



University of Arkansas at Little Rock Law Review

Volume 21 | Issue 1


Article 3

1998

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Recommended Citation

Irwin P. Stotzky, *Establishing Deliberative Democracy: Moving from Misery to Poverty with Dignity*, 21 U. ARK. LITTLE ROCK L. REV. 79 (1998).

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ESTABLISHING DELIBERATIVE DEMOCRACY: MOVING FROM MISERY TO POVERTY WITH DIGNITY

*Irwin P. Stotzky**

I. INTRODUCTION

The transition from dictatorship to democracy is a long and arduous process in the evolution of any society. Indeed, such transitions, although crucially important for the well-being of millions of people, are problematic at best. While the 1980s and 1990s have witnessed the slow movement from authoritarian regimes to fledgling constitutional democracies in many nations, this process is far from complete. It remains much debated in concept and fragile in practice.

The dramatic expansion of interest in the ideas of constitutionalism, the rule of law, democracy, and human rights in diverse parts of the world has given rise to the need to examine, in greater depth, the varied forms which law and institutions designed to promote human rights and government by and for the people can take. Moreover, this wave of democratization has brought a renewed interest in justificatory theories and conceptions of democracy. These theories are crucial for helping change authoritarian regimes into democratic ones. But there is a caveat to offer. Before one can undertake this analysis, one must understand the promise and significance of human rights to a democracy. Indeed, there is an intimate relationship between human rights and the creation of a democracy.

In this essay, I wish to develop this relationship by looking at some of the breathtaking difficulties, and possible solutions to them, in the movement from authoritarianism to democracy. In general, I use Haiti as the specific example when analyzing these issues. In Part I, I begin by explaining the theoretical problems associated with the concept of human rights. In Part II, I explain my conception of democracy. This preliminary conception is developed as a justification for democracy and thus as a basis for examining the transition process. It is also useful for suggesting changes in the structures of these societies which, I believe, will allow people a serious opportunity to experience democracy. In Part III, I sketch out the significant problems of consolidating a democracy. Part IV examines the macro and micro changes that are needed for creating the conditions that will help produce morally correct results to the seemingly insoluble problems associated with the transition process. If

* Copyright © Irwin P. Stotzky 1998. Professor of Law and Director, Center for the Study of Human Rights, University of Miami School of Law. This paper was delivered at the University of Arkansas at Little Rock School of Law on April 17, 1998, as the 1998 Ben J. Alzheimer Lecture.

properly approached, the resolution of these issues should strengthen the chances for the blooming of democratic regimes worldwide.

II. HUMAN RIGHTS

Undoubtedly, human rights are among the greatest inventions of our civilization. I mean to emphasize several things by this assertion. First, that the effective recognition of human rights can be compared in its impact on human social life to the development of modern technological resources and their application to medicine, communications, and transportation. Second, that human rights are, in some sense, artificial; like the computer, they are products of human ingenuity, even though they may depend on certain "natural" facts. Third, contrary to what is generally accepted, the fact that human rights are instruments created by human beings is not incompatible with their significance for social life.

The recognition and protection of human rights is perhaps the most significant aspect of social life in a democratic society. Indeed, human rights constitute an indispensable instrument that sovereign nations and the international community employ to avoid the kind of catastrophes that often threaten the lives of large numbers of people. We know, though we prefer not to be reminded, that our life is permanently imperiled by misfortunes which may annihilate our firmest aspirations and plans. Although obvious, it is nonetheless perplexing that this tragic character of human life is due not only to the fragility of our biological constitution and to the instability of our physical environment, but also to our own work. These misfortunes occur not only because of the scarcity of resources, but also because many use their fellow humans as just another resource—an object—either for their own benefit or to realize peculiar visions of the absolute good. This practice of using human beings as instruments is even more disastrous if, as often happens, it is carried out by the powerful—by those who have access to weapons of mass destruction or other means of subjecting other people to their will on a broad-based scale. Thus, the concept of human rights is especially important in the transition from authoritarianism to democracy precisely because the transition is such a problematic but crucially important process, and one fraught with the potential for human atrocities.

Yet several prominent problems in any such transition must be successfully resolved if the transition is to succeed without great harm to masses of people. Institutional structures must be developed and secured. Economic and political stability must be assured. Corporatist social and political structures must be transformed so that the powerless get their fair shares of the necessities of life. The rule of law must become paramount in the formal institutions and

practices of government, and in the affairs of daily life. The transition process is, however, quite fragile, and the wrong choices by public officials on the many complicated issues that confront them can prove fatal to a democracy and thus lead to human rights violations on a massive scale.

The antidote which human beings have invented to neutralize their source of misfortune is precisely that constituted by the recognition of human rights. Notwithstanding precedents as remote as the Spanish *fueros*,¹ the English charters,² and the North American declarations,³ it was revolutionary France's Declaration of the Rights of Man and the Citizen⁴ in 1789 that made explicit two basic ideas: that the mere will of the strong is not a final justification for actions which affect the vital interests of individuals, and that the mere fact of being human is enough title for claiming goods which are necessary for an autonomous and dignified life.

From then on the acknowledgment of human rights expanded, both through the constitutions of almost all national states, and through international norms such as the Universal Declaration of Human Rights enacted by the United Nations in 1948, and the subsequent covenants promoted by that same organization about civil, political, economic, social, and cultural rights.⁵ This expansion of the recognition of human rights, however, did not prevent

1. See, e.g., ENCICLOPEDIA JURÍDICA ESPAÑOLA (Luis Moutón, et al. eds., 1910); AQUILINO IGLESIA FERREIRÓS, LA CREACIÓN DEL DERECHO: UNA HISTORIA DEL DERECHO ESPAÑOL — ANTOLOGÍA DE TEXTOS (1991); FUERO JUZGO VISIGOTHS, O LIBRO DE LOS JUECES (1980); CLAUDIO SANCHEZ-ALBORNOZ, ESTUDIOS SOBRE LAS INSTITUCIONES MEDIEVALES ESPAÑOLAS (1965); E. N. VAN KLEFFENS, HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES (1968).

2. See, e.g., WILLIAM ALFRED MORRIS, THE MEDIEVAL ENGLISH SHERIFF TO 1300 (1927); BENJAMIN THORPE, DIPLOMATARIUM ANGLICUM Aevi SAXONICI (London, MacMillan 1865).

3. See THE DECLARATION OF INDEPENDENCE (U.S. 1776); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

4. See DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (France 1789), quoted in ENCICLOPEDIA OF HUMAN RIGHTS 529 (Edward Lawson ed., 2d ed. 1996).

