO PENAL arts. 263, 284 (Chile)
Costa Rica:	CÓDIGO PENAL art. 307 (Costa Rica)
Cuba:	CÓDIGO PENAL art. 144 (Cuba)
Dominican Republic:	CÓDIGO PENAL art. 368 (Dom. Rep.)
Ecuador:	CÓDIGO PENAL arts. 230-31 (Ecuador)
El Salvador:	CÓDIGO PENAL art. 339 (El Sal.)
Guatemala:	GUAT. CONST. art. 35, ¶ 2 CÓDIGO PENAL arts. 411-12 (Guat.)
Haiti:	CÓDIGO PENAL arts. 183-85 (Haiti)
Honduras:	CÓDIGO PENAL arts. 323-25 (Hond.)
Mexico:	PRINT LAW OF 1917, arts. 2-5, 33 (Mex.) CÓDIGO CIVIL art. 189 (Mex.)
Nicaragua:	CÓDIGO PENAL art. 347-48 (Nicar.)
Panama:	CÓDIGO PENAL art. 307-08 (Pan.)
Peru:	CÓDIGO PENAL art. 347 (Peru)
Uruguay:	CÓDIGO PENAL art. 173 (Uru.)
Venezuela:	CÓDIGO PENAL arts. 223, 226-28 (Venez.)

70. CHILE CONST. art. 19(4) (The Bill of Rights).

71. CHILE CONST. art. 19(12).

72. CHILE CONST. art. 19(4) (The Bill of Rights). The inclusion of honor and privacy in the Chilean Bill of Rights is consistent with international human rights law. Article 17 of the United Nations International Covenant on Civil and Political Rights provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor or reputation." G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966). Article 11 of the American Convention holds that everyone has the right to have his honor respected and his dignity recognized; no one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation; everyone has the right to the protection of the law against such interference or attacks. American Convention on Human Rights, July 18, 1978, art. 11, 1144 U.N.T.S. 123.

The term *honra* in Spanish refers to a person's public reputation or prestige. Chilean law distinguishes defamation from offenses against *honor*, which involve not only public esteem but also its subjective or personal aspect, such as an offense against a person's self-respect or the honor of his or her family.⁷³ Offenses against honor constitute libel (*injurias*). There is an important difference between defamation and libel. The defendant in a defamation suit may establish innocence by proving the truth of the offensive statement (*exceptio veritatis*). In the case of libel, however, truth is not a defense unless the person affected is a public servant and the injurious statement concerns his or her official function. The rule that the defense of truth is not applicable has also generally been applied to prosecutions under the Law on State Security.

Article 19(12) of the Chilean Constitution guarantees:

Freedom to express opinions and to disseminate information without prior censorship in any form and by any means, without prejudice to assuming the responsibility for any crimes or abuses committed in the exercise of such freedoms, in conformity with the law which is to be passed by a special quorum.⁷⁴

Article 19(12) of the Chilean Constitution thus provides explicit protection to "the freedom to express opinions and to disseminate information" and prohibits "prior censorship in any form."⁷⁵ However, it does not specify on what grounds the right may be restricted by the imposition of legal penalties for its misuse, beyond saying that such grounds must be established by law. Nevertheless, abuses must be dealt with by the imposition of subsequent penalties, not by prior censorship. Article 19(4) also explicitly safeguards the rights of others to be protected from abuses of freedom of expression.⁷⁶

The correct balance between the enjoyment of these competing rights must be struck by the courts when they investigate accusations of the misuse of freedom of expression. While both the right to honor and privacy and the right to freedom of expression are important, the latter is not protected sufficiently from restrictions imposed in the name of honor or privacy. Unfortunately, judicial precedent established in recent years considers the right to honor and privacy to have superior status to that of freedom of expression, a position that has no support in the constitution. This doctrine has led to instances of prior censorship by the courts, violating the constitutional prohibition of this practice, not to mention democratic requirements. In addition, there is no explicit guarantee of the

73. Jose Luis Cea Egaña, *Estatuto Constitucional de la Información y Opinión*, 8 REVISTA CHILENA DE DERECHO 186-97 (1981).

74. A special quorum is an absolute majority of the deputies and senators holding office.

75. CHILE CONST. art. 19(12).

76. CHILE CONST. art. 19(4).

public's right of access to information, and many of the most serious restrictions emanate from the courts themselves.⁷⁷

Alejandra Matus's miserable ordeal with the Chilean judiciary clearly illustrates the devastating effect of the *descato* laws. On a broader level, her experience demonstrates the Chilean courts' extremely restricted view of freedom of expression and the harm such a vision has on democracy. Matus, a Chilean investigative journalist, spent six years scrutinizing the Chilean judicial system. This investigative work resulted in a book, *The Black Book of Chilean Justice*,⁷⁸ published in 1999. The book traces the history of the Chilean high court from its origins through 1999, and concludes that there has never been a truly independent judiciary in Chile. Rather, Matus finds that the Chilean judicial system has been and remains inundated with corruption and incompetence. In the past, this state of the judiciary clearly benefited – and benefited from – Pinochet's military dictatorship.

To understand Matus's book, one must understand the context of the administrative system of the Chilean judiciary. As Jorge Correa Sutil has conclusively shown, Chilean judges may be independent in several senses, but it is an extremely narrow vision of independence that insulates judges from the consequences of their actions.⁷⁹ In Chile, judges are constrained to such a great extent by a pervasive legal culture that they can even justify ignoring executive branch abuses of human rights in the name of upholding the law.

The Chilean judiciary, like many of the court systems in Latin America, is an extremely hierarchical organization, comparable to a military structure. The supreme court, at the top of the pyramid, annually creates a list of judges and examines the qualifications of its members to determine which should be promoted to a higher position (from judge to magistrate of the court of appeals, for example). The government eventually selects those designated for promotion from the lists the supreme court draws up. Citizens do not participate in the selection of judges, nor does any government department oversee the conduct of the highest court officials. The singular and dramatic method of political control is solely congressional impeachment. Until recently, the last word on nominations to the supreme court and courts of appeal came from the executive branch of the government. Recent changes in the law, however, require ratification from two-thirds of the senate.

77. For a thorough and detailed analysis of many of these issues see Memorandum on Law of Freedom of Opinion and Information and the Practice of Journalism, from Gabriel G. Goldberg to Irwin P. Stotzky (Sept. 24, 2002) (on file with author).

78. ALEJANDRA MATUS, *EL LIBRO NEGRO DE LA JUSTICIA CHILENA* (1999).

79. See Sutil, *supra* note 68.

A judge who lives in this structure must defer to the desires of his superiors in order to be promoted. Because most judicial decisions are made in secret, lawyers and lobbyists can visit the judges *ex parte* after working hours without any notice in the public record. The secretive nature of the Chilean process invites corruption, abuse of power, nepotism and other irregularities. This state of affairs exists not only in Chile but in many Latin American nations, as well as other nations undergoing the transition process.

On April 14, 1999, less than twenty-four hours after the public presentation of Matus's book, the judiciary ordered the police to confiscate the first editions.⁸⁰ The Chilean government filed charges against her under Chile's Law on State Security – the Chilean *descato* law.⁸¹ In Chile, contempt of authority provisions exist in the Criminal Code,⁸² in the Law on State Security,⁸³ and in the Code of Military Justice.⁸⁴ These laws are premised on the view that people are required to respect those in authority simply because they hold positions of power. Such a view is antithetical to democracy because it defines the ordinary person as a mere subject rather than as an autonomous citizen. It also violates one of the fundamental principles underlying the concept of human rights because it suggests that the powerful have the absolute right and authority to determine important issues that affect the vital interests of the people without the people's participation in the decision-making process and without their consent.

The Chilean government formally charged Matus under the contempt of authority provisions in the Law on State Security, which potentially criminalizes criticism of a member of congress, a high court justice or the chief of police, among others. Under Article 6(b)⁸⁵ of the law, it is an offense against public order to insult the president, ministers of state, senators, deputies, members of the higher courts of justice, the comptroller general, commander-in-chief of the armed forces or the director general of the national police, regardless of whether the defamation, libel or calumny is committed with respect to the exercise of official functions of the offended party. Ironically, the very institution that is called upon in a democracy to protect speakers who criticize the government is not only the object of the criticism but also the institution that

80. Alejandra Matus, *The Black Book of Chilean Justice*, 56 U. MIAMI L. REV. 329 (2002).

81. LAW ON STATE SECURITY, No. 12,927, art. 6(b) (Chile) (repealed 2001).

82. The provisions in the Criminal Code (arts. 263-64) that protect the president, government ministers, members of congress, and the judiciary from libelous attacks have been rarely used. CÓDIGO PENAL, arts. 263-64 (Chile).

