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# POST-EARTHQUAKE LEGAL REFORM IN HAITI: IN ON THE GROUND FLOOR

*Leonard L. Cavise\**

## INTRODUCTION

The old European way of trying criminal cases, the so-called inquisitorial system, is dying. Throughout Latin America, countries have passed new codes of criminal procedure that have adopted the party system, similar to the accusatorial system in the United States. Even in Europe, lawyers and lawmakers are advocating for a more open and adversarial system. They have managed to enact new legislation calling, at least, for an end to the secrecy of the old procedures, a greater role for lawyers, and a more oral and public system for trying cases.<sup>1</sup> Most dramatically, in France, the birthplace of the European model, President Sarkozy, in 2009, called to replace the centerpiece of the inquisitorial system, the *juge d'instruction*, with a more party-oriented judge and to transfer the duties of investigation to the public prosecutor.<sup>2</sup> Considering that Napo-

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\* Professor of Law and Director of the Center for Public Interest Law and Interim Director of the International Human Rights Law Institute at the DePaul College of Law. I wish to thank the International Senior Lawyers Project for involving me in Haiti's criminal justice reform project. Please note that to the extent this Article includes un-cited assertions, I have made my inferences based on my participation in, and materials and notes from, the conferences to reform the Haitian Criminal Law and Criminal Procedure Codes.

1. Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L. J. 1, 26–29 (2004); to understand the complexities of the Italian experience, see Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, 52 AM. J. COMP. L. 489, 489, 492–95 (2004).

2. At a session before the *Cour de cassation*, France's highest court, Sarkozy said: "Le juge d'instruction en la forme actuelle ne peut être arbitre. Il est donc temps que le juge d'instruction cède la place à un juge de l'instruction qui contrôlera le déroulement de l'enquête mais ne la dirigera plus." (The committing magistrate in its present form can only be a referee. It is therefore time that the committing magistrate cedes his position to the *juge de l'instruction* who will guide the progress of the inquiry but will not direct it.) *Sarkozy confirme la fin du juge d'instruction* [*Sarkozy Confirms the End of the Committing Magistrate*], LIBÉRATION, Jan. 7, 2009, <http://www.liberation.fr/societe/0101310147-sarkozy-veut-supprimer-le-juge->

leon birthed the inquisitorial system in France in 1808, it is significant that a French President himself is calling for such a major reform. The inquisitorial system appears to be in its death throes.

In 2008, President René Prével of the Republic of Haiti appointed two commissions (“the Commissions”) to revise the Penal and Criminal Procedure Codes of Haiti. The Codes had not been revised since 1835, when the Republic was just getting on its feet after the slave rebellion of 1803. Both the substantive and the procedural codes were drawn from the codes of France, then known, of course, as the Napoleonic Codes. They reflected the inquisitorial system of criminal justice, which centers around the *juge d’instruction*.

By the time of President Prével’s decision in 2008, Haiti was already well behind in the Latin American movement to transition its criminal justice systems from the inquisitorial to the accusatorial or adversarial model. As part of that movement, and encouragement via foreign aid from the United States, over twenty nations recodified their law and procedure, hoping to modernize the system, minimize the endemic weaknesses of the European model, and to attract foreign investment by providing a more predictable legal environment.<sup>3</sup>

President Prével named René Magloire, a former Minister of Justice, as chair of the Haitian Commissions.<sup>4</sup> Magloire, partly because of his two terms as Minister of Justice, is a very well known legal personality in Haiti and a close friend of Prével’s. It was Magloire’s task to not only draft the new Codes but also to convince the practicing bar, which was heavily influenced by the French model, and the larger society to accept these reforms as a part of Haiti’s ongoing attempts to launch a functioning criminal justice system.

The challenges of such a reform were overwhelming in view of Haiti’s daunting lack of resources, pervasive corruption,

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d-instruction (Fr.). See also, Alain Salles, *M. Sarkozy envisage de supprimer le juge d’instruction* [Mr. Sarkozy Considers Eliminating the Committing Magistrate], LE MONDE, Jan. 6, 2009, [http://www.lemonde.fr/politique/article/2009/01/06/m-sarkozy-envisage-de-supprimer-le-juge-d-instruction\\_1138259\\_823448.html](http://www.lemonde.fr/politique/article/2009/01/06/m-sarkozy-envisage-de-supprimer-le-juge-d-instruction_1138259_823448.html) (Fr.).

3. Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 630–31 (2007).

4. The Haitian Commissions consist of the Commission to Reform the Criminal Procedure Law of the Republic of Haiti and the Commission to Reform the Criminal Law of the Republic of Haiti.

their history of impunity in police conduct,<sup>5</sup> and the resistance of the more traditional Francophiles and others invested in the maintenance of the present system. Additionally, the catastrophic earthquake in 2010 devastated Haiti, particularly the capital, Port-au-Prince, and caused the death of a number of the important players in the reform project.<sup>6</sup> Almost miraculously, the project continued with the completion—an implausible three weeks after the earthquake—of another draft of the procedural Code and with the convening of the next international conference of the Commissions a mere two months later.

Part I of this Article will briefly describe the general historical and political antecedents to this reform initiative, including several of the previous projects to strengthen and solidify the Haitian criminal justice system. Part II will describe the Haitian criminal justice system as it presently exists, including its perceived deficiencies, as background to this law reform process. Part III will describe the reform process as the author viewed it. This description will touch upon the key elements of the discussion and the attempt by the Commissions and its invited guests to adopt the essence of the party system while adapting it to the legal cultural life of Haiti. Part IV describes the influence of the French in Haiti today and the effects of that influence on the reform process. Part V describes the historic first conference and the divergency of views on the necessity and direction of procedural reform. In Part VI, a description of the content of the new Haitian Criminal Law and Procedure Codes is begun with an exposition of the human rights preamble to the Criminal Procedure Code, which is key to public acceptance of the Codes. That preamble and the human rights provisions in other parts of the procedural Code are interesting particularly for the international norms adopted and the preservation of some traditional Haitian values. Part VII discusses other key procedural Code provisions, beginning with

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5. Impunity refers generally to what Americans would call the arbitrary or capricious use of power without due process.

6. Particularly noteworthy, in this regard, is the death of Micha Gaillard, the Chair of the public advocate's portion of the Commission. José de Córdoba, *Micha Gaillard, Fought for Democracy*, WALL ST. J. (Jan. 22, 2010), <http://online.wsj.com/article/SB10001424052748703822404575019190559786092.html>.

components of the accusatorial or party system that were rejected. In Part VIII, the accusatorial features that are accepted, in whole or in part, are outlined. Part IX describes possible infrastructure reform that will be necessary to implement the full slate of proposed reforms, along with, in Part X, an assessment as to what must happen in Haiti to develop a social consensus and thereby implement this dramatic transition. The Article concludes that, despite the assistance from foreign resources and the hard work and dedication of a cadre of lawyers and their allies, the development of a new criminal procedure system can only be realized with the development of democratic institutions in the country as a whole.

#### I. HISTORICAL ANTECEDENTS

Haiti had not written a new criminal code for substantive law or procedure since the Criminal Codes of 1835.<sup>7</sup> Various new crimes, such as crimes outlawing forced labor and anti-drug trafficking laws, have been inserted into the existing Codes since then,<sup>8</sup> but there has never been a comprehensive revision, which is particularly remarkable in a code-based legal system. It is estimated that fully 165 legal or administrative provisions

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7. CODE D'INSTRUCTION CRIMINELLE [C.I.C.] (Haiti), *translated in* GENDARMERIE TRANSLATION OF THE CODE PÉNAL AND THE CODE D'INSTRUCTION CRIMINELLE (1922).

8. Many supplemental laws to the criminal code were passed by executive order rather than passing through parliament. Aside from the highly irregular nature of these laws, many of them are unknown even to the legal community. Some of these additional laws were introduced by the "Décret du 7 avril 1982" which is an attempt to harmonize Haitian law with various international conventions and treaties that the Government of Haiti had signed or to change some legal definitions, e.g., the definition of rape. Décret du 7 avril 1982 harmonisant la Législation pénale en vigueur avec les Conventions Internationales signées et ratifiées par le Gouvernement Haïtien [Decree Harmonizing the Penal Code with International Conventions Signed and Ratified by the Haitian Government], in ORG. AM. STATES, *L'Entraide Judiciaire en Matière Pénale et d'Extradition* [Mutual Legal Assistance in Criminal Matters and Extradition], [http://www.oas.org/juridico/mla/fr/hti/fr\\_hti\\_penal.html#\\_Toc37077164](http://www.oas.org/juridico/mla/fr/hti/fr_hti_penal.html#_Toc37077164). See HANS JOERG ALBRECHT, LOUIS AUCOIN & VIVIENNE O'CONNOR, UNITED STATES INSTITUTE OF PEACE, BUILDING THE RULE OF LAW IN HAITI: NEW LAWS FOR A NEW ERA 2 (2009); see also Décret du 6 juillet 2005 modifiant le régime des Agressions Sexuelles et éliminant en la matière les Discriminations contre la Femme [Decree Modifying Rape and Eliminating Discrimination Against Women], in LE MONITEUR (Haiti), Aug. 11, 2005, at 1–6.

in the Codes are no longer relevant in the modern era.<sup>9</sup> New codes were passed, by contrast, in other legal disciplines such as the Labor Law in 1961, the Rural Code in 1962, and the Code of Civil Procedure in 1963.<sup>10</sup>

The Criminal Codes of 1835 were based entirely on the French system of law drafted in France between 1804 and 1812.<sup>11</sup> Known as the inquisitorial system, the French system features the key role of the investigating judge, the *juge d'instruction*, and lesser roles for the attorneys. The inquisitorial system has a long investigatory phase that is closed to the parties and the public. The *juge d'instruction* is charged with not only investigating, but also evaluating and judging the case. Oral trials were not conducted nor was there provision for any oral proceedings. The role of lawyers was normally confined to arguments at a proceeding that most resembles sentencing in the American system. Appeal is *de novo*. The victim is a full party, entitled to the same participation as the other two parties. The dossier used by the judge to investigate is commonly replete with second and third party statements rather than statements from persons with personal knowledge.<sup>12</sup>

Many European countries and virtually all of the countries of Latin America mimicked the French system and adopted what was commonly called the Napoleonic Code for their criminal justice systems. Over time, the structural weaknesses of the French system became more apparent, and critics decried the extended delays, the secrecy of proceedings, the lack of advocacy during the guilt-innocence phase, prolonged pretrial detention, lack of confrontation or cross-examination of witnesses, and lack of written decisions based upon a record. Added to that were the additional dysfunctions of impunity, police cor-

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9. INT'L CRISIS GROUP, KEEPING HAITI SAFE: JUSTICE REFORM 10 (2011) [hereinafter KEEPING HAITI SAFE].

10. See Marisol Florén-Romero, *Researching Haitian Law*, GLOBALEX (May/June 2008), <http://nyulawglobal.org/globalex/Haiti.htm>.

11. *Haiti*, FOREIGN LAW GUIDE: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD, <http://www.foreignlawguide.com/ip/flg/Haiti.htm> (last visited Mar. 1, 2013).

12. RICHARD VOGLER, CRIMINAL PROCEDURE IN FRANCE, *in* COMPARATIVE CRIMINAL PROCEDURE 14, 19–21 (noting that the dossier must contain “all available evidence”). For a more complete treatment of the traditional French inquisitorial system, see *id.* at 14–95.

ruption, and long post-trial sentences in depraved prison conditions, adding impetus to reform movements, first in Europe and then elsewhere.<sup>13</sup>

Though many countries considered modernizing or transitioning their criminal systems to the accusatorial model, a reform movement did not take hold in Latin America until the 1980s. In the following twenty years, over half of the nations of Latin America managed at least to pass new codes of criminal law and procedure, which reflected the accusatorial or “party” model of criminal justice.<sup>14</sup> Though there is only basic similarity in the codes adopted, the principal features of this system, familiar to American trial lawyers, are generally included in the codes of the transition states. Those features include oral and public trials, control by the parties of the evidence and witnesses presented, party control of the investigation, prosecutorial control of the police, prosecutorial discretion in charging and dismissing decisions, a judge or jury verdict, rules of evidence that exclude hearsay and prejudicial information, and the power of the parties to plea bargain.