5. See, e.g., Universal Declaration of Human Rights of 1948, Dec. 10, 1948 U.N.G.A. Res. 217A (III), U.N. Doc. A/810; Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 9, 1975, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034; International Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, U.N. GAOR, 34th Sess., Supp. No. 46 at 193, U.N. Doc A/RES/34/180, reprinted in 19 I.L.M. 33 (1980). See generally INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 (UNIFO Editorial Staff, eds. 1984) (providing texts of these instruments); THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 402 (Edmund J. Osmanyczk ed., 1990).

unprecedented genocides, sinister purges, cruel massacres and persecutions, bloody interventions of the great powers in the life of other peoples, avoidable misery, disease and illiteracy in the third world regions, the permanent threat of nuclear warfare, and other catastrophes.

These terrible facts should not obscure the slow and insecure progress which has taken place in this area since World War II. Large-scale slavery has almost disappeared from the face of the earth; the process of decolonization has been substantially advanced; increasingly more nations adhere to the rule of law; international tribunals have been established to protect human rights; people are increasingly alert to atrocities even beyond their own borders. It is not possible, however, to evade the question of why these manifestations of progress are not faster, firmer, and more widespread. Why is it that so many people continue to be systematically brutalized, tortured, and murdered?

The problem is even more complicated than it first appears. One of the major factors that weakens the quest to promote human rights is the belief that, once legally recognized, they are forever secured. Such recognition is undoubtedly important because it helps to neutralize certain kinds of violations, that is, those carried out by particular individuals or isolated officials of the state apparatus. But this is the most innocuous type of disregard for human rights, which may be fought with relative efficacy by operative criminal laws, diligent judges, and an efficient police force. The most perverse and brutal form of that disregard, on the other hand, involves the very core of the state machinery which possesses a monopoly on coercion, or depends on the intervention of foreign powers. In the face of this kind of violation of human rights, their legal recognition has no practical effect, since the legal norms which provide for it cease to be enforced and are generally replaced by others which are consonant with widespread and unpunished violations.

The perception of this limitation of the strategy of enforcing human rights through the state legal system has meant that action in this field concentrates increasingly on the establishment of international covenants which define rights and institute external sanctions for their violation, as well as regional courts and other monitoring procedures. This is another decisive step toward the enforcement of human rights because it makes them relatively independent of the internal contingencies of each country. But this incorporation of human rights into the international legal order has two serious limitations. One arises from the fact that the ideological divergence among governing powers in different countries allows such incorporations to be effected only at the level of the lowest common denominator, leaving aside rights that are disputed. The other and more serious limitation is that the still current conception of the sovereignty of states imposes severe restrictions on the obligations that governments accept by their commitment and on the forms of intervention

available to external organs for investigating and punishing human rights violations.

These limitations to the full acceptance of human rights through the national and international legal order compel one to look beyond that necessary recognition to the creation of a moral consciousness of humanity which recognizes the value of those rights and abhors any action that disregards them. It is this consciousness, once firmly rooted, which, I believe, could constitute the most permanent and efficacious barrier against the enemies of human dignity.

The hope and strategy is that certain types of governmental structures and policies will increase popular participation in public life and thus help to foster a belief in the transcendent value of human rights. If this consciousness becomes commonplace, it should create a commitment in people to fight against any actions that violate the integrity of human rights. This moral consciousness should act as a catalyst for the creation of institutions that will promote respect for human dignity and help insure people's autonomy rather than promote intolerance, slavery, and brutality.

There are, however, problems in creating the conditions necessary for the blooming of a moral consciousness in large groups. Stated otherwise, other factors may slow progress in respect for human rights. It may be true that, behind the abuse of such rights, there are naked interests which their observance frustrates. But those interests are not openly defended. Instead, they are concealed behind an ideological mask. In addition, it is clear that, often, the attack on human rights comes from sincere supporters of ideologies which are averse to them. Thus, the dissemination of certain ideologies, defended by interest or conviction, is one of the most important sources of contempt for the rights of people. This is another reason for concentrating on the spread of a moral consciousness which immunizes against ideologies that regard people as mere resources.

But how can moral consciousness be achieved? The creation of this moral consciousness can be achieved either through propaganda or through rational discussion. The first method may be more efficacious in the short term, but as experience shows, it is considerably more fragile, since it conditions the mind to a kind of answer which may well adapt itself to the opposite stimulus. Furthermore, the propagandistic strategy, when it goes beyond the mere diffusion of ideas, implies an elitist attitude, since it assumes that those who produce the propaganda are convinced not on the basis of such propaganda but for reasons which are out of reach of their audience; and that attitude is pragmatically inconsistent with the defense of the rights promoted by the propaganda.

Fortunately, the scope of rational discussion is much broader than that of human rights. Even the most shameless tyrants feel obliged to offer some justification for their acts, and that attempt at justification, clumsy and hypocritical though it may be, sometimes opens the way to illuminating discussion. For example, many dictators claim that they have to "do away" with the large number of people who degrade their society—free thinkers, leftists, communists, and anyone else who appears to be "different"—in order to protect the majority from being contaminated by these evil and false doctrines. They must keep society pure so that what they consider the truth prevails. Dialogue certainly exposes the folly of this argument, and its disastrous results, to the society at large. This allows an opportunity for opponents of these dictatorial regimes to open a debate. It may even provide individuals and groups who previously have been excluded from any self-determining participation in their society with information necessary to their very survival.

Sometimes, the very defenders of human rights are those who try to avoid moral discussion. They assume that it is possible to take a position in favor of their practical observance without having to face the bothersome question of the reasons which morally justify it. But this is an error; the commitment is a moral one, and if it is not justified on the basis of reasons, one remains defenseless before those who reject it. On the other hand, it is not just a matter of choosing between a position which recognizes and another which disregards human rights. What has to be determined is which of those rights must be recognized and what scope must be assigned to them. These questions can be solved only by rational discussion about moral philosophical principles.

Reluctance to face this discussion is often due to the adoption of one or other of two positions apparently opposed but with equivalent results, positions which have been defended by many moral philosophers and which are deeply ingrained in the minds of many lay persons. On the one hand there is an ethical dogmatic approach, according to which there are self-evident moral truths, or truths apprehended by an act of faith or by an intuition which cannot be intersubjectively corroborated. This makes the attempt to offer reasons in support of such beliefs superfluous. On the other hand there is an ethical skeptical approach, which excludes the possibility of offering reasons in support of a moral conception such as that which legitimizes human rights, since the adoption of such a conception would be determined by decisions or emotions which are not subject to criteria of rationality. I think that the spread of these meta-ethical conceptions, which often reinforce each other in a process of action and reaction, is one of the greatest obstacles to the constitution of an enlightened moral consciousness which would serve as a bulwark against assaults on human dignity.

III. DELIBERATIVE DEMOCRACY

It is therefore necessary to confront the question of which type of political, social, and economic system may be best suited to help overcome these powerful obstacles. While it seems self-evident that a democratic system is the best system for achieving the moralization of the preferences of the citizenry, that conclusion requires studied analysis. The search for solutions must, of course, begin with an analysis of the various justificatory theories of democracy.