83. LAW ON STATE SECURITY, No. 12,927, art. 6(b) (Chile) (repealed 2001).

84. CÓDIGO PENAL MILITAR, art. 284 (Chile).

85. LAW ON STATE SECURITY, No. 12,927, art. 6(b) (Chile) (repealed 2001).

enforces the ban against free and open criticism of public officials on matters of public concern.

The *descato* laws are even more insidious and destructive to free speech than it may first appear. Contempt of authority offenses are dealt with by application of special norms that reduce due process guarantees and rights of defense and also carry higher penalties than other types of similar laws. For example, the maximum penalty under Article 6(b)⁸⁶ is five years in prison while the maximum penalty for libel or calumny is only three years in prison. In addition, under this *descato* law, investigative procedures are telescoped and thus provide significantly less time for defense than the crime of libel in the Criminal Code. The law also allows a judge to order immediate seizure of all materials containing any abuse of publicity that is condemned by this law.⁸⁷ Even more devastating to notions of free speech is the fact that truth is not a defense to these charges.

The charges against Matus, including a possible five-year prison term, caused her to flee Chile and successfully seek political asylum in the United States.⁸⁸ Matus represents the best in journalism — a woman who stood up for truth and accountability and is a living example of a model citizen in a democracy. Because of her principled stand against authoritarianism, and international pressure, the Chilean government has repealed Article 6(b).⁸⁹

86. *Id.*

87. Article 16(b) states in pertinent part:

If a crime against the Security of the State were to be committed using the press, radio or television, the competent court may suspend the publication of up to ten editions of the guilty newspaper or magazine and for up to ten days the broadcasting of programs of the transgressing radio station or television channel. Without prejudice of this decision, in aggravated cases, the court may order the immediate confiscation of any edition in which the abuse in advertising is expressly manifested. The court shall exercise similar powers with respect to any other edition ostensibly issued for the purpose of replacing the one being sanctioned.

LAW ON STATE SECURITY, No. 12,927, art. 16(b) (Chile) (repealed 2001).

88. See Matus, *supra* note 80.

89. On April 10, 2001, the Chilean Senate approved a new press law, the Law on Freedoms of Opinion and Information and the Practice of Journalism, that repeals portions of the National Security Law that affect Matus's case. The new press law repeals Article 6(b) of the Law on State Security (the law Matus was prosecuted under). Felipe González, *Access to Information and National Security in Chile*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 169, 174 (Campbell Public Affairs Institute, 2003). The new law also repeals Article 16, which allowed judges to confiscate any material used to commit a "crime against the Security of the State." Under the new law, journalists will be able to keep their sources secret, courts will no longer be allowed to gag the media from reporting criminal cases, and all prosecutions of press offenses will be handled by civilian instead of military courts. The law did not repeal Article 30 of the Law on State Security, which requires judges to confiscate any material that "might have been used" to commit any crime against state security. LAW ON STATE SECURITY, No. 12,927, art. 30 (Chile). Although the law represents a major step forward in some of Chile's legal framework

In addition to these *descato* laws, in which truth is not a defense, and to the laws limiting public access to government-controlled information, both of which are obviously extremely harmful to creating an environment conducive to the exercise of free speech and press, there are many other laws in Latin American countries that hinder the public debate necessary to a well-functioning democracy. In a study conducted by the Inter-American Press Association,⁹⁰ the author, Jairo Lanao, com-

for press freedom, it also contains several troubling provisions. For example, the law limits the definition of a journalist to a person who has a university degree from a recognized journalism school and to "those whom the law recognizes as such." While the law establishes a right to the protection of sources, it restricts this right to "recognized" journalists, journalism students doing an internship, recent journalism school graduates, publishers, editors and foreign correspondents. It also increases allowable damages, providing for additional compensatory damages in the case of libel or defamation committed by the press. In addition, it contains a conscience clause and a mandatory requirement for the press to publish corrections and clarifications. For a detailed analysis of this new law, see Goldberg, *supra* note 77.

90. See LANAo, *supra* note 69. This study resulted from a hemispheric conference held at Chapultepec Castle in Mexico City in March, 1994. The conference, which brought together 135 leading politicians, writers, academics, constitutional lawyers, editors and private citizens from the Western Hemisphere, resulted in a document — known as the Declaration of Chapultepec — announcing ten significant principles necessary for a free press to perform its democratic mission. These principles are:

1. No people or society can be free without freedom of expression and of the press. The exercise of this freedom is not something authorities grant, it is an inalienable right of the people.
2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector. No journalist may be forced to reveal his or her sources of information.
4. Freedom of expression and of the press are severely limited by murder, terrorism, kidnapping, intimidation, the unjust imprisonment of journalists, the destruction of facilities, violence of any kind and impunity for perpetrators. Such acts must be investigated promptly and punished harshly.
5. Prior censorship, restrictions on the circulation of the media or dissemination of their reports, arbitrary management of information, the imposition of obstacles to the free flow of news, and restrictions on the activities and movements of journalists directly contradict freedom of the press.
6. The media and journalists should neither be discriminated against nor favored because of what they write or say.
7. Tariff and exchange policies, licenses for the importation of paper or news-gathering equipment, the assigning of radio and television frequencies and the granting or withdrawal of government advertising may not be used to reward or punish the media or individual journalists.
8. The membership of journalists in guilds, their affiliation to professional and trade associations and the affiliation of the media with business groups must be strictly voluntary.
9. The credibility of the press is linked to its commitment to truth, to the pursuit of accuracy, fairness and objectivity and to the clear distinction between news and advertising. The attainment of these goals and the respect for ethical and professional values may not be imposed. These are the exclusive responsibility

piled the laws in Latin American nations that adversely affect the rights of a free press and freedom of speech and expression.

This exhaustive study leads to several conclusions that hold across the board for all of these nations. For example, it is clear that criminal libel laws and their close relative, the insult laws, are most frequently employed to attack the press. Moreover, every nation in the hemisphere and all branches of government are responsible for these problems. No government institution is spared from criticism. Every branch of government in these nations is implicated in some form and degree in suppressing freedom of speech. To put it another way, the legislative, executive and judicial branches all enact these limitations and apply them. Thus, journalists and publishers can be charged with a crime and sent to jail for publishing information that is accurate or for attacking the honor or reputation of a person, even in his public life. Moreover, truth is not a defense to most of these charges.

Another obstacle to a free press is the requirement that journalists obtain prior authorization to work, such as obtaining degrees or holding membership in a designated organization. Moreover, most of these nations restrict or forbid the publication of electoral information on the eve of, or during, elections. In addition, right to reply laws, the creation of special courts to try illegal acts committed through the news media, and laws restricting access to government controlled information, such as the absolute secrecy of criminal court records, impinge on freedom of speech and press and directly harm the development of a democracy.

To counter some of these problems, it may be necessary to enact reforms, such as the creation of routine defenses, standards of conduct, and guidelines for the judicial review of issues touching on the freedoms of speech and press. Moreover, each nation must develop a set of rules regarding evidentiary burdens of persuasion and production guidelines for estimating awards for harm to one's reputation and other intangible

of journalists and the media. In a free society, it is public opinion that rewards or punishes.

10. No news medium nor journalist may be punished for publishing the truth or criticizing or denouncing the government.

This compilation of laws flags authoritarian remnants in the legislation of twenty-four countries that honor these principles. The study includes interviews with media experts in all of these countries. This was the first study ever made that compiles information on all of the laws affecting freedom of speech and press in the Western Hemisphere. The book is written against the backdrop of these ten principles. Moreover, it convincingly demonstrates the adverse affect of these laws on these principles and, consequently, to the development and consolidation of democracy. According to the author of the study, the presidents of almost every Latin American nation have endorsed these principles and agreed to abide by them. Interview with Jairo Lanao, Attorney for the Inter-American Press Association, in Miami, Fla. (Sept. 7, 2002). This suggests that the judiciary in these nations shall interpret laws that affect freedom of speech and press in light of these principles. Unfortunately, this is not the case.

harms. Other, more drastic, legal reforms also are necessary. These include eliminating insult law provisions that shield government officials from criticism, decriminalizing libel, and developing civil law remedies for certain violations, such as the right to privacy, that are now criminal in nature. In addition, it may be helpful to use United States Supreme Court legal doctrines as a guiding, but not definitive model. Finally, judges and lawyers must be educated about the importance of these principles to free speech and democracy and in the technical aspects of the necessary legal doctrines that will ensure their protection. The judiciary necessarily has the central role in creating legal doctrines to meet these challenges.⁹¹

Perhaps an even more serious problem than these laws for a free press, freedom of expression, and democratic reform, is the violence perpetrated against journalists by state officials or their agents, and the failure of the courts to bring these criminals to justice.⁹² In the civilian inquisitorial system, such as those in Latin America and Haiti, judges usually conduct the investigations into crimes. If the courts fail to bring to justice the criminals who have committed these terrible acts, this failure obviously has a dramatic negative impact on the building of democratic institutions and on the legitimacy of the rule of law. As previously discussed, one of the main problems in the transition and consolidation process, in addition to the economic, political and social crises and the problem of corporatism, is the failure to follow the rule of law in both the formal and informal aspects of public and private life. This is also a failure of legitimacy and of confidence in legal institutions and public officials.