Many of the law reforms were not complete transitions to the adversarial model, but rather to a hybrid system. Adapting the adversarial model to their local conditions, some states rejected key important American trial features such as the jury, plea bargaining, the reduced role of the victim at trial, and appeals restricted to questions of law.<sup>15</sup> However, many reformers had seen the elements of open and adversarial hearings, public trials, power in the prosecutor to bring and dismiss charges, party presentation of witnesses and evidence, and prosecutorial control of the investigating police as key components of the transition. Other key elements of the party system, plea bargaining

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13. MIREILLE DELMAS-MARTY & J. R. SPENCER, EUROPEAN CRIMINAL PROCEDURES 11–13, 18–27 (2002).

14. Maximo Langer, *supra* note 3, at 670; Leonard L. Cavise, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785, 785 n.1 (2007).

15. For a collection of research and reports by the Centro de Estudios de la Justicia de Las Americas (“CEJA”) on various Latin countries see CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS [JUSTICE STUDIES CENTER OF THE AMERICAS], <http://www.cejamericas.org/index.php/areas-de-trabajo/evaluacion-y-seguimiento-de-las-reformas-penales/reformas-a-la-justicia-penal> (last visited Apr. 27, 2013). For a treatment of Mexico’s new hybrid system, see William Hine-Ramsberger, *Drug Violence and Constitutional Revisions: Mexico’s 2008 Criminal Justice Reform and the Formation of the Rule of Law*, 37 BROOK. J. INT’L L. 291–317 (2011).

in particular, have been subjected to much closer scrutiny and remain part of the continuing dialogue.

Many of the reforms have not yet been realized because most countries are still in the implementation phase. Finding the resources to train police, prosecutors, defenders, judges, court personnel and prison administrators is, in many cases, an imponderable undertaking. Changing the culture of how cases are litigated or, more precisely, imposing a party superstructure on a civil law foundation requires extensive training. Additionally, maintaining the political will to continue with the transition will vary with the changing political atmospheres in each country. In Italy, for example, there have been at least three “restorations” of prior procedure by the *Corte di Cassazione*,<sup>16</sup> and at least one “counter-reaction” by a Parliament intent on institutionalizing the new reforms.<sup>17</sup>

## II. BACKGROUND OF THE HAITI PROJECT

In 1993, Jean-Bertrand Aristide, twice president of Haiti, wrote:

The need for a judicial system that will bring [human rights abusers] to justice is the major concern, the major desire, and the major issue for most Haitians. We need to see that justice is done and that those who have committed such heinous crimes – crimes against humanity – will be brought to justice.<sup>18</sup>

Aristide was speaking of a justice system that, aside from and beyond its treatment of crimes against humanity, was simply dysfunctional.<sup>19</sup> Arbitrary arrest and prolonged deten-

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16. Luca Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA 81, 91–93 (John Jackson et al. eds., 2008).

17. William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 431–32 (2004).

18. Jean-Bertrand Aristide, *The Role of the Judiciary in the Transition to Democracy*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 35, 36 (1993).

19. Haiti's criminal justice system and its continual violation of human rights have been documented in a number of reports. See, e.g., Alternative Chance, et al., *Criminal Justice*, in UNIVERSAL PERIODIC REVIEW, REPUBLIC OF HAITI: SUBMISSIONS TO THE UN HUMAN RIGHTS COUNCIL 26 (2011).



tion,<sup>20</sup> torture and summary execution, impunity in prosecutions, corruption,<sup>21</sup> secrecy, unending delay, lack of counsel, incompetent judges, total lack of confrontation, inhumane prison conditions<sup>22</sup>—all of these were but the first glimpse of the profound dysfunction that had become, over many years, the Haitian criminal justice system. Additionally, murder and torture by government-employed predators, the Duvaliers' army known as the *Tonton Macoutes*, were commonplace during the many years of the Duvalier dictatorships.<sup>23</sup> When, in 1991, there was a *coup d'état* overthrowing the very popular Presi-

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20. See generally Independent Expert on the Situation of Human Rights in Haiti, *Rep.*, U.N. Doc. A/HRC/20/35 (Apr. 23, 2012) (by Michel Forst). Prior to the 2010 earthquake, almost 80% of all inmates in Haiti were pretrial detainees. HUMAN RIGHTS WATCH, WORLD REPORT, COUNTRY SUMMARY: HAITI 2 (2011), available at [http://www.hrw.org/sites/default/files/related\\_material/haiti\\_1.pdf](http://www.hrw.org/sites/default/files/related_material/haiti_1.pdf). Despite a Constitutional provision that arrestees can be held only for forty-eight hours before seeing a judge, most inmates had never seen a judge. In reality, defendants in 2010 spent an average of 408 days in pretrial detention. *Id.* at 5.

21. Corruption in the judiciary contributes mightily to prolonged pretrial detention, involving prosecutors, defense attorneys and judges, all of whom extort money. GOV'T OF THE REPUBLIC OF HAITI, ACTION PLAN FOR NATIONAL RECOVERY AND DEVELOPMENT OF HAITI: IMMEDIATE KEY INITIATIVES FOR THE FUTURE 45 (2010), available at <http://www.interaction.org/sites/default/files/Haiti%20Action%20Plan%20%28English%20version%29.pdf> [hereinafter HAITI, ACTION PLAN].

22. It should be noted that, after the January 2010 earthquake, all of the 5400 prisoners in the Civil Penitentiary, the largest penitentiary in Port-au-Prince, escaped. Eight months later, only 629 had been recaptured. HUMAN RIGHTS WATCH, WORLD REPORT 2011: HAITI (2011), available at [http://www.hrw.org/sites/default/files/related\\_material/haiti\\_1.pdf](http://www.hrw.org/sites/default/files/related_material/haiti_1.pdf). At least one commentator has called the conditions in Haitian prisons “the worst in the world.” Kate Heartfield, *Hell is a Haitian Prison*, OTTAWA CITIZEN (Can.), June 4, 2009, available at <http://www2.canada.com/components/print.aspx?id=e3a6275b-b474-4a32-8149-129177f4571c&sponsor=>. The U.N. Rule of Law Indicators Project noted that “all of Haiti’s prisons were overcrowded prior to the earthquake. According to the report prior to the earthquake: ‘[T]he least crowded prison, in Les Coteaux, is at 230% of official capacity and the most crowded facility (Hinche) holds more than ten times the number it was designed to hold.’” Christopher Stone, *A New Era for Justice Sector Reform in Haiti* 10 (Harvard Kennedy Sch. Faculty Research Working Paper Series, RWP10-033, 2010), available at <http://dash.harvard.edu/handle/1/4448872>.

23. Francois “Papa Doc” Duvalier and his son, Jean-Claude “Baby Doc” Duvalier ruled the country continuously from 1957 to 1986. See generally Sophia Asare, *“This Land Cannot Die”: U.S. Involvement in the Rebuilding Haiti*, 33 HOUS. J. INT’L L. 177, 183–86 (2010).

dent Aristide, leading to a three-year reign of terror, the situation reached a new low:

The law has been used to reify and reinforce the domination of a small elite over the great mass of poor peasants and workers, and has almost never functioned to punish even in the case of the worst massacres. Even when dictatorial leaders have been overthrown, they have usually been allowed to leave the country to join their bank accounts. As a result, the Haitian poor justifiably have little faith in the Haitian state in general and the legal system in particular.<sup>24</sup>

As Haiti struggles now from dictatorship toward a distant form of representative democracy, the threat of a return to authoritarian rule is always present, particularly in the face of starvation and an ineffective government. As Haiti's drama unfolds, the question remains whether the judiciary and the criminal justice system can play a role in regaining the path to development and responsive government. Foreign experts regularly ask whether there can ever be rule of law in a country that has so little tradition of democracy and has not internalized the importance of the rule of law and the legitimacy of a reformed criminal justice system.<sup>25</sup> There is no easy response.

The overwhelming problems in Haiti's justice sector have not escaped international notice. In 2006, the World Bank identified long delays in the criminal justice system caused by "communication failures between the investigative 'judicial' police and prosecutors on evidence-gathering and the preparation of cases, inadequate tracking and management of case files by court clerks, and deficient enforcement of judicial orders for prisoner transfers and release."<sup>26</sup> The treatment plan, however, concluded that reforms cannot be solely focused on "technical capacity building, training, and infrastructure, but instead must be integrated into a broader process of state building and

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24. Reed Brody, *International Aspects of Current Efforts at Judicial Reform: Undermining Justice in Haiti*, in *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* 227, 228 (1999).

25. See Irwin P. Stotzky, *The Indispensable State*, 58 U. MIAMI L. REV. 201, 210 (2003).

26. CARIBBEAN COUNTRY MANAGEMENT UNIT, WORLD BANK, *SOCIAL RESILIENCE AND STATE FRAGILITY IN HAITI: A COUNTRY SOCIAL ANALYSIS* 55 (2006).

democratic consolidation. . . . The creation of a national constituency in favor of reform is essential to furthering change in the police and justice system.”<sup>27</sup> This conclusion came after a lengthy description of failed reform efforts from international donors<sup>28</sup> and the “paralysis of disorganization” and dysfunction of the Ministry of Justice.<sup>29</sup> Most Haitians have felt excluded from even having the right to petition the courts,<sup>30</sup> unlike the high privilege accorded to violent gang leaders<sup>31</sup> who not only had access to the courts but also to the defense lawyers. Members of the bar available to the indigent are few and far between.<sup>32</sup>

In 2005, the Inter-American Commission on Human Rights (“IACHR”) reported that Haiti’s longstanding problems would not change without “urgent reforms to strengthen the administration of justice and the rule of law in Haiti.”<sup>33</sup> The IACHR’s analysis of the court system found that many of the laws were outdated, that there was a lack of effective access to legal assistance, and that the police failed to execute judicial orders. These failures resulted in 85% to 90% of all criminally-accused being held in pretrial detention for long periods of time, pervasive and prolonged pretrial delay, and widespread impunity for state actors.<sup>34</sup> Conclusions like these are commonplace. The IACHR singled out a number of cases, highlighting in particular the removal, on December 9, 2005, of five judges of Haiti’s Supreme Court by the then-interim President Boniface Alexandre, who replaced them with five judges of his own choosing apparently without constitutional authority.<sup>35</sup> The IACHR investigators discovered further dysfunction in the legal system

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27. *Id.* at 58.

28. *Id.* at 53. Both Haitians and international human rights groups have criticized some of the efforts of the U.S. Agency for International Development (“USAID”) and its contracting agencies for projects drawn with little or no input from local actors or for failure to attend Haitian-led programs. Brody, *supra* note 24, at 234.

29. CARIBBEAN COUNTRY MANAGEMENT UNIT, *supra* note 26, at 54.

30. *Id.* at 54.

31. *Id.* at 57.

32. *Id.* at 54. A notable exception is the Institute for Democracy in Haiti, which has staff lawyers available to the indigent.

33. Org. of Am. States, Inter-Am. Comm’n on Human Rights, *Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community*, at v, OEA/Ser/L/V/II.123 (October 26, 2005) [hereinafter *Haiti: Failed Justice?*].

34. *Id.* at vi.