There is a caveat to offer. The process of stabilizing and consolidating democracies has attracted many international figures—lawyers, political actors, and common citizens. Many of these participants are able, highly motivated, and well-intentioned. They clearly possess the necessary skills and dedication to help make the dream of moving from dictatorship to a functioning democracy a reality. At the same time, however, many of those who have become intimately involved in the transition process approach it in a narrow manner. They are essentially concerned with stabilizing the democracy, but largely uninterested in justifying it. They simply assume that it is the best political system and do not see the need for articulating its normative bases. This is dangerous because democracy is itself a normative concept and cannot be preserved without analyzing the values that justify its institutions. The factors that make democracy the best political system are relevant in determining the best means for its preservation. We simply cannot determine which institutions and which policies are essential, and which are not, in relation to democracy without a moral theory justifying the concept.

Fortunately, there exists a plethora of writings on the concept of democracy. Not only political philosophers and political scientists, but also constitutional lawyers⁶ have for many years attempted to articulate convincing conceptions of this system of government. Moreover, the wave of democratization that swept over Latin American in the 1980s, and that has also been sweeping over Eastern Europe and the Caribbean in the 1990s, has revived the study of these theories and conceptions. Hunger for a convincing set of reasons for creating and perpetuating democracies has prompted the academy to respond with new writings and reviews of older works on the subject.⁷

6. In general, constitutional lawyers are more likely than the others to ascribe to democracy both an explanatory and a justificatory import. See, e.g., CARLOS S. NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); IRWIN P. STOTZKY, *SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY* (1997).

7. There has been renewed interest in authors such as Joseph Schumpeter, who, by contrasting an elitist conception of democracy with the classical one, has given various explanations for the United States political system. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (5th ed. 1976). In a similar way, Robert Dahl gives an

These theories are crucial for creating the conditions and justifying the institutional reforms, on both a macro and micro level, that may help turn the possibility of democracy into an actuality.

There are two important categories of justificatory conceptions of democracy in the marketplace of philosophical ideas: those conceptions which justify democracy regardless of how it transforms people's interests and preferences, and those which depend on the transformation itself to assign value to democracy.⁸ The first category of theories, which I shall call "pluralist,"⁹ starts from the assumption that the value of democracy is not tied to the transformation of people's self-centered interests or preferences nor tied to discouraging the association of people in different groups and corporations in order to further their self-interested goals in the political sphere. That value lies, instead, in providing mechanisms in which the pursuance of the extant preferences and interests of individuals and their groups work for the common good.¹⁰ For example, pluralists mean to protect people's liberties by creating mechanisms to insure that these groups do not monopolize power.

This family of theories is defective because it disregards the difference between personal and impersonal preferences, treating the latter in a way that is only appropriate for the former. Personal preferences endorse things that enhance the life or the well-being of the agent. They can be the object of actions which aim at their aggregate satisfaction, without determining their

explanatory prominence to the conception of democracy as a "poliarchy" over the populist and Madisonian models of democracy. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). In another view, Anthony Downs describes an economic theory. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). As opposed to these, which I will generally label "pluralist" views, scholars such as Crawford MacPherson argue for a model of participatory democracy. See CRAWFORD B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (1977). In this camp, Jürgen Habermas defends a democratic system that takes as its model a process of ideal communication. See JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979). Cass Sunstein favors a republican vision of democracy, or at least a conception that mixes elements of it with others coming from the opposite, "pluralist" conception. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). In a different guise, Bruce Ackerman seeks to put forth a unique outlook, which he labels "dualist," placing it in opposition to two other views of democracy that he terms "monist" and "fundamentalist." See BRUCE ACKERMAN, WE THE PEOPLE (1991).

8. For a thorough description and analysis of the variety of different conceptions of democracy see NINO, *supra* note 6. See also, STOTZKY, *supra* note 6.

9. To be accurate, this family of justifications comprises many different outlooks, only some of which are strictly defined as pluralist.

10. Some of those I have labeled pluralists employ theories that attempt to create a separate category for the operation of politics in general and democratic politics more particularly. In this view, moral issues are left uncontested or moral evaluation is suspended *a priori* because of a presupposition of the value of the political process. Moreover, in this view, ethics and politics must remain separated from each other or dangerous results will occur to the polity. See GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED, PART I: THE CONTEMPORARY DEBATE (1987).

respective validity. Preferences for states of affairs which are supposedly valuable from an impersonal point of view—such as slavery or its abolition—are not deemed to be satisfied in an aggregative way. They are adopted or rejected as the basis for action only after their validity is determined. Democratic theories that oppose the marketplace rely on contesting and determining the validity of impersonal preferences.

In contrast to pluralism, the view I endorse, which is a sub-set of the second family of justifications, assigns value to democracy based on a processing of preferences. It relies on the power of democracy to transform people's selfish preferences and assumes that the mechanism for turning these preferences into less partial ones is that of collective deliberation. Thus, democracy may transform individuals' selfish preferences into less partial ones through dialogue. I depart from this sub-set of established views of democracy, however, by adding that the consensus achieved through collective deliberation has value in itself because it provides reasons for believing that the solution endorsed by that consensus agrees with what is prescribed by valid moral principles which, in turn, provide us with autonomous reasons to act. The deliberative conception of democracy which I defend asserts that when democracy is seen as a process of collective deliberation and majoritarian decision-making, there is an intrinsic relationship between democratic politics, the law that results from it, and morality.

But there is a caveat to offer. The democratic process is an imperfect substitute for the informal practice of moral discussion. The practice of moral discussion has epistemic value for discovering correct moral solutions to intersubjective issues. The validity of interpersonal moral principles, which evaluate actions based on their effects on the interests of people other than the agent, rests on a viewpoint of impartiality, rationality, and knowledge of the relevant facts. The discussion and interplay of ideas, when they successfully conclude in a unanimous consensus, are contributing factors to the achievement of impartial, rational, and knowledgeable moral intersubjective solutions. Unanimity is a functional equivalent of impartiality when it results from discussion among all the concerned parties. This is based on the assumption that each one is the best judge of her own interests.

Democracy, as a system in which the majoritarian opinion is binding insofar as all the people concerned have participated in both discussion and in a collective decision, is the natural substitute for the mechanism of informal discussion and unanimous consensus. This system allows for the adoption of new decisions at particular times; otherwise, the status quo would prevail, even if it were favored solely by a minority. Majority rule, of course, is not the functional equivalent of impartiality: the majority may be openly biased against a minority. However, when all the people concerned freely and equally

participate in the process of deliberation and decision, democracy preserves some of the epistemic value inherent in the process of informal discussion and unanimous consensus. Democracy, based upon this process, includes a dynamic of collective action and tends toward the adoption of impartial solutions.

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

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

Nevertheless, there are many cases in which one may be absolutely certain that the majoritarian opinion is wrong and that the result of our individual reflection is closer to the requirements of impartiality, rationality, and knowledge of the relevant facts. But if we accept that this is not the case in general and in the long run, and that the democratic process is more reliable than individual reflection, we have a derivative reason for observing the results of the democratic process even when they are wrong. Otherwise, our individual reflection would always be the final court of appeal, and the democratic process would be superfluous. This would contradict our assumption that such reflection is less reliable than the democratic process. For this system to be operative, we must rely on it even in those cases in which we are sure that it is misguided, unless of course the underlying conditions which determine its epistemic value are not fulfilled.