An excellent example of the harm to democracy when murderers are not brought to justice is the murder of Jean Dominique, a prominent Haitian broadcast journalist. The subsequent judicial investigation has only exacerbated the problem for the courts, the media and the citizens whose most fervent hopes rest with democracy. Unless one is intimately familiar with the political and social history and culture of Haiti, it is almost impossible to imagine the negative impact Dominique's death had on citizens' belief in the legitimacy of the government, the legal system, the judiciary, and the rule of law.⁹³

The Haitian peoples' view of the rule of law has historical support. Since Haiti's independence in 1804, the rule of law has been seen as a

91. See discussion *supra* Part III.

92. Colombia, Mexico, Guatemala, and Brazil have the highest murder rates of journalists. JAIRO E. LANA O, COMPARATIVE STUDY: THE PRESS LAWS AND CHAPULTEPEC (forthcoming 2004).

93. See *infra* text accompanying notes 94-113.

cruel joke.⁹⁴ During the coup period (1991-94), for example, members of the Haitian armed forces systematically assassinated and tortured thousands of people, including government officials who attempted to uphold the rule of law. The military blatantly ignored judicial orders to arrest soldiers or officers accused of human rights abuses. The military also ignored the basic rights guaranteed by the constitution and any laws passed by parliament that threatened its hold on power.⁹⁵ A Creole proverb aptly summarizes the Haitian people's view about law in light of the military's continuing abuses: "Law is paper; bayonet is steel." The Jean Dominique case supports this rather cynical view of the legitimacy of the legal system and the rule of law.

The violation of legal norms, however, is not restricted to formal military or de facto government officials.⁹⁶ Unfortunately, such behavior is a distinguishing mark of political and social life at large, and has existed throughout the nation's history. This failure to follow the rule of law is evident in both social practices and in the actions of government officials.

The tendency toward unlawfulness does not, however, infect only government officials. This mentality correlates with a general trend toward anomie in society as a whole. For example, it manifests itself in public and private corruption regarding economic and social matters. It helps create and secure black markets and a common practice of violating the most basic rules of society. Law is perceived as chaos, corruption, and simply a tool that belongs to the most powerful members of society to use as they wish.

This mentality is both the product and the cause of collective action problems. Frequently, the combination of expectations, interests, possibilities of actions, and their respective payoffs is such that the rational course of action for each participant in the process of political or social interaction is not to comply with a certain norm, despite the fact that general compliance with it would have benefited everybody — in Pareto's terms — or almost everybody. This "dumb anomie" is intimately connected with both the stunting and the reversal of economic and social development.

Therefore, for a successful transition to democracy to occur in Haiti, or in any Latin American nation, it is critical for that nation to consolidate the rule of law. This is important not only to secure respect

94. For a discussion of the deficiencies in the fulfillment of the requirements of the rule of law in Haiti, see STOTZKY, *supra* note 21, at 90-101.

95. See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI (1990).

96. Nor is it restricted to Haiti. This anomie exists in almost every nation undergoing the transition process.

for fundamental rights and for the observance of the democratic process, but also to achieve satisfactory levels of economic and social development. The international community, if it is to become a positive force in these nations, must help in the process of consolidating the rule of law. In Haiti, for example, the international community seems to have misunderstood the contours of the rule of law, placing its resources almost solely into "strengthening" the judiciary. Even those efforts have not appreciably improved the system of justice. In point of fact, despite the international community's best efforts to strengthen the integrity of the judicial system, it remains corrupt and inefficient. Indeed, years of corruption and governmental neglect have left the judicial system nearly moribund. For instance, a shortage of adequately trained judges and prosecutors, among other systemic problems, has created a huge backlog of criminal cases, with many detainees waiting months or even years in pretrial detention before receiving a court hearing. If an accused person ultimately is tried and found not guilty, there is no redress against the government for the time served.⁹⁷ While it is certainly necessary to strengthen the judiciary, this is simply insufficient to achieve the goal of establishing the rule of law in Haiti.

As this discussion demonstrates, the problems associated with the transition from authoritarianism to democracy and the consolidation process itself are complicated and all-encompassing, and require an almost complete overhaul of past practices. Moreover, because of the illiteracy and extreme poverty in Haiti, the broadcast media, particularly radio, must play an unusually important role in the democratization process. The electronic media, particularly radio, are almost the only means of transmitting important information about the relevant issues and their possible solutions to the vast majority of people. It is therefore absolutely critical to the democratization process that there be a lively, engaged, professional broadcast media striving to meet their Fourth Estate function. This is why the murder of an important journalist and the failure of the judicial investigation to bring the murderer to justice are so harmful to the development of a democracy.⁹⁸

Jean Dominique spent his professional life meeting the democratic demands of a journalist. He was the most celebrated radio journalist in Haitian history. It is almost impossible to overestimate Dominique's importance to the political life of Haiti and the Haitian people's hope for creating a democracy and a better life. Indeed, the vast majority of the

97. See U.S. State Dep't, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HAITI (2000), available at <http://usinfo.state.gov/regional/ar/islands/haitihr2000.htm>; See generally STOTZKY, *supra* note 21.

98. Such injustice or failure of the legal system also ratifies the prevalent view of the Haitian people about law and justice.

Haitian people who had been shut out of the nation's political life for almost 200 years, and who took part in the democratic explosion at the grass-roots level in the 1980s and early 1990s, viewed Dominique as a progressive force who helped give formal expression to their lives. Many of the people's hopes represented by Dominique were dashed on April 3, 2000, when he was assassinated as he arrived at his radio station to begin his daily broadcasts.

Dominique was born into Haiti's light-skinned mulatto elite, but broke ranks to become an early champion of the country's overwhelming number of poor peasants and slum dwellers. He was considered an enemy of his class because of his life-long support for the poor in Haiti. After training as an agronomist in France, he turned to journalism as a vehicle for social change. In the 1960s, he hosted a one-man program on a time-leased slot on Radio Haiti. By 1971, he had purchased the station, and began a meteoric rise in the profession resulting from his eloquence and lively, even bombastic style and willingness to challenge abusers of power.

Dominique simply revolutionized Haitian broadcasting. Realizing radio's potential to reach the country's illiterate poor majority, he began broadcasting not just in French, the language of the elite, but also in Creole.⁹⁹ Traditionally, newspapers and radio used only French, thus excluding more than ninety percent of the population. Broadcasting in Creole, therefore, was a revolutionary act. It expanded democratic horizons for the Haitian people and broke their traditional isolation. People in the most remote parts of Haiti, pejoratively referred to as "the country outside," began to understand the politics of "the Republic of Port-au-Prince."¹⁰⁰ The strategy of dividing and separating the peasants into small units would no longer work as a method of keeping power in the

99. Variations in the use of language are one manifestation of cultural division. All Haitians speak Haitian Creole to some degree of fluency; eight to ten percent of the population (the elites) speaks French well enough to claim fluency. Only a tiny minority within the elites, however, is truly bilingual in French and Creole. More important than the fact of bilingualism are the number of times elite children are told that it is unacceptable for members of their class to speak Creole. Until Aristide's reinstatement to office in 1994, French was the official language in schools and in the judicial system. In this way, language has been effectively used as a social barrier and one that denies majority participation in certain state institutions. Thus, language was used to exclude approximately ninety percent of Haitians from any political, social or economic power. Dominique's use of Creole in his radio broadcasting was a political act of great courage.

100. Interview with Michele Montas-Dominique, Co-owner and Broadcast Journalist for Radio Haiti Inter and currently, Spokesperson, Office of the President of the United Nations General Assembly, in Miami, Fla. (June 27, 2001) and in Port-au-Prince, Haiti (Oct. 15, 2001). In 1986, after the fall of the Duvalier regime, there was a nascent journalistic rejuvenation. This so-called rebirth did not open up the political arena. The vast majority remained excluded from the political sphere. Nevertheless, to a degree, it promoted the rights of free speech and association. Montas-Dominique argues that while between 1986 and 1991 the press remained an "echo chamber for opinions," this muted role still contributed to the rebuilding of Haitian civil society in the major

hands of a small but ruthless elite.¹⁰¹ Broadcasting in Creole also helped to break the mass economic slavery. For example, coffee growers in one part of Haiti could now hear the price of coffee on the international markets and compare the prices of coffee traders all over the country.