35. *Id.* at 15–16.

when they found that, in 2004, an appallingly low total of only six trials were scheduled in the entire country. Of the six, one was not heard because the file was not sufficiently prepared; another was not heard because the defendant had escaped from prison. The court heard three trials in absentia because the defendants had escaped, and one trial resulted in acquittal for the co-defendants due to lack of evidence. In that case, the defendants were former leaders of the paramilitary group Front for the Advancement and Progress of Haiti (“FRAPH”), who were widely known as the Duvaliers’ “death squad” torturers and executioners.<sup>36</sup> The IACHR ultimately concluded, based upon general agreement both internationally and in Haiti specifically, that there should be a comprehensive redesign and reform of the country’s criminal laws.<sup>37</sup>

In November 2007, the Haitian Government itself issued a “Growth and Poverty Reduction” Strategy Paper designed to articulate a vision to “lift Haiti out of poverty and destitution.”<sup>38</sup> In Chapter 7, the government outlined the weaknesses in the justice system, such as “executive branch interference in the exercise of judicial authority,” corruption, impunity, organized crime, the public’s inability to understand or trust the legal system, long delays, practically nonexistent maintenance of criminal records, “arbitrary and abusive” preventive detention, appalling prison conditions, and the overall lack of training or adequate salaries.<sup>39</sup> The document was dedicated to the establishment of an “equitable legal order, a functional judicial system, and a general climate of security . . .” wherein justice would be “accessible,” “credible,” “independent,” and “efficient.”<sup>40</sup>

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36. *Id.* at 71–72.

37. *Id.* at 73.

38. MINISTÈRE DE LA PLANIFICATION ET DE LA COOPÉRATION EXTERNE [MPCE], DOCUMENT DE STRATÉGIE NATIONALE POUR LA CROISSANCE ET LA RÉDUCTION DE LA PAUVRETÉ [DSNCRP] (2008–2010): POUR RÉUSSIR LE SAUT QUALITATIF [GROWTH AND POVERTY REDUCTION STRATEGY PAPER] 14–16 (2007) (Haiti). The paper was actually first issued in July 2006 for the International Conference on Economic and Social Development, which was held in Haiti. Though the document comprehensively reviewed the poverty and underdevelopment in Haiti, only its justice sector reforms are discussed here.

39. *Haiti: Failed Justice?*, *supra* note 33, at 77.

40. *Id.* at 77–79.

A principal target of the justice sector reform, as set forth in the Strategy Paper, was the modernization of legislation through the adoption of specific and targeted changes in the Penal Code and the Criminal Procedures Code.<sup>41</sup> This mandate posed the question of whether the present system should be reformed or whether it should be discarded in favor of a complete transition to the accusatorial model. States in transition commonly deal with this question, as each country seeks to minimize the trauma to the established legal order. Several international non-governmental organizations have attempted small reforms in Haiti. “Judicial strengthening” is a typical reform that sends many of the legal players to a variety of training seminars but seldom results in any basic changes.<sup>42</sup> This is not to say that many judges, prosecutors, and police have not benefited from the training exercises. However, very few of the training sessions have convinced the majority of people that anything has changed or that the legal system is any more conscious of due process or human rights than it ever was. It was therefore determined that a group of changes embracing both the accusatorial and inquisitorial systems should be attempted.

### III. THE HAITI LAW REFORM PROJECT

In 2009, René Magloire, chair of the Commissions to reform the Criminal Law and Procedure Codes, invited the author to serve as Senior Advisor to the Commissions to aid in the drafting, codification, and implementation processes. As a French speaker experienced in preparing lawyers and judges for the transition from the inquisitorial to the accusatorial model,<sup>43</sup> the author traveled to Haiti in May 2009. The two Commissions were comprised of the principal players in the reform process, including the dean of the largest law school, the vice-president of the highest court (“*Cour de cassation*”), the Minister of Justice, and the head of the Justice Section of MINUSTAH,<sup>44</sup> the much-criticized U.N. peacekeeping force in Haiti.

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41. *Id.* at 80.

42. Stotzky, *The Indispensable State*, *supra* note 25, at 242.

43. For a full exposition see Cavise, *supra* note 14, at 787–93.

44. *Facts and Figures*, UNITED NATIONS STABILISATION MISSION IN HAITI [MINUSTAH], [www.un.org/en/peacekeeping/missions/minustah/facts.shtml](http://www.un.org/en/peacekeeping/missions/minustah/facts.shtml). For a recitation of some of the more common criticisms of MINUSTAH, see HEALTHROOTS STUDENT ORG., HARVARD SCH. OF PUB. HEALTH, MINUSTAH: KEEPING THE PEACE, OR CONSPIRING AGAINST IT?: A REVIEW OF THE HUMAN RIGHTS RECORD OF THE UNITED NATIONS STABILIZATION MISSION IN HAITI 1 (Oct. 2011), *available at*

The establishment of two separate Commissions, for the substantive criminal law and another for the criminal procedure law, may have been unnecessary. The procedural transformation is a more complex and controversial undertaking, although the substantive criminal Code does require some modernization and integration. However, the Haitian criminal Code has adapted somewhat to the modern era by codifying new crimes.<sup>45</sup> Procedural transition, on the other hand, would have a more dramatic societal impact. The Commissions, composed of lawyers, criminologists, and sociologists, were particularly well-situated to avoid the political turf questions that have plagued other transitions from the inquisitorial to the accusatorial system. No member of either Commission held political or governmental office. Nonetheless, the power of the Commissions was unquestioned due to the presidential mandate and Magloire's status not only as a former and very well known Minister of Justice, but also as a close advisor to President Préval.

Magloire intended to plan for an international workshop on Haiti's transition in Port-au-Prince in June 2009, a month after the author's initial visit. The workshop would unveil the reform project and act as an initial exposition of the accusatorial model of criminal law. Magloire had planned for several prominent protagonists, whether Haitian or foreign lawyers, to demonstrate the advantages of the party model. The Commissions

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<http://www.tanbou.com/2011/fall/MINUSTAHWhitePaper.pdf>. More recently, MINUSTAH and the U.N. have been blamed by some for the introduction of cholera into Haiti which, to date, has resulted in the deaths of over 7000 Haitians. Nepalese soldiers working for the U.N. peacekeepers were allegedly contaminated upon their arrival in Haiti and, thereafter, there were inadequate sanitation facilities in their encampment. Jane Chong & Muneer I. Ahmad, *YaleOpEd: Haiti, Cholera and the U.N.*, MIAMI HERALD (Apr. 30, 2012), available at <http://www.ijdh.org/yale-oped-haiti-cholera-and-the-u-n-by-miami-herald/#.UWBFHJOG2So>. Lawyers for the Institute for Justice and Democracy in Haiti have filed petitions with the U.N. organizations seeking damages. See Matthew Mosk & Rym Momtaz, *Report: UN Peacekeepers Caused Cholera Epidemic in Haiti*, ABC NEWS (Nov. 8, 2011) available at <http://abcnews.go.com/Blotter/report-caused-cholera-haiti/story?id=14904474#.UWBnoZOG2Sr>.

45. ALBRECHT, AUCOIN & O'CONNOR, *supra* note 8, at 2–4. Another problem, however, is that many unmodified portions of the criminal law are unclear or completely outdated.

hoped to convince the attendees that joining the reform movement, already underway in many Latin American countries, would serve Haiti best. The Commissions also hoped that the June conference would unite all the interested national and international parties around addressing several key questions: (1) the jurisprudential underpinnings of the Code reforms, (2) the substance of various actual Code provisions, (3) the process of reform of the Codes, and (4) the implementation issues to expect.

Planning also focused on anticipated obstacles to reform, including jurists who may be hesitant to adopt the accusatorial model or who may prefer small-scale modifications to “Grand Reform.” This has never been an easy question to resolve. The United States, which is the principal employer of the party model, has a number of very strong cultural differences with all of the countries transitioning, and a widely-displayed number of criminal procedure structures that have, in practice, collapsed into virtual dysfunction. The American plea bargaining system, always viewed with suspicion internationally as akin to a business negotiation, is all the more unattractive when it is learned that fully 95% of all federal criminal dispositions are by guilty plea,<sup>46</sup> that people are allowed to plead guilty even though they maintain their innocence,<sup>47</sup> and that defendants can be threatened with increased charges if they refuse to plead guilty.<sup>48</sup> Internationally, including in Haiti, the pervasiveness and perceived unfairness of the guilty plea in the American system is seen as a systemic expedient rather than a proper resolution of a criminal case based upon guilt or innocence.

One important cultural difference is the jury. Most Latin countries have rejected the jury as the arbiter of the facts for a variety of reasons.<sup>49</sup> The lack of a jury tradition is probably the principal reason for hesitation but an underlying bias is the

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46. *Frye v. Missouri*, 132 S.Ct. 1399, 1407–08 (2012).

47. *North Carolina v. Alford*, 400 U.S. 25, 29–30 (1970).

48. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

49. There are exceptions. Argentina, for example, tries most felony cases before a mixed panel composed of judges and laypersons. LUCIANO A. HAZAN Y ALAN IUD, CEJA, INFORME DE EVALUACIÓN DEL PROCESO DE FORTALECIMIENTO DEL SISTEMA ACUSATORIO EN LA PROVINCIA DE BUENOS AIRES – PLAN DE FLAGRANCIA [ASSESSMENT REPORT OF THE STRENGTHENING PROCESS OF THE ADVERSARIAL SYSTEM IN THE PROVINCE OF BUENOS AIRES – PLAN FRAGRANCY] (2008); see also Edmundo Hendler, *Lay Participation in Argentina: Old History, Recent Experience*, 15 Sw. J. INT'L L. 1, 13–14 (2008–2009).

often-encountered feeling that the citizen of Latin countries or Haiti are simply unprepared to assume the responsibilities of being a juror: to impartially receive, understand, and review the evidence and to pronounce a verdict, even if that verdict is against the prosecutor and the police who represent the government. The history of repression in many of these countries has been so strong that the average citizen will still hesitate to contradict the wishes of the representatives of the government.

On a more philosophical plane, there is resistance to the confrontational and, as perceived, overly adversarial nature of the accusatorial common-law system. A basic trust in the truth-seeking ability of the single judge survives even in countries where abuses abound.<sup>50</sup> When the advocates prepare the trial, compiling proof (a more quantitative goal) is seen as more important than the evaluation of that proof (the qualitative goal). Freiberg points out that, too often in the adversarial system, cases are presented to courts as “disputes” and trials are regarded as contests of opposing interests—confrontational and antagonistic. The emphasis is not on finding the truth but rather on destroying the other side’s version.<sup>51</sup> Defense attorneys instruct their clients to “deny everything” and make the prosecution prove its case rather than to accept responsibility where appropriate and perhaps even show contrition. This domination of the system by a sense of adversarialism has led several countries to seek out alternative dispute resolution models that encompass some degree of compromise, mediation, and acceptance of responsibility. This is particularly true in countries where the state apparatus has very high legitimacy and trustworthiness, such as in the Nordic countries.<sup>52</sup>

For reasons such as this, a number of European and Latin countries have opted for what they call a “mixed” or “hybrid” system, which normally lies somewhere between the inquisitorial and the accusatorial models.<sup>53</sup> It is virtually impossible and

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50. Arie Freiberg, *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms*, 8 EUR. J. OF CRIMINOLOGY 82, 83–84 (2011).

51. *Id.* at 84.

52. *Id.* at 85.

53. For a cataloging of differences and similarities see DELMAS-MARTY & SPENCER, *supra* note 13, at 27–32.



indeed ill-advised to consider whether to adopt the “pure” or the “mixed” as a matter of principal. These reforms should be discussed one by one and, in most circumstances, results will be considered “hybrid” even if the country adopts the key constructs of the accusatorial model. Once a country decides to retire the judge of instruction as the investigator, caller of witnesses, evaluator of the evidence, and final judge, it has already prepared the way for the party model. Once the criminal case has been turned over to the parties for an oral and open hearing with live witnesses and cross-examination, the essence of the party system has been adopted. Transferring power from the judge to the prosecutor is an impactful reform, given that the prosecutor will control the investigating police, the charging decision, the investigation itself, and the state’s presentation of evidence. In the absence of a functioning criminal defense bar, particularly for the overwhelming numbers of indigent defendants, the balance of power between the parties will be tilted dramatically towards the prosecution, at least until public defender offices can be funded, and the attorneys trained. This transference of power from the judge to the prosecutor is obvious to the Haitian criminal lawyers and, as will be seen, results in serious doubts for some about the entire transition.