The rules enacted in a democratic way provide the epistemic reasons for adopting the actions they prescribe. This solves the paradox of the moral superfluousness of law, which seems to lead us to anarchism: if law, as I think, is not self-justificatory, but only provides reason for actions when it is endorsed by autonomously accepted moral principles, why not rely directly on those

principles in order to justify decisions and actions? The epistemic vision of democracy provides an answer. We simply cannot determine which valid intersubjective moral principles are the basis for action until we express them in legal rules adopted after a process of collective deliberation and decision. Thus, legal rules are not original reasons for action, but are reasons for discovering the reasons for actions.

At this point, it becomes clear that democracy cannot be created in nations undergoing the transition process without the internalization by the people of the legitimacy of a constitutional system based on the rule of law. They must also internalize universal standards of achievement and competition necessary to the proper functioning of a democracy. A structure that celebrates the overpowering significance of status and connections—a mainstay of many authoritarian societies and one which severely cripples the transition to democracy—must be fundamentally altered.

People who yearn for freedom must create a society based on the establishment of a deliberative democracy as I have described it¹¹—a society that requires equal participation and rational discourse among all segments of the populace. This discourse is essential for the creation of a moral consciousness of humanity that recognizes the value of human rights and abhors any notion that disregards them. The principle of democratic legitimacy requires a continuous order of mutually assured and encouraged autonomy in which political decisions are manifestly based on the judgments of citizens who are perceived as, and are in fact, free and equal persons. It requires that the expression of self-governing capacities operates both within the formal institutions of politics and in the affairs of daily life. The democratic order

11. This conception of a democratic order is strongly influenced by the writings of John Rawls. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); John Rawls, *Kantian Constructivism in Moral Theory*, 57 *J. OF PHIL.* 515 (1988).

Objections to such an epistemic view of democracy are possible along several lines. Perhaps the strongest ones are grounded in the realities of political life and practice. If it is true that the democratic process has an inherent tendency toward reaching just solutions to difficult problems and that one can rely on its enactments in the process of justificatory reasoning, how can one explain the existence of widespread poverty and profound inequalities in resource allocation and distribution within democratic nations? For an attempt at an answer to this question, see STOTZKY, *supra* note 6.

There are also strong theoretical challenges to this position. Indeed, the epistemic vision of democracy differs from both the stronger and weaker versions of Habermas's theory of communicative action. The epistemic theory, unlike Habermas's, does not conceive of consensus, even when reached under ideal conditions, as constitutive of just solutions. To a proponent of this view, the collective enterprise of discussion is not seen as the exclusive way of attaining those just solutions. Rather, this process of discussion is seen as the most reliable method in practice. This epistemic position is also contrary to Rawls's position that individual reflection is the best method for reaching morally correct solutions. See HABERMAS, *supra* note 7; RAWLS, *supra* note 11.

must also satisfy the conditions of equal freedom and autonomy that give it definition.

IV. PROBLEMS IN THE TRANSITION PROCESS

These theoretical considerations and conditions provide the basis for analyzing the more specific institutional arrangements and requirements of a democratic order. But elaborating these requirements is not an easy task. It cannot be done in any absolute sense. The institutional structure for a visionary democracy that justifies itself in the way I have elaborated it can only proceed in general outline. It must necessarily be experimental. Like many conceptions of democracy, this democratic conception assumes a broad framework of social cooperation. How that framework will be expressed institutionally must necessarily vary under different cultural, psychological, and historical conditions.

Thus, in describing the institutional requirements of a democratic political order, my discussion must remain somewhat provisional and abstract. I cannot necessarily anticipate the variety of conditions under which democratic institutions might arise. Moreover, in describing these requirements in the real conditions of any nation, the intricacies become even more complex and the discussion even more problematic. Nevertheless, it is worth emphasizing that the various institutional requirements do comprise a unitary whole. To put it another way, these various institutional requirements within a democratic conception comprise a system—a set of constraints and conditions which are interrelated and which define a distinct social structure of coordination and power.

Before one can judge the potential for a successful democratic transition in any nation that justifies itself through its epistemic value, however, one must understand the problems inherent in any transition. The epistemic conception is helpful in suggesting criteria by which the distance between an ideal democracy and the reality of any particular nation undergoing the transition process can be judged. It also helps one make reasoned judgments about which institutions are necessary, and which are contingent, to the transition process. Different conceptions of democracy suggest different institutional designs and help us weigh diverse policies and strategies. Since democracy is not simply a descriptive concept, but rather a normative one, institutions cannot simply be factually identified. Specific institutions that democracy demands, therefore, will depend on the theory used to justify that institutional design. While some institutions, such as freely held elections, are universally required for all forms of democracy, others depend more crucially on the specific justifications for democracy being applied.

The democratization process needs further analysis before one can discuss particular remedies or begin to resolve the very difficult issues presented by any serious attempt to create a democracy. The issues are further complicated by the fact that the concept of transition to democracy has unclear and shifting boundaries. Indeed, the very question of whether certain Latin American, European, and Caribbean nations remain in transition toward democracy or have already completed the journey is one which requires both empirical corroboration and conceptual clarification.

One possibility is to declare the transition complete when democracy seems to be sufficiently consolidated. But this is clearly an insufficient answer. Setting aside the rather complex question of when a democracy has been consolidated, which, I believe, depends implicitly upon justificatory conceptions of democracy, the concept of consolidation presents difficult problems of its own. The idea of consolidation is intimately connected with the stability of a given political system, and it is possible to argue that the latter is itself an arrangement—a dispositional property—which in turn depends upon certain predictions.

But predictions about the success of any political process, especially the transition process, are problematic at best. I, therefore, do not intend to make such predictions. I do, however, wish to discuss briefly some of the most prominent features of the present consolidation process taking place in Latin America, Eastern Europe, and the Caribbean. These features are useful in formulating those predictions on which the claim that the transition to democracy has or has not been completed depends. They are also directly relevant to the question of whether the democratization process is moving toward the ideal conditions that help justify and preserve any democracy.

The first significant feature of the consolidation is the fact that the process of democratization has taken place in most of these countries—with perhaps the exception of Chile—during one of the worst economic, social, and political crises in the history of these nations. In general, this crisis manifests itself in massive human rights violations, including murders, disappearances, rapes, and tortures. This crisis also manifests itself in enormous external debts, hyperinflation, the collapse of systems of social welfare, extremely high rates of unemployment, increases in infant mortality, and a variety of epidemics.