The use of Creole had other revolutionary effects. It helped empower the majority. It spread the methods and spirit of resistance, it gave a voice to the majority's problems, and it allowed the people to discuss possible solutions. Even with this new opportunity for openness, it remained dangerous for newspaper and radio journalists to cover political topics. Nevertheless, journalists continued to talk of previously unacceptable political topics. The "golden age of pioneers" ended abruptly on November 28, 1980, however, when the political police closed Radio Haiti. They ransacked its studios, jailed Radio Haiti's journalists, and tortured several of them. They also arrested many other activists — journalists, human rights activists, labor union leaders and students. These actions coerced other radio stations to stop their broadcasting. Even in the face of these very real threats, Dominique persevered. Over four decades, his vehement, witty and deeply probing editorials became famous for denouncing government officials (dictators) and powerful private-sector actors who abused their authority and caused great harm to the people and the nation.

While there were things in Haiti that Dominique dared not report on directly, he cleverly used accounts of upheaval in other repressed countries as a way to raise political awareness at home. In 1979, for example, the station closely followed the toppling of the Somoza dictatorship in Nicaragua and the fall of the Shah of Iran, using this information as a poorly disguised vision for Haiti. He did not make these statements lightly. Dominique was acutely aware of the dangers he ran. He jokingly called his style of consciousness-raising journalism "risky business."¹⁰² The bullet-riddled façade of the Radio Haiti Inter building testifies to the station's front line role in the country's fight for freedom and democracy. The bullets date from at least six different attacks between 1980 and 1994.

Dominique and his wife, Michele Montas-Dominique, were twice forced to flee into exile. On their return to Haiti in 1986 after the collapse of the Duvalier regime, a crowd of at least 60,000 joyous people greeted the Dominiques at the International Airport of Port-au-Prince. The supporters celebrated wildly, and some people hoisted Dominique

cities because it allowed for the free circulation of ideas and information. The media did not, however, venture into serious investigative journalism.

101. See generally STOTZKY, *supra* note 21.

102. See Montas-Dominique, *supra* note 100.

on their shoulders above the throng. With the help of donations from all over the country, Radio Haiti Inter was rebuilt.

The station soon was charting an emerging grass-roots popular movement known as *Lavalas*, led by a diminutive Salesian priest with a reputation for radical discourse: Jean-Bertrand Aristide. Dominique became an enthusiastic supporter of Aristide's victorious 1990 presidential campaign. He described it at the time as "the most wonderful experience of my life."¹⁰³ But when a bloody military coup forced Aristide from power in 1991, Dominique's radio station was shut down.¹⁰⁴ He and his wife spent two months in hiding before fleeing once again to New York. Only when United States troops intervened in 1994 to reinstate Aristide were the Dominiques able to return.

Over the years, Dominique became intensely popular throughout Haiti, especially among peasants in the countryside, because his station often addressed issues of land ownership and agriculture. His station was not only the first to offer Creole-language radio programs, a decision later copied by others, but also the first to deliver sizzling tirades against corrupt politicians and businessmen. Dominique's focus and perseverance helped lay the "groundwork for an independent press in Haiti."¹⁰⁵

An early Aristide supporter, Dominique embraced Aristide's democratically elected successor and fellow agronomist, President René Préval, who served from 1996 to February 2001. Préval and Dominique both believed in bringing change to Haiti through political access in the countryside. Together they founded *Kozepep*, a peasant organization that had the backing of untold numbers of peasants and that organized thousands of peasants for political meetings and other actions. The organization eventually ran into problems with the *Lavalas* leadership, who saw it as competition. Several *Kozepep* members were attacked by *Lavalas* people in Haiti's interior. Although many serious problems affected the Préval government, including his entirely constitutional

103. *See id.*

104. Dominique's bravery brought him international renown. For example, the Academy Award winning director Jonathan Demme has spent the past fifteen years working on a documentary film about Dominique's life entitled *The Agronomist*. In 2004, it was one of twelve films to be considered for nomination for the 2004 Academy Award but was not selected as one of the five finalists. Interview with Michele Montas-Dominique, in Princeton, N.J. (Feb. 18-19, 2004). The film has won other awards, including the Chicago Film Festival's Gold Plaque for Best Documentary Feature. *See* Chicago International Film Festival, The 39th Chicago International Film Festival Awards, at http://www.chicagofilmfestival.org/cgi-bin/WebObjects/CIFFSite.woa/wa/pages/Fest_winners03 (last visited Mar. 9, 2004).

105. Continuing interview with Jean-Jean Pierre, Reporter for The Village Voice and Musician, in Miami, Fla., New York, N.Y., and Port-au-Prince, Haiti (1994-2003).

decision to dissolve the parliament, Dominique maintained hope for an improved society during Préval's presidency.

Dominique's murder stunned the country,¹⁰⁶ provoking demonstrations and massive displays of mourning. Préval declared three days of mourning and ordered the national palace draped in black. Approximately 16,000 people packed the capital's soccer stadium for Dominique's funeral. Unfortunately, as of the publishing of this volume, Dominique's killers have not yet been brought to justice.

The search for the assassins has turned into a dramatic test of Haiti's justice system, an opportunity to gauge its strength and reliability, and a way of helping Haiti improve the system and end impunity. The issues involved in the case must become a part of the ongoing public debate. The press must be in the vanguard of the discussion and provide the relevant information to the public.

The investigation has not gone well.¹⁰⁷ The original investigating judge attempted to do a serious job, but apparently was stymied at every turn. Bodies have disappeared, suspects have died unexpectedly, and the cast of characters who are said to have conspired to kill Dominique play parts in a story more colorful than one the most creative mystery writer could dream up. The threats against the judge, witnesses and investigators have been palpable. For example, a man who was allegedly passing on information about Dominique's murder was killed in broad daylight in Port-au-Prince. The original judge fled to Miami and refused to return to Haiti, claiming both a lack of security and a lack of resources that the Haitian government had promised him. On Christmas Day 2002, an attempt was made on the life of Michele Montas-Dominique, Dominique's widow and co-host of *Inter Actualities*, Radio Haiti's most popular morning show.¹⁰⁸ As of September 2002, the newly appointed investigating judge in the Jean Dominique case was just beginning his work. On March 21, 2003, after several other judges botched different aspects of the case, Judge Bernard Saint-Vil issued an indictment accusing Dymsley Millien, Jeudi-Jean Daniel, Philippe

106. It also shocked neighboring nations, nations in Latin America, and Europe, and it even had a major impact in the United States.

107. For a devastating critique of the investigation, see Michele Montas-Dominique, *Is Another Assassination of Jean Dominique About to Take Place?* (Radio Haiti Editorial, Mar. 3, 2002).

108. Montas-Dominique escaped the attempt, but, unfortunately, one of her bodyguards was killed. Régis Bourgeat, *Radio Station Chief Survives Murder Attempt*, REPORTERS SAN FRONTIÈRES, Dec. 26, 2002, available at <http://www.rsf.org>. This caused her to flee Haiti for the United States. This attack has yet to be fully investigated. In Feb. 2003, Montas-Dominique closed Radio Haiti Inter indefinitely out of concern for the safety of the staff. See Amnesty International, *supra* note 35, at 14. See also *A Press Chill in Haiti*, MIAMI HERALD, Feb. 26, 2003, at B10.

Markington, Ralph Léger, Ralph Joseph, and Freud Junior Demarat of the murders. Dany Toussaint, a prominent ruling-party senator and former police chief, was widely believed to be involved in the crime, but was not indicted for lack of evidence. Montas-Dominique vehemently criticized the decision for failing to charge those who, she alleged, were the intellectual authors of the crime. "It is outrageous, it does not answer any questions," she said.¹⁰⁹ Montas-Dominique appealed the indictments and the Court of Appeal ordered that the investigation be reopened to address the issues she raised. The Court of Appeal also dismissed the indictments of three of the six detainees for insufficient evidence and ordered their release.¹¹⁰ One of the defendants appealed this ruling to the Supreme Court, which stayed the Court of Appeal ruling. The case remains in this posture.¹¹¹ So far, the judicial system has not been able to bring the killers to justice and the rule of law remains elusive. The Haitian people continue to chant their apparently accurate mantra: "Law is paper, bayonet is steel."

Since Dominique's death and the failed investigation, other reporters have been murdered, harmed and threatened.¹¹² With the exception of a few brave reporters, such as Michele Montas-Dominique, the press has completely failed to do the investigative reporting on the murders of Jean Dominique and others - reporting that is necessary to make government accountable in a democracy. Violence against journalists first led to fear and then to a discontinuance of the investigative and legal (judicial) work necessary to bring these cases to public attention and to resolve them.