The author’s task, at this early stage, was to outline the principal points for discussion in both the plenary session and the small working groups at the June conference, focusing on the practical differences—such as the role of the prosecutor—in order to draw out the philosophical differences. The field from which to propose questions, both practical and philosophical, is very rich. The accusatorial system differs dramatically from the inquisitorial system in well over twenty respects. Even if one is convinced that a transition should occur in the key ways previously mentioned, such as turning over the proceedings to counsel, conducting open and oral hearings, developing a strong defense, and changing the judge’s role to that of an arbiter mainly of questions of law, it does not necessarily follow that each of the other ancillary changes often discussed should be adopted in all cases. Experiences in other countries have shown which parts of the transition would be the most difficult to accept, certainly at this early stage. Nonetheless, foreigners placed in the role of experts in the design and implementation of justice projects such as this one should proceed cautiously to avoid being impatient, judgmental, or over-bearing. Allegiance to the accusatorial system, particularly common among Ameri-

cans, can lead to biases and assumptions that are unhelpful in this context. All too often, small groups of foreign experts have developed codes in consultation with a discreet number of government officials, but virtually no consultation with the remainder of the bar or other parts of civil society.<sup>54</sup> Fortunately, Magloire was also very sensitive to that problem. After much discussion, it was determined that the working groups at the first conference should concentrate on the following issues:

- 1) Whether to maintain the *juge d'instruction* or to adopt President Sarkozy's formulation of the *juge de l'instruction*, which, despite seeming to be almost exactly the same appellation, provides for a judiciary more akin to that of the party system, a referee between the parties as they present evidence;
- 2) Whether to give the prosecutor control of the judicial police;
- 3) Whether to implement the concept of *l'égalité d'armes*, which contemplates a considerable expansion of the role of the defense counsel to bring the defense into an equal position with the prosecution, at least at trial, and;
- 4) How to set and enforce time limits in regards to the rights to a speedy trial, and to be free from unnecessary preventive detention.<sup>55</sup>

If time permitted, the working groups would also consider the role of the victim,<sup>56</sup> training and jurisdiction of justices of the peace, oral presentation of evidence in general,<sup>57</sup> and plea bargaining.<sup>58</sup> This list of topics did not touch upon many smaller

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54. Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 45 (2001).

55. Conference notes on file with author.

56. In most traditional European systems, the victim is a full party to the proceeding, with rights to call witnesses, argue, contest legal rulings, and appeal. *See infra* text accompanying notes 78–80.

57. One of the major hesitations about oral witness examination is the suggestiveness and aggressiveness of cross-examination. *See Cavise, supra* note 14, at 804–05.

58. Transition countries have developed a variety of ways of adopting some form of plea bargaining without opting into the purely American model. The widely held perception is that, in the United States, some defendants will plead guilty without actually being guilty because of the pressure brought to

sub-issues, including the principle of *opportunité*,<sup>59</sup> various burdens of proof, whether the invocation of the right to silence can give rise to negative inferences, and reform of law school curricula and teaching methods. Again, the field from which to draw is infinite.

Most of the roadblocks to a wholesale reformation of the criminal justice system encountered at the conference were entirely foreseeable. Primarily, and always a concern in Haiti, the problem of financing the transition. How can Haitians persuade foreign donors to finance the law reform project when Haiti has so many other “survival” issues to face? That question remains unanswered today. How, and in which jurisdiction, to conduct training is another major concern.<sup>60</sup> This question brings into play the predictable turf issues, which also remain largely undecided. How can the reformers educate the public to boost popular confidence in the justice system? How can this project be coordinated with prison reform and judicial administration initiatives? The questions are numerous, but one formidable but unspoken obstacle was the resistance of the French and the Francophiles to the transition.

#### IV. THE HISTORY OF FRANCO-HAITIAN RELATIONS

A very short look at historical Franco-Haitian relations may be useful. The French have, of course, the longest history in Haiti. French rule began in 1660 after the Spanish decided to concentrate on what has become the Dominican Republic. The Spanish formally ceded the western half of the island to the French in 1697.<sup>61</sup> By the 1780s, the French colony of Saint

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bear by the prosecutors. *See, e.g.*, *North Carolina v. Alford*, 400 U.S. 25, 29–30 (1970). The Italians, for example, have adopted the “summary trial” which, in most respects, resembles a plea bargain. *See Marafioti, supra* note 16, at 90.

59. *Opportunité* refers to the right of the prosecutor to dismiss a criminal charge without prior consultation with the presiding judge.

60. In the wake of the earthquake, non-governmental organizations (“NGOs”) have been very reluctant to turn over dedicated funds to Haitian government without assurances of when and how the funds will be spent. *See* Jake Johnston, Op-Ed., *Humanitarian Aid in Haiti: Supply and Demand*, CARIBBEAN J. (Dec. 23, 2011, 6:00 AM), <http://www.caribjournal.com/2011/12/23/op-ed-jake-johnston-on-humanitarian-aid-in-haiti-supply-and-demand/>.

61. Jalisco Lancer, *The Conflict Between Haiti and the Dominican Republic*, ALL EMPIRES, [http://www.allempires.com/article/index.php?q=conflict\\_haiti\\_dominican](http://www.allempires.com/article/index.php?q=conflict_haiti_dominican) (last visited May 12, 2013).

Domingue, from which Haiti emerged, had become a major producer of coffee and sugar.<sup>62</sup> The French imported 790,000 slaves, far more than any other country in the Americas, including the United States, to do the labor. The French also killed their slaves at the highest rates through generally inhumane treatment.<sup>63</sup> The revolt of the slaves began in 1791 and culminated in a full-scale invasion by the armies of Napoleon in 1802. The French suffered enormous losses, and the former slaves made a final declaration of independence in 1804.<sup>64</sup> The French immediately imposed a trade embargo, which was not lifted until France recognized the independent republic in 1825 in exchange for a ransom payment of 150 million gold Francs.<sup>65</sup>

In 1915, Haiti was occupied by U.S. marines sent to protect U.S. and French interests. The military occupation lasted until 1934 and, thereafter, the United States and France together supported a considerable number of ruling juntas<sup>66</sup> and dictatorships in Haiti.<sup>67</sup> In 1986, France granted asylum to Haitian dictator Jean-Claude “Baby Doc” Duvalier. With the election of Jean-Bertrand Aristide in 1994, and his reelection in 2000, the people of Haiti indeed had found a popular hero in whom they were convinced democratic ideals resided. Aristide, however, was not at all trusted by foreign interests.<sup>68</sup> The United States and France installed World Bank official Gerard Latortue as prime minister after a 2004 military coup that overthrew Aristide.<sup>69</sup> A continuing issue, reiterated by Aristide in 2003, is Haiti’s demand for \$21 billion as restitution for the ransom

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62. Irwin Stotzky, *The Truth about Haiti*, 26 CONN. J. INT’L. L. 1, 17–18 (2010).

63. *Id.* at 18.

64. *Id.* at 17, 25.

65. *Id.* at 18.

66. The term “junta” usually refers to a form of non-democratic governance of a country. Whether it be a military or civilian junta, it usually means governance by a small committee, often leading to dictatorship.

67. Stotzky, *The Truth about Haiti*, *supra* note 62, at 23–24.

68. *See id.* at 26–27.

69. *Aristide Denies Ties to Violence in Haiti and Calls for Dialogue*, N.Y. TIMES (Oct. 21, 2004), <http://www.nytimes.com/2004/10/21/international/americas/21haiti.html?ref=gerardlatortue>.

paid to the French for independence.<sup>70</sup> It is plain, however, that, at some point in the latter part of the last century, the United States took the lead in managing Haiti's relations with the rest of the world. Nonetheless, Haitians continue to see France as a main culprit in the destruction of Haitian democracy. Additionally, France contributes far less foreign aid to Haiti than Canada, the United States, and the Nordic countries, despite its historical legacy, commonality of language, and institutional development, including the legal system.<sup>71</sup>

Despite the lack of the kind of post-colonial foreign aid that is typical of the "mother country," France maintains a strong presence in Haiti and continues to play a role in the nation's affairs. In that context, it is not surprising the French would have strong opinions about the idea of Haiti transforming its criminal justice system away from the French inquisitorial model toward the American model. Beyond a certain national chauvinism in defense of the French-founded civil code system, many French critics think of the transition and its logistical burden as too costly for such a poor and undeveloped country. They also see the reforms as too difficult to implement for the Haitian people, most of whom are unschooled and illiterate. Indeed, it is undeniable that the maintenance of one *juge d'instruction* is certainly less expensive than the party model. However, those financial savings come at the cost of many fundamental rights that Haitians are entitled to enjoy just as much as any other people. This particular manifestation of "Haitian exceptionalism" must also play a role in the French perspective that any criminal procedure reforms should proceed slowly, even though so many of the Latin countries that have begun the transition are, themselves, very poor and underdeveloped. Finally, it should not go unnoticed that French critics may be particularly forthright when the question is seen as whether to adopt yet another American way of doing things.

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70. See Interview by Radio Solidarity with Joseph Philippe Antonio, Haitian Minister of Foreign Affairs, in Port-au-Prince, Haiti (Apr. 10, 2003), available at <http://www.haitiaction.net/News/Rest3.html>.

71. See *Haiti Earthquake Aid Pledged by Country*, GUARDIAN (Jan. 14, 2011), <http://www.guardian.co.uk/news/datablog/2010/jan/14/haiti-quake-aid-pledges-country-donations#data>; Patricia A. Reid, *The Haitian Revolution, Black Petitioners and Refugee Widows in Maryland, 1796-1820*, 50 AM. J. LEGAL HIST. 431, 438 n.25 (2010) ("The entire Haitian legal system is that of France of the early 19th century.").

## V. THE FIRST LAW REFORM CONFERENCE: A CLASH OF VIEWS

In June 2009, the conferences and workshops<sup>72</sup> on the modernization of the Codes took place in Port-au-Prince. Besides the leading members of the Haitian bar and Haitian academics, a number of French representatives (including an appellate judge from Toulouse and a Supreme Court Justice from Senegal), there were several independent foreign experts in attendance. One of the “godfathers” of transition movements in Latin America, the Argentine Alberto Binder,<sup>73</sup> made valuable contributions, along with a number of jurists from the Dominican Republic whose experience is seen by many as a model for Haitian legal development. Several American government funding agency officials were also present. The foreign presence also included representatives from the U.N. Mission in Haiti (“MINUSTAH”), the United States Agency for International Development (“USAID”), the International Legal Assistance Consortium, the U.S. Institute of Peace, and the Organization of American States.

The purpose of this first conference was to expose the principal Haitian actors to the importance of this transition and to the experiences of other countries in Latin America that had attempted to implement the accusatorial system. As anticipated, discussion over the two days centered on several key questions.<sup>74</sup>

The first major discussion topic had to be, of necessity, the question of the suppression or maintenance of the *juge d'instruction*. Even those seeking to maintain the status quo were, for the most part, willing to admit that adjustments had to be made. For example, the accused should be given a lawyer

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72. L'Atelier sur la Modernisation du Code Pénal et du Code d'Instruction Criminelle [Workshop on the Modernization of the Penal and Criminal Procedure Codes], June 9–10, 2009, Port-au-Prince, Haiti (agenda and materials on file with author); see ALBRECHT, AUCOIN & O'CONNOR, *supra* note 8 at 1, 5.

73. Dr. Alberto Binder, Professor in Procedural Rights and the University of Buenos Aires, is also the Director of the Public Policy Center for Socialism (“CEPPAS”), Director of the Latin American Institute for Security and Democracy (“ILSED”), and Co-Director of the review “Judicial Systems,” published by the CEJA.