In some countries, the problems are even more pronounced. In Haiti, for example, the number of political assassinations that took place during the military coup period (1991-1994) is estimated to be over 5000.¹² Unfortunately, this is not the whole of the matter. Haiti's human and material resources are in such short supply or have been so degraded by poverty,

12. For a detailed analysis of the Haitian dilemma, see STOTZKY, *supra* note 6.

illiteracy, malnutrition, disease, violence, corruption, overpopulation, rapid urbanization, deforestation, and soil erosion as to raise serious questions about Haiti's continued survival as a society and as an independent nation-state.

Even before the most current crisis erupted, between 1991 and 1994, over the military's refusal to restore President Aristide to power, Haiti was the poorest country in the Western Hemisphere. Its per-capita income was \$370 a year. In a country of approximately seven million people, there are fewer than a thousand doctors. The life expectancy is a mere fifty-six years, one in every eight babies dies before reaching the age of one, and seventy percent of all children are estimated to suffer from some form of malnutrition. At least two-thirds of the population is illiterate, and the state school system is so inefficient and small that fewer than five percent of eligible students are enrolled in government high schools. As if these problems are not bad enough in themselves, many of the doctors, engineers, administrators, and others with the necessary skills to change Haiti have been killed or driven into exile. Most of those who are in exile do not wish to risk their lives and fortunes by returning to Haiti until positive changes occur. The irony is that Haiti needs these very same people to make the changes that would attract them to return.

The most difficult obstacle to democracy in many countries, particularly in Haiti, however, may be psychological and cultural. For example, the tradition of a predatory, oppressive state has left Haitians deeply distrustful of government. Moreover, due to the protracted armed struggle for independence from France (1791-1804) and the almost twenty year occupation of Haiti by the United States (1915-1934), Haitians remain deeply distrustful of foreigners. In addition, Haiti's political culture has long been characterized as an admiration of force. Political disputes are often settled not by negotiation, but through the exercise of force, and respect for democratic procedures and obligations, including reasoned justifications for actions, is minimal.

Furthermore, there is great controversy in the international community about whether crises of this kind are leading to changes in the economic and social structures of these countries necessary to allow for new oligopolizations of their economies. To put it another way, it remains unclear whether new oligopolizations will develop in these nations which will greatly restrict the avenues of access for the powerless sectors of society to the basic goods necessary for leading a life of dignity or whether, on the contrary, these crises are leading to more efficient schemes of production, thereby benefiting all sectors of these societies.

The problem is even more difficult than it is usually perceived to be. In many of the nations in the transition process, the present circumstances result from a long-fought war of attrition against the vast majority by a small but ruthless ruling class. Under the best of circumstances, a nation such as Haiti

cannot be changed structurally without some yielding of power by the haves—the economic elite. But, of course, rulers who profit from stasis are disinclined to risk change. Moreover, if it is to be the policy of the international community, led by the United States, which it appears to be, to sustain at all costs the present distribution of economic power in many of these nations, hardly anything can be done that will necessarily have long-range beneficial political consequences.

A second prominent feature of the consolidation, intimately connected to the first, is the clear fact that the corporatist political and social structure that characterizes nations in the transition process must be transformed. These structures directly impede opportunities to make the kinds of structural changes necessary to create the conditions that satisfy the epistemic theory of democracy. This corporatism¹³ has been described as bifrontal; it refers to two distinct situations. In the traditional sense, corporatism refers to the control exercised by the state over organizations and interest groups. This serves the state power structure by allowing it to control different sectors of civil society. The more technical meaning, usually used in the political arena, refers to the contrary phenomena: these same organizations and interest groups acquire considerable influence over, and exert persistent pressure against, the state decision-makers. Stated otherwise, these social groups establish cleavages of privilege and domination within the very structure of the state, thus controlling significant aspects of public life.

The groups which form the constellation of corporative power vary from country to country: in Argentina, for example, it includes the armed forces, the Catholic Church, the trade unions, and different economic groups. In Haiti, of course, these corporative entities include not only these groups, but a vast range of civic organizations. Moreover, these corporative forces have completely violated norms of democracy.

Haiti is a particularly striking example of the devastation created by corporatism. During the military dictatorship, between 1991 and 1994, the armed forces and their civilian front—the attachés—assumed total power and influence in, and completely violated and destroyed any semblance of, democratic practices and institutions. Indeed, the military forces consolidated their rule by intentionally and ruthlessly suppressing Haiti's once diverse and vibrant civil society. Until the 1991 coup, Haiti hosted a huge assortment of peasant associations, grass-roots development projects, trade unions, student organizations, church groups, and independent radio stations. In the rural areas, local groups, generally known as "popular organizations," formed literacy

13. For an analysis of the corrosive influence of corporatism, see *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (James M. Malloy ed., 1977).

programs, rural development projects, and farming cooperatives, often with international support. The military and para-military forces assassinated approximately 5,000 people, brutalized and tortured thousands of others, and forced almost 500,000 people to go underground. The military systematically repressed virtually all forms of independent association in an attempt to deny the Haitian people any organized base for opposition to the brutal dictatorship. Their apparent goal was to push Haiti back into an atomized and fearful society reminiscent of the Duvalier era. The strategy seemed to be that even if the international community successfully returned Aristide to power, he would find it almost impossible to transform his popularity into the kind of organized support necessary to exert civilian control over the army and to create a democratic institutional structure that would aid in that endeavor. The cost to the Haitian people has been astronomical. The very civil society that Haiti needs to confront its desperate economic and social problems has nearly been destroyed.

The Catholic Church has played both positive and negative roles in the lives of these nations. The Catholic Church hierarchy in Haiti, for example, has for years been siding with the military and the economic elite. It has even been a catalyst for the repression of those who publicly practice Vodoun, even though almost every Haitian practices it in private. Moreover, the Vatican is the only nation to have recognized the political legitimacy of the military coup, and the Church hierarchy has consistently opposed the first democratically elected President in the history of Haiti, Jean-Bertrand Aristide. Local churches, however, have long helped the people of Haiti by nurturing the populist groups in the rural areas. For example, the Catholic Church has long sponsored literacy programs for the peasants.

Fortunately, positive changes in the corporatist structures of these nations have taken place. Presently, the armed forces have lost power and influence in some countries in Latin America and have generally been more accepting of democratic practices and institutions. In Haiti, the armed forces has literally been dissolved. The Haitian army is now a fifty-person marching band. In several nations, the Catholic Church is reluctantly ceding its claim that the state enforce its vision of private, personal life. In many of these nations, the trade unions have been enormously affected by unemployment and by the reduction—sometimes adversely affecting parties normally allied with the government—of the welfare state.

The great enigma, which is directly related to the controversy surrounding the first feature of the consolidation—the economic and social crisis—is whether the previous dominant economic groups remain all-powerful, or have even increased their power, by having changed their positions as privileged

contractors of the state to positions as owners and thus monopolistic providers of the recently privatized public services.