* * * * *

In attempting to exercise the sovereign prerogative of collective self-governance, the people must obtain the relevant information necessary to make the morally correct or at least the democratically appropriate decisions. The hope of democracy is to have "the widest possible dissemination of information from diverse and antagonistic sources."¹¹³

109. Press Release, Committee to Protect Journalists, Haiti: Six Men Indicted for Journalist's Murder, (Mar. 25, 2003), at <http://www.cpj.org/news/2003/Haiti25mar03na.html>.

110. See Amnesty International, *supra* note 35, at 14 & n.22.

111. Interview with Michele Montas-Dominique, Co-owner and Broadcast Journalist for Radio Haiti Inter and currently, Spokesperson, Office of the President of the United Nations General Assembly, in Princeton, N.J. (Feb. 18-19, 2004).

112. For example, on September 26, 2002, Radio Kiskeya, one of Haiti's most popular radio stations, shut down after receiving "very serious and grave threats." The station was being targeted for reporting on public issues; in particular, the recent disappearance of a community organizer and the arrest of a leading advocate for investors who lost money — sometimes their life savings — in a pyramid scheme that rocked Haiti. See Michael Deibert, *Haiti Radio Station Suspends Broadcasts After Death Threats*, REUTERS PRESS, Sept. 28, 2002, available at <http://www.haitipolicy.org/content/218.htm> (last visited Mar. 5, 2004).

113. Associated Press v. United States, 326 U.S. 1, 20 (1994).

Informed public opinion is the most potent of all safeguards against misgovernment. The organized press is, of course, the principal institution that performs the function of providing the relevant information to the people.

To put it another way, the paramount function of freedom of speech and press is to assure the proper working of democracy by protecting the free exchange of political information and ideas. Professor Alexander Meiklejohn put it this way:

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process against which* [freedom of speech and press] *is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government.¹¹⁴

Freedom of speech has other justifications that are intertwined with democracy. Freedom of speech is itself an end because the human community is in large measure defined through speech. Indeed, freedom of speech is intrinsic to individual dignity. This is particularly important in a democracy, in which the autonomy of each individual is accorded equal and incommensurate respect. There is, however, more to the concept of freedom of speech than individual dignity. Freedom of speech, by fostering the values of democratic self-government, is thereby instrumental to the attainment of social ends. Again, the role of the press is crucial to this goal.

As this discussion indicates, however, the role of freedom of speech and freedom of the press has been severely restrained in many of the nations undergoing a transition to democracy. Press autonomy has been compromised by government and private actions, thus severely limiting the scope, quantity and quality of the necessary information that reaches the people. This lack of press autonomy and integrity is caused in large part by such factors as market forces, government and private corporative coercion, tyranny, severe legal constraints, and historical and cultural barriers. Nevertheless, as the brave individual reporters, non-governmental organizations, academics and democratic minded political actors work to develop democratic states, a democratic hope may come closer to a democratic reality, but only if the institutions of government stringently protect freedom of expression and freedom of the press.

An absolutely crucial aspect of democracy and the creation of a moral consciousness of humanity is an institutional structure that protects and encourages freedom of speech and freedom of the press. Cre-

114. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1965) (emphasis in original).

ating and preserving such a structure is one of the most difficult tasks assigned to the judiciary and the citizenry of a democracy. The success of such a venture remains uncertain. Indeed, in nations striving to become democracies, the struggle continues on a daily basis.

A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the greater values of freedom of expression and the people's right to know. In the final analysis, it is not merely the opinion of the editorial broadcaster, the writer or the columnist that is protected by freedom of speech and the democratic structure. It is the free flow of information — the entire communicative process — that must be protected so that the public will be informed about the government and its actions, including the relationship between private corporative power and government, and so that the people can scrutinize government, hold it accountable, and protect their sovereign prerogative. A vibrant, independent, democratically minded judiciary must protect this structure. It can do no less if democracy is to take hold. A true democracy requires no less from the judiciary.

V.

OLD PROBLEMS AND A NEW VISION OF THE POLITICAL ECONOMY

Decades after the beginning of the “era of democracy,” it is clear that the struggle of these transitional nations for internal security and economic, social, and political development — their attempts to create the conditions for democracy to bloom — will continue to be a tortuous one. Unsettled political conditions, weak management of the economy, pervasive corruption, failed institutions, electoral crises, and sometimes gross inequality in resource allocation leading to grinding poverty underscore how poorly the international democratic revolution has succeeded.

While many of these problems and the legacy of their history can only be overcome by the people of these nations, help from the international community is essential. But only the correct international incentives directed at the real problems will lead to a viable, sound democratic revolution. So far, these incentives have not been properly employed. Each of the nations I have either mentioned or discussed in varying depth — Argentina, Chile and Haiti — is an example of these problems.

The deepest roots of these nations' problems lie not simply, or even most significantly, in the particular country's politics or cultural history. Institutional reforms of the type championed by the international community — such as total privatization of state owned industries or “judi-

cial reform" — simply will not work until the more serious problems are confronted. While the moral turpitude of many of the elites and corporatist forces is real, the major political problems of these nations lie in their social and economic organization. Unless and until these difficult issues are addressed, there is little hope for positive change or true democratic reform for the millions of people trapped in despair and destitution. If these issues are addressed, however, it is possible that positive changes in the political sphere will follow. The major hope these nations have for achieving a valid democracy is the creation of a new socioeconomic arrangement, which will be difficult to create and even harder to maintain. But the absence of material deprivation is a prerequisite for the conditions necessary to create a viable democracy. What steps must be taken to achieve this goal?¹¹⁵

An energized, vital democracy is much more than a nation that holds periodic elections. Democracy requires an environment of security that will allow people to maximize their liberty so they can follow their dreams, pursue their preferred professions and try to fulfill their personal desires. It requires freedom of thought and action so one can explore a range of ideas and move about freely while doing so. Democracy also means, among other things, the full development of a diverse, rich civil society and the building and development of a creative institutional structure that will assure the rule of law and justice. The hope is that these developments will encourage political and social participation. Only a strong state can provide these incentives. While these choices — and democracy is always a choice — cannot necessarily be imposed by the international community, they certainly can be encouraged by it.

While many nations are reaching out for democracy, what are the policy choices for changing the political economy? The overriding characteristic of the political life and discourse of nations in the transition process has been a frustrated desire to escape the choice between a nationalist-populist project and a neoliberal project. The rejection of these alternatives, and of dictatorship, has a deeper meaning than is traditionally understood. It is a revulsion against a feigned public life, which is in fact little more than a weapon or disguise of private interests. This problem is not unique to Argentina, Chile or Haiti. It is reflected in the institutional structures of many developing nations. The dominant regimes of the less developed economies, and even their critics, often start with the desire merely to imitate and import the institutional arrangements of the rich industrial democracies. They do this in the hope that from similar institutional devices, similar economic and politi-

115. The judiciary's role in this democratic experiment, while somewhat limited, is still crucially important.

cal development will result. But such imitation has not led to the desired results. The failure of these efforts at emulation may nevertheless be useful to the development of new and experimental institutional structures, which may shed light on the suppressed opportunities for transformation to democracy. But many of these nations in the transition process have not yet started on this experimental path.

The import-substituting protectionist style of industrialization and the pseudo-Keynesian public finance of a nationalist-populist approach are unable to deal with the huge problems facing these nations. Latin America, for example, still faces some of the problems and after-effects caused by hyperinflation and stagnation created by irrational closed economies and massive public spending. Neoliberalism (*neoliberalismo*), the single-minded pursuit of foreign investment and its accompanying austerity and inequality, is equally unable to service the real conditions of sustained economic growth.

Neoliberalism's rise to the status of religious doctrine is largely due to the influence of the United States, particularly in regulating and controlling the conduct of international monetary and trade organizations. The Reagan Administration pushed the Latin Americans into pro-business austerity programs and set the tone for a worldwide reduction of government rule. Neoliberalism's acceptance is also due to the policies of the World Bank and the IMF and to the wealth of its corporative backers in a region where money matters above all else in politics. Nevertheless, globalization has not had the desired consequences.¹¹⁶

Joseph Stiglitz, the 2001 Nobel laureate in economics and formerly the chief economist of the World Bank, in his new book, *Globalization and Its Discontents*, convincingly argues that by promoting private enterprise wherever it can, the IMF was following the so-called Washington Consensus view of economic development, which sees the expansion of free-market capitalism as the route to prosperity.¹¹⁷ With the backing of the U.S. Department of the Treasury, the IMF urged governments everywhere, especially those in the transition to democracy, to privatize, liberalize and retrench. In the past twenty-five years, most of the developing countries in the transition to democracy have followed

116. Both Joseph Stiglitz and George Soros, in their recently published books, argue that globalization has failed. See GEORGE SOROS, *ON GLOBALIZATION* (2002); JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002). Stiglitz, in particular, argues that the benefits of globalization have been less than its advocates claim and the price paid has been greater. He argues convincingly that the environment has been destroyed, political processes have been corrupted, democracies undermined, and cultures eroded. Moreover, globalization has made millions of people worse off, particularly as their jobs are destroyed and their lives made increasingly insecure.