74. Commentary about this conference is drawn largely from the only formal minutes taken (“Rapport de synthèse”) as well as some of the author’s notes and impressions.

who has access to the file and the right to contradict and cross-examine; the police should be subjected to examination or interrogatories by the judge during the investigation phase. A separate judge should be charged with making the preventive detention or bail decision; the *juge d'instruction* must be more respectful of individual liberties and the problem of pretrial delay. There is also the possibility of creating a panel of three persons to oversee complex cases such as those of organized crime. Defendants should be granted the right to appeal from the results of the judge's investigation. Those favoring the elimination of the present *juge d'instruction*, fell into two camps: those who would follow the standard transition course and transfer the judge's investigating power to the prosecutor, and those who would create a restyled *juge d'instruction* with much more defined powers, including preservation of the judge's supervision of the investigation.

It is impossible to discuss reforming the role of the trial judge without discussing strengthening the role of the prosecutor under the new Code. The reaction of the Haitian bar to this transfer of power from the former investigating judge to the public prosecutor has been typically circumspect. Those who tend to trust prosecutors are in agreement with the proposed changes. Those who prefer the watchful eye of a supposedly impartial investigating judge resist the transfer. Particularly when it is understood that the prosecutor would also control the investigating police, and basically displace the trial judge from any investigatory or supervisory role, the dramatic nature of this transformation becomes even more pronounced.

In a country such as Haiti, where neither prosecutors nor judges are well paid and both are subject to corrupting influences, there is no reason to assume that the processes employed by the prosecutor will be any more transparent than those of the traditionally secretive *juge d'instruction*. It should be of some consolation, however, that, optimistically, there would be a functioning defense bar, which could operate as a check on the power of the prosecutor. When a prosecutor violates a provision of the Code or when, for example, a prosecutor forces the police to conduct a one-sided investigation, the benefit of the adversarial system is that the defense counsel could then bring a motion before the sitting trial judge seeking relief. If, as is usually provided, the defense has access to discovery while the case is progressing towards trial, it may come to the defense counsel's attention that the prosecutor is engaging in misconduct, allowing the defense to pursue appropriate relief

before the judge. This check on the prosecutor's power can only be realized when there is a functioning criminal defense bar in Haiti. The training of criminal defense lawyers, along with retraining of all the principal players in the criminal justice system, should be a main focus of the infrastructure reform.

Some of the resistance to this aspect of the reform exists simply because the public prosecutor is today under the control of the executive branch and arguably subject to additional political influences. The fear expressed was that a subservient prosecutor's office would become a jurisdiction unto itself with the power to both prosecute and judge. On the other hand, the new Code provides that the office of the prosecutor shall be independent and that there is a clear separation of powers between the executive and the judiciary. These provisions, if complemented by the necessary increase in material and human resources, are seen as a possible path to a stand-alone prosecutor's office. Some safeguarding suggestions included a precise hierarchy in the office of the public prosecutor with clear lines of authority, creation of a civil remedy for those victimized by prosecutorial abuse, judicial supervision over malfeasance in the office, and, of course, strengthening the defense function as part of the equal power or "*égalité d'armes*." Even those who are the most supportive of the *juge d'instruction* had to agree with the absolute necessity of prescribing time limitations for the various stages of the process to avoid the same interminable delays in the prosecutor's office as have traditionally been seen with the *juge d'instruction*.

Discussion over whether or not the prosecution should have the power to dismiss unilaterally (the principle of *opportunité*) a charge is generally controversial, particularly in countries like Haiti, where corruption is a severe problem. In some transition countries, such as Italy, the judge must approve a dismissal whereas in France, for example, the prosecutor has the sole power to do so.<sup>75</sup> Once again, the view is that unbridled power vested in the prosecutor can lead to corruption or influence peddling. Several provisions of the present criminal

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75. Freiberg, *supra* note 50, at 84.



Code<sup>76</sup> and several decisions of the *Cour de cassation* have not given the prosecutor that right.<sup>77</sup> Nonetheless, the right to dismiss generally was supported since it would result in a reduction in the number of docket cases and the number of persons being held without trial. The decision to dismiss a previously filed case must, however, be on the record, with notification to the victim. A discussion was also had about a third path between prosecution and dismissal—alternative dispute resolution.

Another important question was the role of the victim in the criminal process, as the right of participation of the victim (“*partie civile*”) is another transitional sticking point. In inquisitorial systems, the victim is ordinarily much more included as a full third party to the criminal process.<sup>78</sup> The victim, with or without counsel (provided the victim qualifies for free court-appointed counsel), presently has the right to appeal a judgment, to present argument, and to fully share in the, albeit limited, role enjoyed by the parties in the inquisitorial system.<sup>79</sup> In the Haitian draft code, the victim, defined as a person who has “personally and directly suffered damage” as a result of the crime, even has the right to contest before the trial judge a prosecutor’s decision to deny him or her designation as *partie civile*. In the accusatorial model, the victim loses that third party role. The prosecutor, at least in the American model, is charged with protecting the participation of the victim. This ordinarily means that the victim, who is often the complaining witness, can be a witness at a preliminary hearing, motion, or trial if called by the prosecutor and can testify, with restrictions, during sentencing.<sup>80</sup> Beyond that, the American system, at least, allows the victim to proceed civilly for money damages or other appropriate relief, but in a separate cause of action.

The prospect of a drastically reduced role for the victim in the adversarial system was not well received in Haiti, just as it has

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76. See CODE D’INSTRUCTION CRIMINELLE [C.I.C.] arts. 37, 42, 51 (Haiti), translated in GENDARMERIE TRANSLATION OF THE CODE PÉNAL AND THE CODE D’INSTRUCTION CRIMINELLE 8–12 (1922).

77. In French civil parlance, the right to dismiss is referred to as *système d’opportunité*.

78. See Freiberg, *supra* note 50, at 92–93.

79. See Carlos Rios Espinoza, *Redesigning Mexico’s Criminal Procedure: The States’ Turning Point*, 15 SW. J. L. & TRADE AM. 53, 70 (2008).

80. Reference here is made to the victim impact statements approved by the U.S. Supreme Court in *Payne v. Tennessee*, 501 U.S. 808, 824–30 (1991).

not been well received in other transition states, particularly those where victims seldom actually bring civil suits and look to the criminal trial for damages.<sup>81</sup> Even when presented with, if nothing else, the logistical difficulties of three-party trials, including three opening statements, three closing arguments, three direct examinations, three cross-examinations, and three sets of exhibits and motions, it was never seriously doubted that the new Code would continue to recognize the victim's rights as in the old Code. Those rights, as the draft law is presently written, would also include the presentation, by the victim, of third-party witnesses such as experts. The rights of the victim would also include, in the new Code, perhaps the most obstructing provision of all: the victim's right to contest a prosecutor's decision to drop a case.<sup>82</sup> The importance of allowing a prosecutor to drop criminal charges that should not be in the system or cannot be proven is difficult to overestimate when considering the enormous backlog of cases. Should victims be allowed to contest that decision through court proceedings that can do nothing but frustrate the intent to relieve the congested dockets, Haiti will continue to face the possibility of protracted proceedings in potentially every case.

Analyzing the reluctance to transition to a more common-law version of the role of the victim is not difficult when one understands the importance, in Haiti, of public acceptance of this entire transition. To tell victims that they would have a much more limited role would undoubtedly provoke a feeling of not having been heard or not having had a day in court, and could therefore diminish the public confidence essential to the success of the system even before implementation.

There seemed to be consensus that a *partie civile* could only be a physical person and could not be a business or corporation, *personne morale*. There also seemed to be a consensus that the role of the victim should remain unchanged from that presently existing under Haitian law, meaning that the victim can assert his or her rights at all phases of the criminal process, including the right, as discussed, to petition the judiciary when the pro-

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81. See, e.g., CODICE DI PROCEDURA PENALE [C.P.P.] arts. 74, 75 (It.). Under these provisions, civil actions are joined to the criminal proceeding. *Id.*

82. See discussion of the prosecutor's right of *opportunit  supra* notes 59, 75–77 and accompanying text.

ecutor refuses to prosecute. Some advocated that "associations" could also be treated as *parties civiles*. Finally, to help alleviate the concern that victims would be shut out of the process, there was also support for the idea that victims of unsolved crimes should receive indemnification from a public fund.<sup>83</sup>

The question of preventive detention self-divided into two sub-issues: *la garde a vue*, referring generally to the period of time officials can detain a suspect for purposes of investigation without presentment to a judge,<sup>84</sup> and the more internationally standardized concept of preventive or pretrial detention. *La garde a vue* not only had its supporters at the Haitian conference, but a number of jurists felt that the traditional limit of forty-eight hours of detention was unrealistically short given the problems of communication, distance, and transportation. In serious cases, an indefinite *garde a vue* under judicial supervision was proposed. Others, perhaps in the majority, felt that the forty-eight-hour limitation was a constitutional guarantee of individual rights and liberties that must not be touched. As to preventive detention, referring to all detention prior to judgment, the conference reinforced the idea that liberty is the rule, that detention should be the exception, and that any judicial decision to hold a suspect would have to not only conform to the speedy trial provisions of the Code, but must also be the subject of a decision on the record by the judicial officer. Any prolonged detention would have to be justified on the record, with a right to appeal the detention, and to be released when the limits were surpassed. The conference also reconfirmed the availability of the writ of habeas corpus to contest detention.<sup>85</sup>

Another important question was the nature of proceedings in minor criminal cases or "contraventions." In Haiti, justices of the peace, most of whom are not lawyers, typically preside over these proceedings. They also serve a double function ("*double casquette*") as judicial police, meaning that they investigate the cases over which they will later preside. In the inquisitorial system, that is the classic dynamic. In the party system, however, the *double casquette* is a source of confusion and dysfunction.

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83. Conference notes and materials on file with author.

84. For a discussion of Mireille Delmas-Marty's comments before the French Senate on the *garde vue*, see *Audition de Mme. Mireille Delmas-Marty, Professeur À L'Université de Paris I, Responsable de la Commission "Justice Pénale et Droits de l'Homme" en 1988-1990*, BIENVENUE AU SÉNAT, available at <http://www.senat.fr/rap/199-283/199-28325.html>.

85. Conference notes and materials on file with author.

tion in the procedural chain. Most participants wished to end the double function and return investigation to the judicial police. A minority felt that a police investigation conducted by a justice of the peace normally inspired more confidence in the results.

A more controversial issue was who should be the fact-finder at trial. Even though the present Haitian Constitution calls for jury trials in certain cases,<sup>86</sup> there was, in the drafting process, very little support for the adoption of criminal jury trials. The objections were typical in that the participating Haitian lawyers did not feel that their fellow citizens were “qualified” to apply the law to the facts of a case. This has generally been the reaction in most transitioning Latin American countries.<sup>87</sup> The idea that a decision by a jury could be seen as more legitimate because it comes from the people themselves does not yet have traction in Haiti. Several alternative proposals were made. Some reformers were content to stay with one judge, while others preferred a panel of three persons including at least one judge. Not only were very few participants in favor of the American model of the six or twelve-person jury, but few were willing to support even the maintenance of the present Haitian Constitutional provision.<sup>88</sup> If there was a consensus point, it would have been around the three-person panel, as proposed and reserved for felony-type cases, while the single judge would oversee minor crimes. Some felt that panels of judges are simply unrealistic, given the lack of resources and the high costs of training. Almost all participants agreed, however, on the idea of judge specializations (“*chambres spécialisées*”) where judges

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86. Article 50 of the 1987 Constitution of the Republic of Haiti calls for jury trials in “*crimes de sang*” or “blood felonies.” CONST. of 1987 art. 50 (Haiti). Commentators say, however, that there have been no jury trials for several years. INT’L CRISIS GROUP, HAITI: JUSTICE REFORM AND THE SECURITY CRISIS 3 (2007) [hereinafter SECURITY CRISIS].