Strongly interconnected in several ways with the two above-described features of the process of democratic consolidation is a final one, which may be the most significant factor impeding the transition process—the deficiency in the fulfillment of the requirements of the rule of law.¹⁴ This deficiency is a central characteristic in almost every nation attempting to change authoritarian regimes into democratic ones. Indeed, the consequences of this failure to recognize the primacy of the rule of law have made international headlines in extreme cases. For example, in Peru, President Alberto Fujimori unconstitutionally closed down Congress and removed the Supreme Court Justices. He based his actions on the pretext that these bodies were infested with corruption and thus harmed his policies of economic recovery and combating terrorism. In Brazil, President Fernando Collor resigned after having been impeached by Congress, only minutes after the Senate had begun an impeachment trial for serious acts of corruption.

Haiti presents an even more extreme case. During the 1991-1994 coup period, members of the armed forces systematically ignored human rights. Internationally recognized human rights, which are frequently codified in Haitian law, were intentionally and persistently violated. The pattern of abuses¹⁵ included:

- Haitians [were] routinely taken from their homes and thrown into detention with no legal basis whatsoever and with no access to judicial protection.
- Judges have been detained and beaten for ruling against the military.
- Government officials who have attempted to uphold the rule of the law have been murdered.
- Prior to the return of the democratically elected government in 1994, no member of the armed forces had ever been charged or prosecuted for ordering or executing any human rights abuses in violation of the

14. For a comprehensive look at the role of the judiciary and the rule of law in the transition to democracy, see *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (Irwin P. Stotzky ed., 1993).

15. See *LAWYERS' COMMITTEE FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI 1-2* (1990).

1987 Constitution, despite widely available evidence implicating the military in the assassination of political opponents and the massacre of civilians.

- The military ignored judicial orders to arrest soldiers or officers accused of human right abuses.
- The abuses inflicted upon those held in Haiti's overcrowded prisons [have been] particularly severe, including torture and even murder.
- Violent crimes, some clearly politically motivated, proliferated since the departure of Jean Claude Duvalier in 1986. The government refused to even attempt to stop these nightly rampages.

In many other nations undergoing the transition process, attacks on the rule of law are perhaps slightly more subtle, but nonetheless pervasive. For example, in Argentina, as in other countries, deeds of corruption by government officials are reported almost daily. Yet judicial procedures have not been helpful in investigating them. Indeed, despite persistent rumors of corruption by the highest officials in the Menem government, few, if any, serious judicial investigations have taken place against these officials.¹⁶ These acts of corruption in all of these nations generally undermine the credibility of democratic institutions.

Even more debilitating to democracy than these acts of corruption, however, are the attempts by those in the Executive Branch who have a monopoly on power to dominate the other state powers and branches of government. For example, Article 263 of the Haitian Constitution¹⁷ requires the separation of the police from the military, but during the military dictatorship, the police remained under the control of the army. In the rural areas, section chiefs, charged with performing police duties, have been little more than gang leaders who report to military officials rather than to civilian authorities. In the past, they possessed absolute power in the rural regions, where approximately ninety percent of the population lives, and were immune from civilian control. They imposed arbitrary taxes, had private armies, and arrested, tortured, and murdered people.

Haitian prisons have long been controlled by the military. Prior to the restoration of the democratically elected government in 1994, the prison

16. Interview with Jaime Malamud-Goti, Professor of Criminal Law and Philosophy, Universidad de Buenos Aires, in Coral Gables, Fla. (Apr. 12, 1998).

17. CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI art. 263 (Republic of Haiti).

conditions clearly constituted severe and systematic violations of Haitian law and international standards. In addition, the military has dominated the civilian justice system to such an extent that it has failed to investigate or identify those responsible for massive rights violations. There has never truly been any judicial independence. Judges have routinely been appointed and removed at the will of the military. Finally, the congressional branch of government has possessed no power. It followed the dictates of the military. It is no exaggeration to claim that the law has indeed been used as a weapon to oppress and terrify the people.

In Argentina, the Menem government has attempted to dominate other state powers.¹⁸ For example, in 1990, Menem packed the Supreme Court with those loyal to his government. He took advantage of the majority which he enjoyed in both Houses of Congress to pass a law expanding the number of Supreme Court Justices and requiring that the confirmation of candidates to fill the new positions be handed down swiftly by the Senate. Moreover, many of the officials whose offices are charged with the duty of observing and enforcing the rule of law and many of the officials of the bodies which control the financial dealings of the government—the Attorney General (historically part of the Supreme Court and appointed with Senatorial confirmation until Menem's administration), most of the members of the Tribunal of Accounts, the Attorney for Administrative Investigation, and others—have been removed. The Menem Administration has also enacted decrees of so-called "urgency and need," thus circumventing Congress in the adoption of significant reforms, economic and otherwise. Congress has also delegated many of its responsibilities to the Menem Administration. Moreover, that Administration clearly abused its power of vetoing Congressional bills, even resorting to the device of enacting part of the bill vetoed, which is a way of creating a new statute more agreeable to its policies. Several provinces have been placed in receivership; that is, their elected officials and their Supreme Court Justices have been removed by executive decree. This is a clear violation of Article 6 of the Argentine Constitution,¹⁹ which in its standard construction ascribes that power to the Federal Congress in cases of internal upheavals. Finally, an assault on the judicial power occurred on the occasion of the adoption of a new code of federal criminal procedure. Since adoption of the code required a doubling of the number of judges, the government simply appointed political and personal friends to fill these openings.

18. Interview with Carlos Nino, Professor of Law and Philosophy, Universidad de Buenos Aires, in Buenos Aires, Argentina (August 20, 1993).

19. CONSTITUCIÓN ARGENTINA art. 6.

The violation of legal norms in nations undergoing the transition process, however, is not restricted to formal government officials, such as Menem in Argentina or the newly replaced military leaders in Haiti. Unfortunately, such behavior is a distinguishing mark of political and social life at large, and usually has existed throughout a country's history. This failure to follow the rule of law is evident in both social practices and in the actions of governmental bodies. Indeed, this rule-oblivious mentality has often been depicted and even celebrated in the literature, art, and theatre of these nations.

This tendency toward unlawfulness does not, however, infect only public officials—it infects the general society. Stated otherwise, this unlawfulness mentality correlates with a general trend toward anomie in society as a whole. It manifests itself in such things as enormous black markets, tax evasions, corruption in private economic activities, non-observance of efficient economic norms, and non-compliance with the most basic rules of society, such as elementary traffic and urban regulations. This general tendency toward illegality in public and private social life normally appears in one of two ways. People may adopt a “finalist attitude,” where they agree with the goals of a rule but do not follow the commands of the rule. Conversely, they may adopt a “formalist attitude,” where they blindly comply with the commands of the rule but ignore its goals. Both of these attitudes are incompatible with, and thus contribute to the continuing difficulty of, securing adherence to the rule of law. They adversely affect the attempt to create a moral consciousness in the citizenry.