117. See STIGLITZ, *supra* note 116, at 16.

this advice, dismantling their public-sector enterprises and opening up their economies to world trade and investment.¹¹⁸ As a result, the world has become more interconnected than ever, with the level of exports, imports and cross-border investment all increasing sharply.

According to classic economic theory, the expansion of trade and commerce should have made humanity much better off. Ever since Adam Smith, economists have generally agreed that trade is a good thing, because it allows countries to specialize in what they do best. This "division of labor" (Smith's phrase) raises productivity, which results in more income to spend on food, health, education and consumer goods. Although some people lose their jobs as the pattern of trade changes, the winners gain enough to compensate the losers and still have some left over for themselves.

During the 1970s and 1980s, when countries such as South Korea and Singapore were exporting their way out of poverty, the theory seemed to be working as advertised. Globalization claimed to improve lives – the standard of living – of millions of people. Since 1990, however, the number of people living in extreme poverty — on less than two dollars a day — has risen by more than 100 million to 3 billion.¹¹⁹ The gap between rich and poor countries has turned into a chasm. Even relatively prosperous parts of the world, such as Southern Asia and Eastern Europe, and relatively prosperous nations, such as Argentina, have fallen into unprecedented slumps.¹²⁰ Stiglitz argues that neoliberalism (including "globalization") is simply not working for many of the world's poor, for much of the environment, and for the stability of the global economy.¹²¹

Why not? What went wrong? According to Stiglitz, the rich countries have hijacked globalization, using as weapons the IMF, the World Trade Organization and other international bodies that are supposed to act in the interests of all countries.¹²² These institutions are all too often closely aligned with the commercial and financial interests of those in the advanced industrial countries,¹²³ Stiglitz argues, and the net effect of the policies they promote is to benefit the few at the expense of the many, the well-off at the expense of the poor.¹²⁴ The governments of the rich countries have pushed developing democratic-minded nations to open their borders to computers and banking services but have continued

118. *See id.* at 53-73.

119. *See id.* at 253 n.2.

120. *See O'Donnell, supra* note 23.

121. *See* STIGLITZ, *supra* note 116, at 214.

122. *See id.* at 206-13.

123. *See id.* at 216.

124. *See id.* at 209.

to protect their own farmers and textile workers from the cheap food and clothing that poor countries produce. The rich countries have supported the extension of patent agreements that guarantee high profits for Western pharmaceutical companies while depriving African countries of the drugs they need to fight an AIDS epidemic. Stiglitz claims that those critics who accuse Western industrialized democracies of hypocrisy are right.

Moreover, the “shock therapy” aspect of economic reform championed by neoliberalist doctrine — freeing prices, hawking state-owned enterprises to private investors at a discount (privatizing), and trying to maintain a strong currency — is now seen as bad policy. Indeed, there is now a consensus among economists that it is a mistake to create a market economy without first developing the institutions necessary for capitalism (and democracy?) to function properly, such as enforceable laws, a working tax system, a modern legal system and a social safety net. Almost every expert now agrees there is no shortcut to building a modern economy.

It appears that there is no disputing Stiglitz’s and George Soros’s¹²⁵ central point that globalization has outgrown its institutional framework. Both authors suggest reforms that might help remedy the situation. Most significantly, they advocate restructuring the international institutions, so they are more democratic and effective.¹²⁶ For example, the IMF’s voting structure makes no sense — the Netherlands has about as many votes as China. Stiglitz also recommends improving banking supervision, changing the international bankruptcy laws, reducing the number of IMF bailouts,¹²⁷ and increasing the amount of aid and debt relief that developing countries receive, especially those in Africa.¹²⁸ Soros believes that international aid should be increased¹²⁹ and that the World Trade Organization ought to take greater account of issues like workers’ rights, health and safety, and the environment.¹³⁰

Whatever the merits of these suggested reforms, there is more than

125. See SOROS, *supra* note 116.

126. See SOROS, *supra* note 116, at 14-16; STIGLITZ, *supra* note 116, at 250-51.

127. See STIGLITZ, *supra* note 116, at 236-40.

128. See *id.* at 243-44.

129. See SOROS, *supra* note 116, at 57.

130. Although Soros states that the WTO should make changes in response to these problems, he also recognizes that the WTO by itself is in no position to solve them.

The WTO is not qualified to deal with environmental protection, food safety, human rights, and labor rights except insofar as international trade is involved. Although some changes could and should be introduced to make the WTO more cognizant of these issues, the main remedy lies in states, particularly the United States, giving equal support to other international arrangements.

Id. at 36.

enough blame to go around. The governments of these developing democracies have clearly made bad policy choices, which have done at least as much as the IMF to keep poor people poor. In addition, the difficulties the IMF faces in trying to help a country whose stock market and currency are both plummeting are monumental and should not be underestimated. But the international community is largely to blame for exacerbating the economic, social and political problems of many of these nations.¹³¹

What is clearly needed now is somehow to fix neoliberalism's major flaw —that it does not help the vast poverty-stricken majority live a dignified life. Instead, corporative power creates wealth for a small minority, while almost enslaving the majority. Unlike neoliberalism's claim that government should play a minor role in the economy, real democratic change requires the government to play an important and dynamic role. At a minimum, the international community must encourage these governments to pursue locally designed policies to draw the poor into the global economy. To achieve even this minimal goal, these governments must be given incentives to pursue a vision of a political economy that is quite different than the image traditionally suggested. Moreover, the judiciary has an important, if somewhat limited, role to play in this process.

In political economy terms, promising alternatives that will allow for a flowering of democracy might develop in some of the seriously or marginally underdeveloped nations such as Haiti or Argentina in a variety of experimental directions. Each of these experiments must be continuously monitored so they can be changed as they unfold to meet the requisite goals of democratization. This method is one of the few ways that a positive transformation may take place in many of these developing nations. Flexibility is a necessary key to success.

Moreover, what we may be able to say and do about the future possibilities of democratization depends crucially on our interpretation of contemporary political, social and economic history. The radical change many of these nations are making from inward oriented statist growth is still in full swing.¹³² Macroeconomic policy makers still wres-

131. Free market reforms have had one or two successes in Latin America. Chile is repeatedly cited as such a success. Much of the rest of the continent, however, has still to make up for the last decade of growth following the allegedly "successful" IMF bailouts of the 1980s. Unfortunately, in addition to very low growth rates, many of these nations have persistently high rates of unemployment —at double digits in Argentina since 1990 — even as inflation has declined. The collapse in Argentina in 2001 is one of the most recent of a series of failures over the past several years. Moreover, given the high unemployment rate for almost seven years, it is amazing that the Argentine citizens did not riot sooner but instead suffered quietly.

132. Unfortunately, some nations, Argentina in particular, have been on the verge of full-scale economic, social and political failure.

tle with price instability and proper exchange rate regimes. External threats and internal mistakes only prolong the transition and generate uncertainties that exacerbate the problems. Simultaneously, microeconomic changes, technical leaps and innovations, the legal evolution of firms, and the use and disbursement of property rights are still more in flux than fixed on the eve of new cycles of growth or retraction.

At first blush, it may appear that Latin America's and perhaps Haiti's relationship to the world economy leaves these nations and their region with relatively few options. But I believe that options do exist. Although we understand large-scale transitions imperfectly, what we do know is that decisions made while institutions and partnerships are being created and forged have significant — indeed enormous — subsequent effects. Thus the conjuncture of deep structural transformation means that what these nations do now will shape what they can do later. It is not just the structures, but also the rules that will shape them, that are changing.¹³³

Three major areas of concern are evident in the social, political and economic spheres. The first involves money. Macroeconomic instability is a major force in undermining the ability of people, rich and poor alike, to save and invest for the long term view. International sources may help, but, without local savings or investment, they often leave these nations exposed to forces over which they have the least control.

The second area of concern is the legal structure girding ownership and use of property rights. Reform of corporate law and the emergence of a new regulatory regime (paradigm) may help private parties to seize upon new property rights to create new enterprises and new industries. In both of these areas, the liberalization of the market is the factor that should give the single biggest boost to long-term growth. Increasing growth, however, is not the same as sustaining it. In both of these areas, rule making and enforcement will certainly become the cornerstones for growth.

The third concern is the approach to human capital. Both the long-term view and long-term progress will be shaped by human skills and aptitudes. In Latin America, for example, the educational systems are impoverished. Good, sound education is scarce and increasingly hard to find. It is, therefore, expensive and unequally distributed. If it is true, as many claim, that education yields increasing returns, this is clearly a matter of urgency for these nations.