87. See Cavise, *supra* note 14, at 803–04. For an example of one of the few codes that has introduced a jury system, see CÓDIGO DE PROCEDIMIENTO PENAL [C.P.P.] art. X (Bol.) (enacted on March 25, 1999, as Law No. 1970). On the other hand, Brazil has had a jury system since 1822. In that country, a group of seven jurors is selected from a group of twenty-one as the “Jury Council.” Edmundo Hendler, *Lay Participation in Argentina: Old History, Recent Experience*, 15 SW. J. L. & TRADE AM. 1, 4–5 (2008).

88. CONST. of 1987 art. 50 (Haiti).

with particular training would preside over certain types of cases.

Internationally, in those criminal court systems where there is no jury, the rules of evidence and discovery are not highly developed. Theoretically, the judge does not need to be protected from the introduction of prejudicial evidence such as improper character evidence or hearsay. Often, particular code provisions are adopted to reflect evidentiary concerns, rather than embarking on the more complex process of elaborating rules of evidence or discovery. Some participants at the Haitian conference were in favor of the adoption of a code of evidence to control the admissibility or nonadmissibility of physical or material proof, the accessibility of all proof to both sides, and the availability of experts and technical or scientific proof. Others felt that particular Code provisions would be sufficient. The question was left unresolved.

Another key procedural mechanism of the accusatorial system that has received a mixed reaction in Haiti is plea bargaining. In the inquisitorial system, guilty pleas ordinarily are not admitted since the investigating judge decides guilt or innocence. However, most civil systems have found a way to accommodate some degree of plea negotiation to adapt to rising crime rates and limited judicial resources.<sup>89</sup> The hesitation is due to the philosophical difficulties inquisitorial countries have had with the idea that justice would depend on a negotiation, sometimes regardless of actual guilt or innocence.<sup>90</sup> The Haitian reaction to plea bargaining proposals was typical of civil law countries. Lawyers are very hesitant both to see culpability as an object of deal-making and to give prosecutors and defense lawyers, independent of the judge, the authority to arrive at a negotiated disposition. To include a provision that the judge must approve the plea bargain is often of little consolation. What most transitioning countries fail to appreciate is that plea bargaining can relieve much of the stress on the criminal justice system and that a large percentage of cases can be disposed of through equitable and reasonable negotiation. Unfortunately, Haitians have seen the results of the plea bargaining system in the United States where fully 97% of all criminal cases in the federal system and 94% of all state cases are disposed of by guilty pleas,<sup>91</sup> rendering most of the previously

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89. See, e.g., Marafioti, *supra* note 16, at 90.

90. KEEPING HAITI SAFE, *supra* note 9, at 11.

91. Frye v. Missouri, 132 S.Ct. 1399, 1407 (2012).

cherished trial rights largely illusory. They have also come to understand that the desperately overcrowded American criminal system has led to Supreme Court sanctioning of what could be considered distortions of plea bargaining, such as *North Carolina v. Alford*<sup>92</sup> or *Bordenkircher v. Hayes*.<sup>93</sup> It is one thing to encourage a country to adopt plea bargaining *grosso modo*, but to include the notion that one can plead guilty without actually being guilty,<sup>94</sup> or that a prosecutor can threaten to and actually increase the charges on a defendant who refuses to plead guilty,<sup>95</sup> would be to delegitimize the process as consistent with basic human rights norms.

Rather than sublimate human rights protections within other provisions of the new Code, it was determined that a human rights preamble should introduce it, partially to codify but also to make the statement that human rights is at the forefront of this reform. At the conclusion of the conference, the author was asked to draft the human rights preamble to the new criminal procedure Code. That work was undertaken immediately in full anticipation of another conference in a few months at which the discussion could be continued.

On January 12, 2010, the earthquake struck Haiti, centering on a point just outside Port-au-Prince, the seat of government and home to all central government institutions. As many as 300,000 people were killed, and even more were injured; 208,000 residences were destroyed, along with 1300 educational institutions, and more than fifty hospitals and health centers.<sup>96</sup> The National Palace, the Ministry of Justice, and the Supreme Court buildings were destroyed. Since the earthquake, institutions throughout Haiti have been in a state of disarray if not total dysfunction. As the United Nations Development Programme noted:

The earthquake destroyed almost all the Government's infrastructures (buildings, archives, technical and IT systems) and

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92. *North Carolina v. Alford*, 400 U.S. 25, 29–30 (1970).

93. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

94. *Alford*, 400 U.S. at 39.

95. *Bordenkircher*, 434 U.S. at 364.

96. HAITI, ACTION PLAN, *supra* note 21, at 6–7.

severely affected its capacity to deliver the basic public and administrative services . . . .<sup>97</sup>

Violence erupted almost everywhere. Looting, even grave-robbing, massive prison escapes,<sup>98</sup> and a complete absence of local authority throughout the affected region of the country worsened the situation.<sup>99</sup> Women have suffered particularly in the aftermath in that sexual abuse, always prevalent in Haitian society,<sup>100</sup> became an epidemic in the tent cities.<sup>101</sup> Key personnel in the criminal justice system, including various key officials in the Ministry of Justice and various members of the *Cour de cassation*, did not survive. There was also widespread loss of judicial files with the destruction of judicial buildings.<sup>102</sup> The capacity of the very diminished government to carry out large justice reforms seemed most implausible, especially in the face of widespread starvation, homelessness, and violence.

With Port-au-Prince in chaos, without essential infrastructure such as electricity and clean water, and with food in short supply, it was fully expected that the law reform project would be put on hold indefinitely—at least until the basic needs of the population had been fulfilled. That was a mistaken assumption. In the days after the earthquake, President René Préval summoned his surviving ministers to his base at the airport and the rule of law was again declared a priority for the gov-

97. United Nations Development Programme [UNDP], *Governance: Democratic Process and Public Administration Reform* (March 2010), available at [http://204.200.211.71/\\_assets/fichier/publication/CN\\_5\\_Governance.pdf](http://204.200.211.71/_assets/fichier/publication/CN_5_Governance.pdf).

98. By one estimate, some 4000 inmates escaped, most of whom had never been tried or convicted but were awaiting trial in a system that does not provide for bail. Ashby Jones, *On Rebuilding the Haitian Criminal-Justice System: Where to Start?*, WALL ST. J. L. BLOG (Jan. 19, 2010, 11:33 AM), <http://blogs.wsj.com/law/2010/01/19/on-rebuilding-the-haitian-criminal-justice-system-where-to-start/> (quoting Gerald Shargel, *Haiti's Lawless Streets*, DAILY BEAST (Jan. 17, 2010 5:35 PM), <http://www.thedailybeast.com/articles/2010/01/17/haitis-lawless-streets.html>).

99. *Id.*

100. Benedetta Faedi, *The Double Weakness of Girls: Discrimination and Sexual Violence in Haiti*, 44 STAN. J. INT'L L. 147, 165 (2008).

101. The situation remains, at this writing, out of control, even in the face of the adoption, in July 2005, of a statute requiring that laws against rape be enforced. James D. Wilets & Camilo Espinosa, *Rule of Law in Haiti Before and After the 2010 Earthquake*, 6 INTERCULTURAL HUM. RTS. L. REV. 181, 201 (2011); Faedi, *supra* note 100, at 181–82 (discussing the *Décret Modifiant le Régime des Agressions Sexuelles et Éliminant en la Matière les Discriminations Contre la Femme*).

102. See also HAITI, ACTION PLAN, *supra* note 21, at 7.

ernment.<sup>103</sup> The Minister of Justice contacted all Haitian courts, prosecutors, and police to request an assessment of damage and fatalities, along with an inventory of urgent needs. He also reactivated the Ministry of Justice in a series of warehouses near the destroyed Ministry.<sup>104</sup> Amidst this chaos, barely three weeks after the earthquake, the third draft of the procedural Code began circulating and, within two months, another conference was called.<sup>105</sup>

#### VI. THE HUMAN RIGHTS PREAMBLE

The best hope for democracy in Haiti ultimately lies in respect for the human rights and autonomy of each individual. Most agree that there is parity between respect for individual human rights and the creation of a democracy.<sup>106</sup> One cannot overstate the role that the legal system can play in the development of human rights and therefore in the transition to democracy. This is particularly true in a country like Haiti that has suffered dictatorship, occupation, and privation for so long and has so little tradition of democracy.<sup>107</sup> Nonetheless, the people of Haiti hunger for their human rights and have often risen in protest against an autocracy designed to oppress them.

It is not enough to pass new codes. That kind of formal recognition of rights has yet to yield practical results in Haiti. The supremacy of law remains unrecognized. The equality of persons before the law is still only an aspiration. The accountability of government officials is nonexistent. The accessibility of law is not a reality for most people. Efficiency, predictability, and transparency are unknown.<sup>108</sup> A national discussion must be held among all those whose lives are affected by the criminal justice system. This discussion cannot be held while Haitians

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103. VIVIANNE O'CONNOR, U.S. INST. OF PEACE [USIP], PEACE BRIEF 18: THE RULE OF LAW IN HAITI AFTER THE EARTHQUAKE 3 (2010).

104. *Id.*

105. The reform of the Code of Criminal Procedure is, at this writing, in its eighth draft form, the most recent having been issued in June 2012.

106. Stotzky, *The Truth about Haiti*, *supra* note 62, at 27.

107. "Governance lies at the root of Haiti's multiple crises. Decades of dictatorship and military coups with only short democratic interludes have hindered the emergence of a coherent and nationally owned governance system." See UNDP, *supra* note 97.

108. See generally, Wilets & Espinosa, *supra* note 101, at 199–208.



are still living in tents at displacement camps. The discussion must be had hand-in-hand with recovery.

It would be supremely progressive if Haiti were to develop a social consensus around universally recognized principles that guarantee the rights of the individual, including the right to participate in the democracy, to choose between competing interests, and to have an equal voice in the popular debate.<sup>109</sup> The human rights aspect of a new criminal law and procedure is likely to be the part most noticed by a distrusting populace that was never exposed to a working legal system. Developing a social consensus might spark a new moral consciousness born of respect for the government and its laws, and of increased intolerance for corruption, bias, and impunity.<sup>110</sup>

At this point, the recognition of "the autonomous individual as a paradigm for democracy"<sup>111</sup> by the public is practically impossible, given the institutional dysfunction, the disorganization of political parties, and the lack of resources for public education. In anticipation of the country's development of democratic institutions and the consolidation of the structural integrity of the nation, the legal system must be ready. It must assure the Haitian people that there can be justice in the country, that judges and legal officials do not have to be corrupt, and, most importantly, that any arrested person can look forward to more than languishing in a local jail without charges, without a lawyer, and without any defense. The legal system must afford the individual defendant the opportunity to contest the charges and to put the system to the test.<sup>112</sup>

An important step in the process of the consolidation of the rule of law is the drafting of the fundamental human rights guarantees ("*Principes Fondamentaux*" or "Fundamental Principles"). Haiti must adopt these and apply them to every criminal defendant. In the United States, most individual rights are

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109. See Stotzky, *The Indispensable State*, *supra* note 25, at 217.

110. See Stotzky, *The Truth about Haiti*, *supra* note 62, at 9 (discussing how law influences moral consciousness in countries like Haiti).

111. *Id.* at 11.

112. Haiti is a state party to the key international treaties pertaining to human rights and the administration of justice, including the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights (providing for equality before the law, the right to personal liberty, the right to a fair trial, the right to a hearing within a reasonable time, and the due process of law). See HAITI: FAILED JUSTICE?, *supra* note 33, at 22–26, 55–57.

encapsulated in the Bill of Rights and elaborated upon through case law. In Haiti, as today's framers contemplated the drafting of a new criminal procedure Code, it was determined that the code should be preceded by a formal declaration of those rights drawn from international guarantees, the preamble of the criminal procedure Code of the Dominican Republic, and from a sense of the Haitian needs.