The problem may be intractable because it is so pervasive and, therefore, difficult to change. The tendency toward unlawfulness in public and social life is often the product and cause of collective action problems, such as those with structures that game theory labels “prisoner's dilemma,” “assurance game,” “chicken game,” and so forth. Frequently, the combination of expectations, interests, possibilities of actions, and their respective pay-offs is such that the rational course of action for each participant in the process of political or social interaction advises him or her not to comply with a certain norm, despite the fact that general compliance with it would have been for the benefit of everybody, or almost everybody. This kind of anomie may be called “dumb anomie,” since it refers to situations in which the compliance with a certain norm would have led the social actors to a more efficient result—in Pareto's terms—than what they obtain in the actual situation of not observing norms.²⁰

“Dumb anomie” is intimately connected with both the stunting and the reversal of economic and social development. (It has not, however, been

20. Carlos S. Nino used this term in describing this phenomenon in Argentina. See CARLOS S. NINO, *UN PAÍS AL MARGEN DE LA LEY* (1992).

perceived as such in the attempts to explain the economic and social problems in nations undergoing the transition process.) First, there is a direct conceptual connection between that kind of anomie and failures in economic productivity. Indeed, "dumb anomie" is identified by the results of processes of interaction, including economic ones, that do not observe certain norms. Second, it is clear that anomie affects the process of capital accumulation. For example, when the behavior of people intervening in the process of production—even that of judges and government officials—is not sufficiently predictable, productive investments decline or claim disproportionate profits.

Therefore, it is critical for nations engaged in the transition process to consolidate the rule of law. This is important not only to secure respect for fundamental rights and for the observance of the democratic process, but also to achieve satisfactory degrees of economic and social development. It is also clear that the consolidation of the rule of law, with the consequent overcoming of "dumb anomie" requires strengthening the independence, reliability, and efficiency of the judicial process. To achieve this goal, a nation must satisfy the guarantees that derive from the idea of due process of law.

V. STEPS TOWARD DEMOCRACY

There is a deeper meaning to the rejection of the military leaders by the vast majority of people in nations attempting to make the transition from dictatorship to democracy than is traditionally suggested. It is a revulsion against the lack of a public life that is little more than a weapon or disguise of private interests. But there is a caveat to offer. This rejection cannot succeed in its larger objectives without changes in the established structure and dominant ideas of these societies that remain far outside the realm of their traditional politics or even outside international understandings of the problems.

This unusual perception is not unique to any particular nation undergoing the transition, such as Haiti. Rather it is reflected in the institutional structures of many developing nations. The dominant political regimes of the less-developed economies, and even critics of these regimes, often start with the intention simply to imitate and import the institutional arrangements of the rich industrial democracies. They do this with the belief that from similar institutional devices similar economic and political consequences will result. Such imitation, however, has not led to these desired results. The failure of these efforts at emulation may nevertheless be useful to the development of new institutional structures. To put it another way, such efforts may end up driving some of these countries into an involuntary institutional experimenta-

tion, which may shed light on the suppressed opportunities for transformation. So it is possible that if a nation begins on this path, positive results may follow.

A. The Basic Necessities: A First Step Toward Democracy

Because the absence of material deprivation is a prerequisite for free and unconstrained deliberation and individual development and fulfillment, a democratic society must provide a basic level of material satisfaction for all members of the political order. Further, to satisfy democratic values, the level of material satisfaction must be determined through a free process of deliberation among the people. Indeed, the expression of self-governing capacities must operate both within the formal institutional structure of government and in the affairs of social life. The democratic order must, in any endeavor, satisfy the conditions of equal freedom and autonomy that help define it. But how can a government fulfill these requirements?

The overriding characteristic of the political life and political discourse of Latin America, Eastern Europe, and other developing nations today is a frustrated desire to escape the choice between a nationalist-populist and a neo-liberal project. The import-substituting, protectionist style of industrialization and the pseudo-Keynesian public finance that accompanied it seem to have exhausted their capabilities. The neo-liberal alternative, however, is unable to service the real conditions of sustained economic growth. Moreover, if taken seriously, this neo-liberal economy remains anathema to the very elites that pretend to champion it. There is an absence of an articulated and viable alternative to these rejected and unpromising options.

In political-economy terms, and in line with the epistemic theory of democracy, a country attempting to become a democracy, such as Haiti,²¹ might develop such an alternative by moving in the following directions:

First, these nations must take macro-economic stabilization seriously. They should initiate a dramatic rise in and focusing of the tax rate that would impose upon the privileged classes and regions of these nations the costs of public investment in people and in infrastructure. It would, of course, be utterly unrealistic to take another approach and conceive of a sound financial system as one based upon a drastic lowering of governmental expenditure rather than upon raising and rationalizing taxes. One approach would be to have a universal, direct consumption-based tax as a means to finance the state and promote capital formation and investment.

21. The Aristide government's economic recovery plan attempts to achieve some of these goals. For a thorough analysis of the plan, see STOTZKY, *supra* note 6.

Second, these governments must help create the conditions for an “anti-dualist” political economy. This economy has to attack and overcome the internal division of these nations into two (or more) economies only weakly and hierarchically connected. What is needed, therefore, is the consolidation and development of a technological vanguard in both the public and private sectors and the use of this vanguard to lift up and transform these immense, backward second economies. Perhaps the key to this strategy are untried forms of public-private partnership, and decentralized capital allocation and management.

Third, the stringent requirements of capitalism must be imposed upon so-called capitalists through the privatization of the private sector (i.e., real competition, real refusal of the capitalization of profits through the socialization of losses, real antitrust, real markets in corporate control, real constraints upon nepotism and inheritance, real private responsibility for the costs of public investment). Moreover, these governments must create and develop public companies and impose upon these companies a regime of decisive competition and independent financial responsibility. Total privatization of state-owned enterprises is not necessarily a sound policy.

Finally, there must be massive investment in people and infrastructure financed by taxes on the people with the goods. There must be a priority of such claims upon the budget, backed by procedural devices with executive force. In addition, preventative public health, sanitation, and food supplementation must be given precedence over therapeutic medicine. Even more important, the people must be educated. Schools and universities must be freely opened to everyone. Literacy programs must be created and implemented. Education must focus on the mastery of generic practical and conceptual capabilities and move away from the mere memorization of facts.

B. Institutional Organization and the Transition Process: Macro-Political Changes

In the organization of government, politics, and civil society, the alternative would take the following form: a public-law counterpart to the political economy I have just outlined, animated by the same concerns and moving toward the same goals. This raises questions, of course, about the significance and independence of the judiciary. I do not believe, however, that the problem is any different in most developing nations, such as Haiti, than it is in any liberal democracy. When we say independence, we usually refer to independence from parties, politics, and sometimes even ideology. But serious obstacles to these ideas remain dominant in many developing nations, particularly one as underdeveloped as Haiti.