These three areas of concern do not necessarily add up to an indict-

133. See, e.g., Lucien Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 *STAN. L. REV.* 127 (1999).

ment of the state in Latin America and Haiti. Rather, they are best seen as an injunction that the state perform its role as a state, with public duties and public authority. Indeed, there are public goods — sound currency, security, the rule of law, and education for which the state has an overwhelming, indeed incomparable comparative advantage. Long-term growth in this region may well depend on governments' abilities to appreciate and exploit their own mandates and resources. An active state is essential to the success of such democratic reforms. Courts, of course, have to play major roles in this grand experiment.

If governments are to play this major role, what steps can they take? First, as I have already suggested, it is important that these nations take macroeconomic stabilization very seriously. One way of doing this is through a dramatic rise in, and focusing of, the tax rate, which would impose on both the privileged classes and regions of these nations the costs of public investment in people and in infrastructure. It would be utterly unrealistic for these nations to take another approach and conceive of a sound financial system as one based on a drastic lowering of governmental expenditure rather than on a raising and rationalization of taxes. There needs to be a strong preference for a universal, direct consumption-based tax — taxing, in a steeply progressive way, the difference between income and savings — as the means to finance the state while promoting capital formation and productive investment. Countries like Argentina and Haiti will need large amounts of international aid over a long period to augment these taxings, because these nations are in financial crisis. But this aid must not be based on the same schemes that have harmed their economies and helped lead these nations into their present predicaments.

Second, there must be a push to train the poor majority in a variety of skills needed in the global economy. Simultaneously, the state must help create the conditions for an "anti-dualist" political economy. These democratically minded governments have to attack aggressively and overcome the internal division of these nations into two (or more) economies that are only tentatively and hierarchically connected. What is needed is the consolidation and development of a technologically skilled group of people in both the public and private sectors, and the use of this group to lift up and transform the immense, backward second economy. This approach would also suggest attempting joint public-private ownership of enterprises and encouraging decentralized capital allocation and management. These two or more economies cannot be allowed to become the platform for an antiquated fordist-style industry that is unable to compete abroad except through internal wage repression and that is incapable of transforming the second economy. For example, net-

works of small and medium-sized enterprises represent the most dynamic forces in many of the economies of the developing nations and are even paralleled by external experiments in the large businesses with the greatest potential for growth and innovation. These intimations of an alternative, less conforming industrial future — changing the organization of firms, perhaps by making them more democratic, as well as the character of regional economies within the country — need to be developed by a deliberate economic program, sometimes with the determined help of the international community. Indeed, the international community must play a central role in this experiment through monetary and technical assistance, including training people in highly technical skills.

Third, if the breakdown of corporative control of the economy is to succeed, the strict requirements of capitalism must be imposed on the so-called free market capitalists through the privatization of the private sector. Because market forces tend to concentrate wealth and power, a democratically minded government must ensure that no barriers exist to participation in the market. Indeed, the more players in the market, the less concentration of wealth and power. Otherwise, there is the omnipresent risk of the dominant player whose power may skew the debate or the policy toward his own self-serving ends, which may not be democratically optimal ones. Therefore, the government must control monopoly, encourage business formation, and even compete to counteract the power of the dominant big-business actors. In addition, the activist state must protect local businesses from the overwhelming power of international influences. Local voices remain unheard when powerful external forces control the media, the economy or the political sphere.

There are, of course, many positive aspects to a private market. If the economy is successfully privatized, this will mean real competition, real refusal of the capitalization of profits through the socialization of losses, real antitrust, real markets in corporate control, real constraints on nepotism and inheritance, and real private responsibility for the costs of public investment necessary to meet some of these goals. Such a capitalist regime requires parliament to pass laws, and the executive and the courts to enforce them, opening the market so everyone can compete on a somewhat level playing field.

These governments also must develop a parallel set of institutions to compete in the marketplace. Public companies should be created and developed to compete with the private ones. Moreover, these governments must impose on these public companies the requirements of serious and decisive competition and independent financial responsibility. Total privatization of publicly owned companies is not necessarily a good idea.

The last part of the plan is educational. There must be a massive investment in people and infrastructure, financed by taxes on the people with the goods — those who possess the wealth. There must be a priority of such claims on the budget, backed by procedural devices with executory force. In addition, preventive public health, sanitation and food supplementation need to be given preference over therapeutic medicine. Even more important for democratic change is the fact that the people must be educated. Free public schools must be open to everyone, and literacy programs created and developed. There must also be a shift of the control of education away from the memorization of facts and towards an emphasis upon the mastery of generic practical and conceptual capabilities.

In the organization of government, politics and civil society, the alternative to nationalist-populist or neoliberalist projects may take the form of a public-law counterpart to the political economy I have just outlined, animated by the same concerns and moving toward the same goals. Experiments should be attempted in these areas as well. For example, structural reforms require at least two sets of institutional innovations. First, a merger of the electoral characteristics of presidential regimes is needed, posing a periodic threat to oligarchic control of political power. There must be a facility for rapid resolution of impasse through priority accorded to programmatic legislation, liberal resort to plebiscites and referenda, and perhaps the vesting of power in both the legislative and executive branches of government to provoke anticipated elections in the face of impasses over the direction any particular country should take. Second, measures must be taken to heighten the level and to broaden the scope of political mobilization in society, especially through the strengthening of the political parties, public financing of political campaigns, increased free access to television and radio, and the breakup of any broadcasting cartel. Direct democracy must be encouraged at all levels of society.

The macropolitics of institutional change must be complemented by a micropolitics confronting the logic of habitual social interactions. The typical elements of this logic include a predominance of patron-client relations, with their pervasive mingling in the same associations and encounters of exchange, power and sentimental allegiance. There is frequently an oscillation between rule formalism and personal favoritism, and each creates the opportunity and need for the other. There is also a stark contrast between the treatment of "insiders" and "outsiders," and the consequent shortage of impersonal respect and reliability.

A democratic system must be capable of challenging and changing both the established arrangements of the economy and the polity, and the

intimate habits of sociability. In this task, those who yearn for democracy must combine a strategic approach to the satisfaction of recognized material interests with the visionary invocation of a reordered society. In nations striving for democracy that are trapped in these impoverished visions and systems, nothing is more important than encouraging the belief in the people that structural change is possible. The governments of these nations and the international community must encourage such beliefs and actions. The state must be an active one in all of the democratic senses I have discussed. The judiciary's role is essential to the task.

VI.

SOME NECESSARY JUDICIAL CHARACTERISTICS FOR THE PERFORMANCE OF ITS DEMOCRATIC ROLE

In my discussion concerning the transition from dictatorship to democracy, I have made several major points about the courts. To begin with, I claim that the judiciary has an important, if somewhat limited, role to play in this process and in the new democratic regimes. In particular, I argue that the judiciary must be vigilant in protecting freedom of speech and freedom of the press. It also must play a major role in the creative, transformative process of helping to shape a new vision of a political economy. There is a caveat to offer, however. To meet its democratic burdens, the independence of the judiciary must be assured.¹³⁴ At the same time, however, it cannot be too independent in the context of a democratic regime. Moreover, the courts have to develop and engage in a constitutional adjudicative process, where rational discussion, dialogue and argument rule.

Judicial independence is a term that is generally used to characterize the relationship of the judiciary to other institutions or agencies. An independent judge is one who is not under the control or influence of someone else. In a broad sense, there are three types of judicial independence. One type requires the judge to be independent from the parties in the litigation. A judge cannot be related to the parties or under their influence or control. The theory is that the judge must be completely impartial. The extreme example of a violation of this impartiality is a bribe or perhaps a social or political bias by the judge in favor of or against one of the parties.

A second form of judicial independence concerns the collegial relationships or power of one judge over another. In the usual common law

134. See ELIN SKAAR, JUDICIAL INDEPENDENCE AND HUMAN RIGHTS POLICIES IN ARGENTINA AND CHILE, (Chr. Michelsen Institute, Working Paper No. 15, 2001), available at <http://www.cmi.no/public/2001/wp2001-15.htm>.

system, the doctrine of *stare decisis* binds judges. Control, in both common and civil law countries, also is exercised through the regular appellate procedures. These forms of control do not generally threaten the independence necessary to perform the proper judicial function. Another form of judicial control outside of the normal appellate procedure may, however, threaten judicial independence. These are bureaucratic controls in which one group of judges acting through an outside organization may review the work of an individual judge and discipline him. Such bureaucratic controls are commonplace in civil law countries, where the judiciary is professionalized. There are also such controls in some common law countries.¹³⁵

A third form of independence, sometimes referred to as "structural independence" or "political insularity,"¹³⁶ is independence from other governmental institutions — from the executive and legislative branches. This political insularity allows the judiciary to act as a countervailing force within the broader governmental system. But too much independence may be harmful to a democracy. A judiciary that is insulated from popularly controlled institutions of government may interfere with the actions or decisions of the legislative and executive branches and therefore frustrate the will of the people. This can be a threat to a democracy.¹³⁷ In this sense of the term, judicial independence in a viable democracy may require that we optimize and not maximize judicial independence.¹³⁸

135. See, e.g., The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 § 3, 28 U.S.C. § 372 (2000).

136. Elin Skaar lists four factors that are key indicators of structural independence: appointment procedures, length of tenure; judicial councils; and the power of judicial review. Moreover, she argues convincingly that Argentine courts have recently become more independent because of constitutional reforms, alterations in the perceived military threat, and renewed vigor by the human rights sector, and that this new independence has led to increased judicial activism in human rights cases against the military. While I am convinced by her arguments to some degree, they fail to explain the persistent corruption of Argentine courts. See SKAAR, *supra* note 134.