The human rights principles are intentionally brief to allow for the Code itself to be the more complete elaboration. However, the preamble is significant in that it adopts basic human rights principles hitherto unspecified in Haitian law. The most important Fundamental Principles, beginning with Article 110 of the eighth draft of the Code of Criminal Procedure are:<sup>113</sup>

1. All persons are equal before the law and in court, and are subject to the same rules. The law must prohibit all discrimination, notably that of race, color, sex, language, religion, sexual preference, political opinion, national or social origin, or socio-economic resources.

2. The legality principle, which provides that no crime shall be charged unless, at the moment of commission, Haitian or international law to which Haiti is a signatory makes the act criminal, is codified. Where there is sufficient evidence that a crime has been committed, the prosecutor normally is required by law to prosecute.<sup>114</sup> Punishment shall not be imposed, if it is not authorized in the applicable law at the time of commission. Laws shall be made retroactive only when they operate in favor of the accused.

3. There is a presumption of innocence in the code's preamble. Haitians have the right to be silent without any inference of culpability, the right to be free from testifying against oneself, the right to have the prosecution bear the burden of proof, the prohibition of press coverage that presumes the guilt of the accused, the right to be free from deprivation of pretrial liberty except in exceptional cases, and the right to judicial review. In addition, to deal with the complicated issues of the *garde à*

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113. Conference notes and materials on file with author.

114. This is the version of the legality principle as adopted in countries such as Germany, Austria, Italy, Spain, and Portugal. Freiberg, *supra* note 50, at 84.

*vue*,<sup>115</sup> the Preamble also provides that Defendants shall be brought before a judge within forty-eight hours to determine pretrial release.

4. The state must prove its case beyond a reasonable doubt (“*au-dela de toute doute raisonnable*.”).

5. All suspected or prosecuted persons have the right to be informed of the charges against them, the right to be assisted by a lawyer and, if necessary, an interpreter, and the right to be present at trial. The right to counsel includes counsel during police interrogations, the preliminary phase, and all phases of trial. For those who cannot afford counsel, one will be appointed free of charge.

6. The function of investigation and judicial review shall be separate.

7. The trial shall be held within a reasonable period of time.

8. All evidence admitted before the court and entered into the record must have been obtained legally or must be rejected by the tribunal.

9. Depositions and the trial until the pronouncement of judgment shall be conducted orally.

10. Cross-examination is at the center of the criminal process. This means that the accused has the right to be physically present at the trial and all other parts of the trial procedure, the right to dispute the evidence or indications of culpability, and the right to enter exculpatory evidence.

11. There is a guaranteed right to appeal a conviction. This requires a written decision from the trial court as to both facts and law.

12. Double jeopardy is prohibited, including a ban against a second prosecution even where the first prosecution was dropped or dismissed, unless new elements have been discovered.

13. Foreign judgments will be recognized in accordance with international treaties and conventions. The decision of an international court recognized by Haiti could provoke a reopening of a previously disposed-of case.

14. The right to an independent and impartial tribunal is guaranteed.

15. There is also an explicit right to a fair and public trial.

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115. See *supra* note 84 and accompanying materials.

VII. KEY FEATURES OF THE NEW CRIMINAL PROCEDURE CODE THAT DIFFER FROM THE ACCUSATORIAL SYSTEM

Beyond the preamble, the Code as drafted includes a large number of other provisions characteristic of the accusatorial system. The most basic guarantees for the defendant, such as the right to defense counsel, the right to independently call witnesses, and the right to produce evidence, are all improvements on the old system that was so reliant on the investigating judge. Those new rights are reflected throughout the Code.

The Haitian decision to include a role for the victims remains a major variance with classical accusatorial procedure. Aside from granting the victim full party status, the Code also specifies that victims will be treated with compassion, dignity, and respect, and that their interests will be taken into account at all stages, especially when the victim is a minor, a senior citizen, physically or mentally handicapped, or a victim of sexual violence or other violations against women. The victim has a right to demand that an investigation be opened, and the right to present evidence. The government must consider those demands. The victim shall also be notified of the progress of the case. Additionally, the trial tribunal can order that the victim be given access to the case file and the evidence, and ensure that the victim's right to counsel and to present experts is not infringed.

Another unorthodox set of provisions concerns the method of questioning witnesses. Counsel may ask questions and even make brief observations or commentary during the questioning of the defendant. First, the prosecution calls its witnesses, followed by the defense and the victim, and, if necessary, the judge. Both the prosecution and the defense have the right to respond, implying that what is called a rebuttal case in the United States is afforded not only to the prosecution but also to the defense—not normally the case in the United States.<sup>116</sup> All witnesses may be cross-examined and the judge may question witnesses if she wishes. Cross-examinations must be relevant either to the case or to the credibility of the witness. Witnesses

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116. In the United States, the prosecution normally has the right to present a rebuttal case after the defense case. In the discretion of the judge, the defense may call witnesses after the prosecution's rebuttal but that is reserved to the extraordinary discretion of the trial judge.

are first examined by direct examination, followed by cross-examination, followed by redirect, as necessary.

Conditions of pretrial release remain somewhat different. The new Code retains the old inquisitorial procedure of holding a recently arrested defendant in *garde à vue* for people where there is a "reasonable motive."<sup>117</sup> Those motives include the prevention of flight or destruction of evidence. The *garde à vue* is for twenty-four hours, but the chief prosecutor may authorize a twenty-four-hour extension. If the detainee has an attorney, that *Mission de l'Administration Penitentiaire* attorney must be notified of the detention and may communicate in confidentiality with the detainee. There is also a specific right to have a family member notified of the detention. Aside from the obvious difference that there is no *garde à vue* in the American system, there is also the fact that, for almost all crimes in the United States, a bond amount will be set which entitles the defendant to pretrial release upon posting. The Haitian system, much like other transition states, does not adopt the bail-setting procedures. After the *garde à vue* period has passed, the criminal defendant is either released or detained until trial, depending on a variety of factors including flight risk, danger to the community, and the seriousness of the charged offense.

There is no provision for plea bargaining in the new Code. There are provisions concerning the right to plead guilty and the power of the judge to consider guilty pleas when passing a sentence, but there are no provisions granting the prosecutor the right to reduce or dismiss charges pursuant to guilty plea or the right to make an agreement with defense counsel as to sentencing, subject to the judge's approval. The success of the new Code and the reformed system will depend largely on the acceptability of plea bargaining as a way of dislodging the overcrowded courts in Haiti.

#### VIII. KEY FEATURES OF THE NEW CRIMINAL PROCEDURE CODE THAT RESEMBLE THE ACCUSATORIAL SYSTEM

Turning to those provisions that more evenly track the classical accusatorial procedure, a large number of provisions govern how the case is to be handled in the pretrial stage. Access to the case dossier is a key aspect of the reform in that the international concept of the *égalité d'armes* is meaningless if the files are unavailable to the defense. Under the proposed Code,

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117. See *supra* note 84 and accompanying materials.

access is permitted whenever the court is open. Within five days, the chief prosecutor can ask the court to deny access in cases of possible pressure or intimidation of witnesses or victims. The decision to deny access is itself appealable.

As to investigation, any of the parties, including the victim, can demand that the prosecutor conduct an interrogation, investigate a certain place, or make any other inquiry that is necessary to the investigation. The parties may also request certain tests by experts. In case of refusal, the parties may approach the judge of the preliminary or investigative stage. As to investigative techniques, the Code has very specific provisions on the interception of communications, including telecommunications, surveillance, personal mail, financial transactions, and the like.

The problem of cases lying dormant for many months or even several years was addressed. In cases where no investigation has been conducted for four months, the defendant can demand that the prosecution close the investigation. If the chief prosecutor does not move to close the investigation within one month, the defendant can petition the judge.

The defendant must be immediately advised of his right to remain and that he has a right to a court-appointed lawyer if lacking sufficient funds to hire his own. These *Miranda*-type warnings must be given before any interrogation.<sup>118</sup> In addition, all persons interrogated must be advised of the right to an interpreter. If the person requests counsel, no further questions may be asked until the attorney arrives or until two hours have passed at which time the questioning may begin again. As to the questioning of other witnesses, the code declares that measures for the protection of witnesses must be taken where justified, including provisions for anonymous witnesses.

Rights guaranteed under what would be the Fourth and Fifth Constitutional Amendments in the United States are code-based in Haiti. The key provisions are that evidence seized without a warrant is inadmissible. Warrants must be based on "reasonable motives." The proposed code is very specific about the content of any warrant and the exceptions. For example,

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118. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

immediate danger to a person in the place of search will excuse the necessity for a warrant. There is also a provision that law enforcement must avoid unnecessary modes of intrusion such as the "knock first" rule and restrictions on execution of warrants between 6 p.m. and 6 a.m. Also based upon "reasonable motives," there are specified limitations on the search of a person or an automobile without a warrant.

Expert witnesses may be requested by the parties or the investigating judge. The procedures for the request are outlined in the Code. The provisions are very detailed, right down to the oath that the witness must take. The Code even specifies the medicolegal extent of autopsies. DNA examinations must be done pursuant to warrant.

In all criminal matters, the accused is first declared to be under "judicial control." The preliminary judge ("*juge de l'enquête et des libertés*") may impose a restriction from a long list of possible restraints upon the accused. All of those restrictions can be reviewed or modified upon demand, with special provisions for modification of pretrial conditions after the case has passed from the investigation to the trial stage, meaning after a finding of probable guilt has been made. The investigative judge may order pretrial detention in "exceptional" cases, where the accused is subject to at least three years of imprisonment upon conviction, or where the accused has violated the conditions of pretrial release. These decisions are subject to appeal. The detention cannot exceed "a reasonable duration," which is defined as either four or six months depending on the seriousness of the crime, with the usual provisions for an extension if in conformity with a lengthy set of criteria.<sup>119</sup>

No witness is required to incriminate himself. Statements of witnesses made before trial are available to refresh a witness' recollection, but may not be put to substantive use. In a section called "Rules of Evidence," relevance is required and there are prohibitions against cumulative evidence, evidence unlawfully seized or coerced, privileged information, evidence of prior sexual behavior, uncounseled confessions, and "proof which damages the integrity or equity of the proceedings or the rights of the accused."

The court for minor offenses ("*tribunal correctionnel*") will be composed of one judge. Cases will be placed on the docket pursuant to citation or *garde à vue*. Civil parties can use the criminal proceeding to sue for damages. A decision as to guilt or in-

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119. Conference notes and materials on file with author.

nocence will also include an amount for damages. More serious offenses will be tried in *tribunaux criminels* presided over by a judge or jury, as previously described. Verdicts are by majority vote. The least serious offenses (“*contraventions*”) will be tried by justices of the peace. The judge of the investigatory phase cannot participate in the trial (*incompatibilité*). All trials and preliminary hearings are to be public and in the presence of the defendant. Audio or visual recording, in the judge’s discretion, is required unless there are “precise” written minutes.

Appellate rights are also set forth, providing not only an appeal of right but also that the appeal will be de novo and not simply restricted to a review of questions of law.<sup>120</sup> The Code also makes provisions for writs of habeas corpus specifying when a prisoner must be released from custody, for extradition of defendants to other countries under international agreements, and for the special treatment of juveniles.

#### IX. INFRASTRUCTURE REFORM IN HAITI

It is obvious that any reform to the Criminal Law and Procedure Codes must be accompanied by training and increased capabilities by all justice actors. In the judiciary, the Superior Judiciary Council awaits a filling of eight vacancies,<sup>121</sup> the Judicial Inspection Unit (“JIU”) and the Academy for the Training of Judges (“*École de la Magistrature*”) must be reorganized and strengthened.<sup>122</sup> The *Cour de cassation* has a number of vacancies.<sup>123</sup> All need both human and financial resources.<sup>124</sup> As to the attorneys who will now take lead roles in the conduct of criminal cases, training in the new system, resources for adequate salaries and facilities, and coordination with the police and court personnel will be fundamental. This is particularly true if the guarantee of adequate defense counsel is to have any meaning. Since Haiti has no tradition of public defense, a public defender’s office composed of trained and adequately funded

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120. See *supra* Part V.