It is clear that the Haitian people, as well as many people in Eastern European and Latin American nations, have not internalized the significance and legitimacy of a constitutional system based on the rule of law. Moreover, many of these cultures appear to be strongly resistant to the internalization of universal standards of achievement and competition necessary to an equitably functioning democracy. Rather, the people in these nations appear to have internalized a belief in the overpowering importance of status and connections, thus crippling the transition to a constitutional democracy. While some may argue that the problems associated with the transition to democracy are almost intractable and that the military and economic elite will never adhere to the demands of a deliberative democracy, I believe that is not necessarily correct. Indeed, simultaneously making changes on a macro and a micro level should act as a strong incentive for people to live up to democratic requirements.

One way to attack the problems I have discussed above, which adheres to the democratic principles I have outlined, is through a radical change in the institutional structures of these developing democracies. The dominant constitutional tradition in the rich industrial countries, such as the United States, relies upon arrangements and practices tending (1) to use the fragmentation of power and the promotion of impasse as a safeguard of freedom and (2) to maintain political society at relatively low levels of political mobilization. But in the real conditions of a nation like Haiti, which is attempting to make the transition to democracy, structural reforms require at least two sets of institutional innovations.

First, a merger of the electoral characteristics of presidential regimes is needed so that they create a periodic threat to oligarchic control of political power. There must be a facility for the rapid resolution of major political impasses through granting priority to programmatic legislation, liberal resort to plebiscites and referenda, and perhaps the vesting of power in all branches of government to provoke anticipated elections in the face of serious disagreements over the direction the country should take. Second, measures must be taken to heighten the level and broaden the scope of political mobilization in society, especially through strengthening of parties (districts and lists), public financing of campaigns, increased free access to television and radio, and the breakup of the broadcasting cartel. In addition, political organizing must be encouraged, and incentives must be developed so that people become more active in determining the conditions of their lives.

In the organization of civil society, the prevailing legal tradition in the rich industrial democracies relinquishes the self-organization of civil society to private contract. But the integrity of economic and political institutions such

as those I have described here requires a civil society both strongly organized, and independent in this organization, from governmental tutelage.²²

C. Micro-Political Change

Macro-political reform by itself, however, is simply insufficient to create the opportunities for democratic change. Micro-political reforms must also become an integral part of the process. Indeed, many nations in the transition process have a history permeated by a dual social, political, and economic structure that stubbornly impedes any progress toward positive change.

In general, two broad features emerge from any serious analysis of the history of nations attempting to create a democracy: the total rejection of the majority by the very groups that exert political and economic control, and the role of the state as the key mechanism of both rejection and control. Stated otherwise, the elites believed and continue to believe their lifestyle to be more important than the survival of the majority. This results in the use of the state to expropriate the economic output of, and to simultaneously repress, the majority. For example, as Michel Rolph-Trouillot has so eloquently argued, the Haitian State is predatory; it has always operated against the nation it claims to represent.²³ Thus, class structure, not merely income, and historical tides, not simply the immediate past, are at the root of this modern crisis.

The macro-politics of institutional change, therefore, remains inadequate to the aims of democratization and practical experimentalism unless complemented by a micro-politics that confronts the logic of habitual social interactions. The typical elements of this logic are similar in many developing nations. There is a predominance of patron-client relations with their pervasive mingling, in the same associations and encounters of exchange, power, and sentimental allegiance. There is frequently an oscillation between rule formalism and personal favoritism, and each creates the opportunity and the need for the other. Moreover, there is a stark contrast between the treatment of *insiders* (anyone with whom, by virtue of the role you occupy, you have a preexisting relationship) and *outsiders* (everyone else) and the consequent shortage of impersonal respect and reliability.

A “transformative” politics capable of challenging and changing both the established arrangements of the economy and the polity and the intimate habits

22. The labor law regime in the United States is an example of what I have in mind here.

23. See MICHEL-ROLPH TROUILLOT, HAITI, STATE AGAINST NATION: THE ORIGINS AND LEGACY OF DUVALIERISM (1990); MICHEL-ROLPH TROUILLOT, L'ÉTAT PRÉDATEUR; NICARAGUA AUJOURD'HUI 25-27 (1991); Michel-Rolph Trouillot, *État et duvaliérisme*, LA RÉPUBLIQUE HAÏTIENNE: ÉTAT DE LIEUX ET PERSPECTIVES (Gérard Barthélemy & Christian Girault eds., 1993).

of sociability must appeal to each of the (at least) two parts of the nation that it wishes to unite. In this task, those who yearn for democracy must combine a strategic approach to the satisfaction of recognized material interests with the visionary invocation of a reordered society. In Haiti, as in other developing nations trapped in these impoverished visions, nothing is more important than to encourage the belief in the people that structural change is possible.

VI. CONCLUSION

Authoritarianism cannot be overcome simply because people favor democratic methods for resolving disputes. Powerful social forces block the passage from dictatorship to democracy. These underlying forces are an organic conception of society that leads to a dualistic vision of the social order, corporatism, anomie and unlawfulness, and extreme concentrations of institutional, economic, and social power. These forces are directly related to massive human rights abuses.

It is clear that the transition to democracy is a difficult journey. In nations undergoing this transformation, economic, political, and social stability has not yet been achieved. The corporatist political and social structures have not yet been transformed to allow the less privileged majority to enjoy the basic necessities that ensure a life of dignity. Institutional structures, such as an independent judiciary, a representative congressional branch, and limitations on the executive power, must be developed and stabilized. The rule of law and the standard guarantees of due process have to be consolidated and become an accepted, basic requirement of social interaction. This is necessary not only to protect human rights and the democratic process, but also to reach a satisfactory level of economic and social development. Moreover, determining what to do with those who have committed massive human rights violations—whether to hold human rights trials, grant amnesties, or take other action—is an important step in reaching these goals.²⁴

All of these factors are interconnected. Indeed, the problems inherent in the transition to democracy are extremely complicated, and they are interrelated in incredibly subtle ways. These problems and possible solutions cannot be successfully addressed, however, without a justificatory theory of democracy. Such a democratic vision requires a continuous order of mutually assured and encouraged autonomy in which political decisions are manifestly based on the judgments of members of that order who are free and equal persons.

24. For a discussion and analysis of this issue, see JAIME MALAMUD-GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (1996); CARLOS S. NINO, *RADICAL EVIL ON TRIAL* (1996); STOTZKY, *supra* note 6.

Moreover, the expression of self-governing capacities must operate both within the formal institutions of politics and in the affairs of daily life. The democratic order must satisfy the conditions of equal freedom and autonomy that give it definition.

If correctly implemented, this system of deliberative democracy should have the best chance of the various justificatory theories of democracy to develop what I in this essay have called a "moral consciousness" in the citizenry. But a warning is in order. If these nations striving to become constitutional democracies fail to create the conditions needed for democracy to develop and grow, they will inevitably be barred from beginning the long journey from misery to poverty with dignity.²⁵ Instead, they will be plunged back into states of terror and authoritarianism.

25. This is a phrase that former President Aristide often evokes when he discusses the future of democracy in Haiti. It has a powerful resonance in nations involved in the transition process.