Indeed, another serious problem with courts playing a democratic role in checking the executive is the politicization of the courts. Argentina, clearly a nation with a mature infrastructure and set of institutions, presents a striking example of the failure of the independent judiciary to check executive branch abuses, to help inculcate the importance of the rule of law in the minds and hearts of the people, and thus to promote democracy. Argentina, to some extent, is an example of the corruption of the judiciary by the executive it is meant to check. The judicial actions in investigating the 1992 bombing of the Israeli embassy in Buenos Aires and the 1994 bombing of the Argentine Israelite Mutual Aid Association are sad tales of this corruption. For a thorough discussion of these cases, see Memorandum on Argentina, the Judiciary, Corruption, and Terrorism, from Gabriel G. Goldberg to Irwin P. Stotzky (Oct. 1, 2002) (on file with author).

137. See Sutil, *supra* note 68; SKAAR, *supra* note 134.

138. See Owen M. Fiss, *The Right Degree of Independence*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 55 (Irwin P. Stotzky ed., 1993). Simultaneously, the judiciary must be strong enough to be able to say no to the other branches of government if

A second factor, besides independence, that is essential in helping the courts meet their democratic burdens is the creation and development of a constitutional adjudicative tradition. This requirement stems from the most significant role the judiciary plays in a democracy — the protection of human rights. Indeed, the recognition and protection of human rights is the single most significant aspect of social life in a democratic society. It is an instrument — a tool — that should help nations avoid social catastrophes.

There is a caveat, however. Even when human rights are legally recognized, as they now are in many nations undergoing the transition process, that recognition does not ensure their protection. Those who have a monopoly on coercion — corporative forces, such as powerful executive officials, military officials, and the economic elite — may employ the state machinery to carry out the most brutal violations of rights. There are, of course, international agreements and other mechanisms that put pressure on these forces to help secure these rights. But that is only of limited help.

What is needed is the creation of a constitutional adjudicative tradition — a tradition that helps to create a moral consciousness in the citizenry.¹³⁹ This is where the judicial role is most crucial as a positive, democratic force. Perhaps the best example of such a tradition is in the United States. There, the establishment of a constitutional adjudicative tradition has clearly helped protect human rights. The process establishes methods of rational discourse that have helped create a moral consciousness in the citizenry and thus a barrier against abuses of human rights by the government. In large part, this method demonstrates that the function of the judiciary is to give meaning and application to constitutional values independent of political preferences. Adjudication on constitutional questions is the social process by which judges give meaning to our values.¹⁴⁰ The process creates a dialogue between the courts and society. It helps define and shape the protective contours of these values. In the United States, the process, including remedies such as injunctive relief, has led to structural reform of public schools, pris-

their policies adversely affect democracy, and to enforce its decisions. Courts must not themselves become captured by corporatist or other external forces.

139. See, e.g., Irwin P. Stotzky, *The Tradition of Constitutional Adjudication*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 347 (Irwin P. Stotzky ed., 1993).

140. In constitutional democratic nations, there is always a tension between constitutionalism and democracy. These tensions operate when the strengthening of the constitutional ideal restrains the democratic process and when the expanded power of democracy weakens constitutionalism. For an intriguing analysis of the two concepts, see CARLOS S. NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996).

ons, mental hospitals, and even housing authorities.¹⁴¹ Indeed, the quality of social life in the United States depends crucially on this process.

Many nations involved in the transition process, particularly Latin American nations, have failed to develop this type of constitutional adjudicative tradition. In many of these nations, the institutional structures and practices needed to establish and perpetuate this tradition simply do not exist. Institutional instability is often caused by the large degree of dependence of the highest courts on the political process,¹⁴² by the rapid changes in doctrine, and by the regular wholesale replacement of judges.¹⁴³

The development of such a tradition, however, does not necessarily mean that human rights will be secured. Even in the United States, the process has not always been carried out with the sensitivity needed to protect such rights or indeed the democratic process itself.¹⁴⁴ Moreover, the methods of adjudication developed in the United States do not necessarily fit neatly into the cultures of developing democracies. Distinctive legal cultures, different constitutional histories and theories, and different visions of the role of and rule of law in each nation play a major role in defining and shaping methods of adjudication. Moreover, such a tradition cannot develop in a vacuum. The independence, reliability and efficiency of the judicial process must be strengthened simultaneously with changes in the economic, social and political spheres. But, if done correctly, the establishment of such a tradition in these nations attempting the transition to democracy can be very important in consolidating and perpetuating the rule of law, in protecting human rights, and ultimately in developing and protecting the democratic process itself.

CONCLUSION

Authoritarianism and its remnants cannot be overcome merely because people favor democratic methods for resolving almost insoluble problems and developing a democratic nation. Powerful economic, social and political forces block the passage from dictatorship to democracy. The underlying forces include an almost organic conception of society that leads to a dualistic vision of the social order, corporatism, anomie and unlawfulness, and extreme concentrations of institutional,

141. See, e.g., OWEN M. FISS, *THE LAW AS IT COULD BE* (2002).

142. See Goldberg, *supra* note 136.

143. See generally *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (Irwin P. Stotzky ed., 1993).

144. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* (2d ed. 2002); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11*, (2002); Memorandum on The U.S.A. Patriot Act, from Alice E. Meyer to Irwin P. Stotzky (Oct. 13, 2002) (on file with author).

economic and social power. A combination of these forces and the interplay among them are often directly related to massive human rights abuses committed by those who possess the power. In addition, the doctrines of neoliberalism and globalization, and their implementation, have exacerbated many of these problems.

Central to the resolution of these issues and the operation of a democracy is the need to develop and consolidate the institutional structures of government — an independent judiciary, a representative congressional branch, and limitations on the executive branch. The rule of law and the guarantees of due process must become an accepted, basic requirement of public and private life. This means that the people of these nations must internalize the importance and legitimacy of a constitutional system based on the rule of law. They must also internalize universal standards of achievement and competition necessary to the proper functioning of a democracy. The belief in the overpowering significance of status and connections, which severely cripples the transition to democracy, must be defeated.

In the long run, nothing positive can be achieved in these nations without the establishment of a deliberative democracy — one that allows for equal participation and rational discourse among all segments of society. This discourse, in turn, is essential for the creation of a moral consciousness of humanity that recognizes the value of human rights and abhors any notion that disregards them. Courts must play a role in this deliberative process, and help society resolve some of its major economic, political and social problems. The courts' role in this democratic experiment, while important, is somewhat limited. Courts must protect the processes of freedom of speech and press. Indeed, the law may sometimes have to be used to liberate and equalize speech opportunities, to protect critics of the government, and to see that those who physically harm journalists are brought to justice.

In addition, the political economy must be transformed, and courts also have a role to play in this transformation. This includes the ability to interpret and enforce a constitutional system. The function of a judge in a constitutional democracy is to give meaning and application to constitutional values, independent of political preferences. Indeed, the right of the judge to speak and the obligation of others, like governmental agencies, to listen depend not on the judge's personal attributes, nor even on the content of his message. Instead, what is crucial is his ability to be both detached and distant from the particular contestants and the body politic itself. Simultaneously, a judge must be fully attentive to claims and grievances, and fully responsive in ways that transcend preferences and that are sufficient to support judgments determined to be

constitutional. Thus, the legitimacy of a judicial decision depends critically on the quality of the process itself.

In the past three decades of democratic transition, the judiciary has had rather limited success in promoting democratic reform. As I have argued, democratic change cannot be created in a vacuum. This position parallels Fiss's suggestion that an activist state is necessary to a developed democracy. In this article, I have extended Fiss's notion of the significance of an activist state, and argued that it is even more important to a developing democracy. What this means, of course, is that all parts of the public and private sectors must work together on these overwhelming problems. So far, this has not happened. But the promise and the hope for real democratic reform remain in the hearts and minds of the vast majority of the people in these nations. The activist state, particularly an activist judiciary, by living up to its democratic demands, must keep these hopes alive and help them become a reality.