121. KEEPING HAITI SAFE, *supra* note 9, at 1.

122. *Id.*

123. *Id.*

124. Trial judge salaries are estimated at between \$400 and \$500 per month. SECURITY CRISIS, *supra* note 86, at 3–4. Poorly compensated judges is a prime reason for corruption. See Salas, *supra* note 54, at 26–27.



personnel will be essential. Until now, the bar associations have been expected to provide pro bono counsel in criminal cases, however, in many areas of the country, there are no bar associations whatsoever. Where they do exist, support has been woefully inadequate.<sup>125</sup>

To acculturate the practicing bar to the new way of trying cases, there needs to be massive reeducation, starting in the law schools. Projects envisaging advocacy training in the law school curriculum should be encouraged. The bar associations, both in Port-au-Prince and in the principal political subdivisions, called *départements*, should also develop a variety of training programs to train its present members. Classes and tutorials in oral procedure, investigative techniques, direct and cross-examination, and legal argument would be necessary. Internationals can be of particular assistance in this aspect of training.

This is not to overlook the essential element that the office of the public prosecutor, through the Ministry of Justice or independently, must retool to oversee any reform process to assure its integrity.<sup>126</sup> Key to the effective functioning of the party system is the independence of the prosecutor. As an organ of the executive, there could always be attempts at interference with prosecutorial authority in ways that would not even be attempted with the judiciary. Prosecutors will also have to be trained in investigative techniques and supervision of the investigating police. With little experience in actual investigation, one can anticipate a continuing over-reliance on defendant confessions. At some point, however, prosecutors will have to learn how to conduct on-the-scene forensic investigations independently and how to supervise the police, who will also need training.

As much hesitation as there is in Haiti about such a major transfer of power from the judge to the prosecutor, there is,

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125. SECURITY CRISIS, *supra* note 86, at 5. At various times, there have been other programs designed to address the absence of defense counsel, including a U.S. Administration of Justice program in the last decade under which law students were trained to provide defense representation. The program failed for lack of supervision. *Id.* at 9–10. The International Legal Assistance Consortium (“ILAC”) has, over the years, begun pilot programs in various areas of the country to provide counsel or judicial assistance. Some of those programs still exist. *See, e.g., Important ILAC Break-through in Haiti*, INT’L LEGAL ASSISTANCE CONSORTIUM (Jan. 18, 2011), <http://www.ilac.se/2011/01/18/important-ilac-break-through-in-haiti/>.

126. KEEPING HAITI SAFE, *supra* note 9, at 11.

nonetheless, a consensus view the new code represents a major improvement in the human rights guarantees of the defendant.<sup>127</sup> Much of the success of the new Code will depend on the good will and talent of prosecutors who now must bring and possibly dismiss charges; honor all the constitutional and human rights provisions regarding search and seizure, preventive detention, and speedy trial; and supervise the investigating police in the collection and preservation of evidence. One can expect resistance from several quarters, including from the Haitian judicial police.<sup>128</sup> Haitian judicial authorities have traditionally operated largely as independent units—judge, prosecutor, and police—and not as components of a single system.<sup>129</sup>

Justices of the peace in Haiti are the local judges who sit in judgment of all offenses that are not serious felonies.<sup>130</sup> The justices are normally not trained legal professionals. This results not only in a lack of uniformity but also in violations of fundamental human rights by justices who are insensitive to, or unschooled in, basic guarantees. This creates a particularly dangerous human rights situation since justices of the peace handle fully 80% of all cases outside Port-au-Prince.<sup>131</sup> To make matters worse, Haitian judicial authorities do not require that justices of the peace separate the judicial function from their other common role as judicial police (the *double casquette*).<sup>132</sup> There have been training programs for justices of the peace in the past—most of them unsuccessful attempts at creating a culture change in administration of local justice. This time, the training needs to be part of and simultaneous with a nationwide effort at broad reform so that the justices know that this is not just one more foreign attempt to change how they have always done things.<sup>133</sup>

Since investigation of crime should eventually fall to the police (under prosecutorial supervision), whether it be the judicial

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127. See KEEPING HAITI SAFE, *supra* note 9, at 10, and discussion *supra* Part VIII.

128. KEEPING HAITI SAFE, *supra* note 9, at 11.

129. *Id.*

130. *Id.* at 12.

131. SECURITY CRISIS, *supra* note 86, at 2.

132. *Id.*

133. *Id.* at 6–7.

police or other duly constituted enforcement agency, it goes without saying that training, equipment, and salary increases are absolutely necessary. For example, forensic evidence is virtually unknown in Haiti for lack of training and resources. Beyond that, if the prosecutors are to oversee investigation, working with the police and carrying cases through trial, there must be guarantees of independence and freedom from retaliation, professional or otherwise. One suggestion is that an Office of the Attorney General be created to oversee prosecutorial careers and their functioning within the trial and appellate system.<sup>134</sup>

Case management systems are noticeably absent as well. There is no uniform system for registering or filing cases or case records. There is no coordination between court administrators and the prison system. There is a lack of communication between the local centers and Port-au-Prince. Police have no way to know of a suspect's criminal record. Prison authorities have no way to learn of court dates.<sup>135</sup> For that matter, there is a lack of basic office supplies. Again, international assistance would be crucial, as it has been in many Latin countries, to establish a uniform records maintenance and communication system. In Haiti, however, there has traditionally been a reluctance to fund infrastructure because of concerns about sustainability.<sup>136</sup>

Since much of this reform process centers on the political will to spend the resources necessary to give the criminal justice system a new foundation, it is noteworthy that the new President, Michel Martelly, has announced that he intends to respect the separation of powers between the executive and the judiciary and that, despite indications to the contrary, he believes the reforms to the justice sector should continue.<sup>137</sup> In January 2012, President Martelly reconstituted the reform commissions, naming some new members, maintaining René

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134. KEEPING HAITI SAFE, *supra* note 9, at 11.

135. SECURITY CRISIS, *supra* note 86, at 2–3.

136. There is a long history in Haiti of funding projects that do not result in any permanent changes but rather function only as long as the funding term. *Id.* at 4.

137. See *id.* at 13–16; Steven Monroe, *Haiti Monthly Wrap Up—July 2012*, EMERGING FRONTIERS BLOG (July 31, 2012), <http://emergingfrontiersblog.com/2012/07/31/haiti-monthly-wrap-up-july-2012/>.

Magloire as vice-president, and continuing the mandate for two years.<sup>138</sup>

There is some degree of importance to the rapidity with which the reforms are instituted. This is a period of wholesale transformation in Haiti: in commerce, agriculture, government, labor, and housing. A complete reform of the criminal law and procedure system should be integrated into this era of change in the country. External funding is probably more available now and in the short-term than it will be in the long-term. Finding that the executive and the parliament are attuned to and capable of making major changes should be more attractive to funders than the piecemeal reforms that do little to address the kind of impunity that has endemically marked the system.<sup>139</sup>

#### X. DEVELOPING THE SOCIAL CONSENSUS

All parties in Haiti understand that the legal recognition of human and procedural rights does not at all guarantee their enforcement in practice.<sup>140</sup> Several transition efforts in other countries of Latin America have at least temporarily halted because of the failure to recognize that any codification must be accompanied not only by structural reform, as discussed, but also be a wide-ranging campaign of public education and discussion.<sup>141</sup> That discussion must be carried to the local level, which is where most people encounter the criminal justice system. At that level, there must be a series of town hall-type sessions, seminars, school programs, and even debates in civil society to not only understand the new Codes, but to recognize a new morality implicit in the Codes. In this aspect of the reform, as with the infrastructural reforms, the international community plays a key role but a role that must be directed by the Haitian actors at every stage.<sup>142</sup>

The Haitian people are accustomed to seeing flowery and enlightened prose in new laws emanating from Port-au-Prince.

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138. Valéry Daudier, *Pour la réforme de la justice*, LE NOUVELLISTE (Jan. 16, 2012), <http://www.lenouvelliste.com/article4.php?newsid=101658> (Haiti).

139. KEEPING HAITI SAFE, *supra* note 9, at 11.

140. Stotzky, *The Truth about Haiti*, *supra* note 62, at 8.

141. Salas, *supra* note 54, at 44–45.

142. Stotzky, *The Truth about Haiti*, *supra* note 62, at 34.

What they are not accustomed to seeing is any attempt to ask their opinion about the changes and what those revisions mean for rebuilding the society according to a more humane and value-based model. Those discussions may raise the hopes and consciousness of the people enough to defeat endemic cynicism and give the reforms a chance to work. “[S]uch a consciousness, if fully rooted, constitutes the most permanent and efficacious barrier against the enemies of human dignity.”<sup>143</sup>

The discussion of moral principles that govern us as citizens is an exciting one and should be even more exciting in a country like Haiti, which is only now seeing the importance of the dialogue. The debate in connection with this project entails not only parsing out the provisions, particularly the human rights guarantees, but also delving into the social constructs that inform the Codes. The concepts of “due process of law” can be placed in juxtaposition to the deprivations wreaked by the state’s coercive methods, which have, for years, dominated the political agenda. Notions of justice, truth, and impartiality should be resurrected to allow a sort of cleansing process, much like many nations have attempted in truth commissions.<sup>144</sup>

In “advanced” democracies, elected representatives of the people, the media, the executive, and the courts normally lead the discussion. In Haiti, the discussion will be more difficult quite simply because that foundation of trust or confidence in the wisdom of leaders is almost entirely absent. The channels of participation must be widened. The debates must be sharpened, the discourse more rational. The deterioration of political parties hinders such discourse. The preference of the corporate interests in having their discussions with the government in private is a major disadvantage to both the Haitian people and a democratic reform process.<sup>145</sup> The international community must be included but controlled. The draw of the charismatic leader is often dangerous as it leads to over-confidence among a people starving for honest and competent leadership. Finally, the tradition of dictatorship has in essence stifled the voice of all but a few of the Haitian people. The major motivating factor for this silence, which is the fear of the people in speaking out, must be overcome.

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143. *Id.* at 9.

144. See *Truth Commissions*, AMNESTY INT’L, <http://www.amnesty.org/en/international-justice/issues/truth-commissions> (last visited May 19, 2013).

145. Stotzky, *The Truth About Haiti*, *supra* note 62, at 6.

Haiti has never been a deliberative democracy. One can easily understand why, given the almost unfathomable series of indignities inflicted on the Haitian people. How can one rationally discuss a legal system when privation and need abound? How can the government expect support and cooperation from the people when the legitimacy and moral justification of the government is itself largely rejected? When public servants are perceived as corrupt and authoritarian, how can any legislative work-product gain popular acceptance? How can the international community be trusted when, for so long, other countries have exploited Haiti, its people and its land for profit? These are all impressive theoretical mountains to climb.

In Haiti, the criminal law and procedure system is more important than what appears on the surface. A popular discussion can succeed if the people agree that the system can be changed and that, at the end of the process, Haiti can take its place as a country governed by the rule of law. Popular discussions have happened before in Haiti.<sup>146</sup> This time, that focus could be human rights and the criminal justice system. With the attention of the population and the government focused, the international community will finally understand that the Haitian people will not simply adopt the foreign vision of democracy. It is up to the Haitian people themselves to dictate the terms of their future. In the meantime, it is important for the international community to assist the reform process in a concrete way, but also to celebrate the dedication of the Haitian lawyers who still work today to institute a reform that is fundamental to rebuilding their country.

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146. In 1990, 67% of the Haitian electorate elected Jean-Bertrand Aristide to the presidency in Haiti's first democratic election. Lisa McGowan, *Haiti*, FOREIGN POLICY IN FOCUS (Jan. 1, 1997), <http://www.fpif.org/reports/haiti>.