Post-Earthquake Constitutional Analysis of the Interruption of the Legislative and Executive Powers

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EXECUTIVE SUMMARY

Due to the earthquake on January 12, 2010, elections for the members of the House of Representatives and one third of the Senate scheduled for February 28 and April 4, 2010, were canceled. As a result, Haiti will have no legislative power as of May 8, 2010. There will be a rupture in the constitutional order.

The disappearance of the legislative power will have a crucial impact on the political and constitutional stability of the Republic of Haiti. In addition to the inability to pass laws, it might also bring a serious disruption in the functioning of the State:

- Inability to replace the President of the Republic and the Prime Minister in case of vacancy of their office - one must already understand the immediate vulnerability of the State and that such disruption would be fatal to its functioning - and to replace a member of the CEP after the office of the Presidency has become vacant

- No more budgetary credits starting as of October 1, 2010, due to the absence of emergency measures during the period between the two Legislatures

- Weakened control on the actions of the government due to the Senate not having any real power of constraint, and possibly, the support to do so

In short, all conditions for a total and complete dysfunction of the Haitian State are met.

With no legislative power, the President of the Republic will have to resort to legislative decrees in order to govern the State, but this is categorically against Articles 150 and 285.1 of the Constitution.

Insofar as the provisions of the Constitution are very clear on the length of the terms in office of the members of the House of Representatives, the Senators, and that of the Presidency, they cannot be extended. Therefore, elections must be held as soon as possible in order to fill the office of the President of the Republic, whose term expires February 7, 2011.

In the background, there is also an on-going draft revision of the Constitution; but in the current situation, the amendments that would be adopted should only enter into force after a period of five to eight years. However, if the next Legislature adopts the constitutional revision before February 7, 2010, these amendments could come into force under the next President. Moreover, Haitian constitutions have traditionally been shaped by Constituent Assemblies. The use of such procedure requires a consensus that will be difficult, or even unrealistic, to achieve because of the current weakness of the political parties and the absence of political leadership.

In a state where the Constitution is not always respected, and sometimes even discarded through specious interpretations, it is difficult to state the law because the governance of the State is not fundamentally based on the respect of the rule law. In any case, it is imperative to reach an agreement to hold elections before the end of the year 2010, as there is little time left before the country faces not only the absence of legislative Power but of the executive power as well.

Post-Earthquake Analysis of the Interruption of the Legislative and Executive Powers within the Haitian Constitutional and Legal Framework

I. MANDATE

This project was carried out under the mandate to conduct an in-depth and thorough legal and constitutional analysis of the political processes in Haiti's post-quake environment, with a specific focus on options for their scheduling, sequencing, and legal implications for extending mandates, in particular, the impact on the extension of mandates and timing/sequencing of the next elections and their succession in time.

II. THE ANALYSIS

a. The Problem

i. The Earthquake: Postponement of the Elections

The January 12, 2010, earthquake caused the postponement of the legislative elections, the first round of which was scheduled for February 28, 2010, in nine departments and March 3, 2010, in the Central Department.[12] Presidential elections, although not officially declared, were to be held before the end of 2010 as well.

The postponement of these elections, especially those for the House of Representatives, has a crucial impact on the political and constitutional stability of the Republic of Haiti. Indeed, given the fact that the term of office of the members of the House of Representatives expires on May 8, 2010, Haiti will thus be without legislative power. This fact is based on Article 88 of the 1987 Constitution which reads as follows:

> "Article 88: The Legislative power is exercised by two (2) representative Houses, One (1) House of Representatives and one (1) Senate that constitute the Legislative body."[13]

In her *Handbook of Constitutional Law*, Mirlande Manigat, describes the importance of the legislative power as follows:

> "It takes its name from *lex* (law) meaning that its principal purpose is to make laws, and, by extension, to enforce them and establish the legality of the texts from the power of

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12 The second round was scheduled for April 11 and 14 respectively.

13 See also Article 89 which reads:
« Article 89**:** The House of Representatives is a body composed of members elected by direct suffrage by the citizens and is responsible for exercising, on their behalf and in concert with the Senate, the functions of the legislative power."

interpretation of the Constitution. But its jurisdiction and authority go beyond those responsibilities derived from its etymological roots." (*Underline added for emphasis.*)[14]

Thus, there will be a rupture in the constitutional order and, as underlined by Mirlande Manigat,[15] the rupture is much more serious because, under the Constitution, the Legislative body exercises powers that are essential to ensure the functioning of the Haitian institutions.

ii. The Consequences of the Absence of Legislative Power

The "competences" that are assigned specifically to the legislative power by the Constitution, and that will have a significant effect on the Haitian State when not being exercised, are the following:

1 The Adoption of Any Law

> "Article 111: The Legislature makes the laws on all matters of public interest."

2 The Adoption of a Vote Of Censure

> "Article 129-6: The Legislative body may not pass more than one vote of censure a year on a question concerning a Government program or a declaration of general policy."

In the current situation, a vote of censure could be important; however, such a vote has already been exercised in November 2009 for the replacement of the Prime Minister.

3 The President's Oath of Office

> "Article 135-1: Before taking office, the President of the Republic shall take the following oath before the National Assembly:
>
> ("....)" .[16]

This provision already imposes greater constraint on the order in which the coming elections should be held. It is necessary for the legislative power to be restored first to then proceed with the inauguration of the newly-elected president.

4 The Election of the Prime Minister

> "Article 137: The President of the Republic shall choose a Prime Minister from among the members of the Parliament's majority party. In the absence of such a majority, the President of the Republic shall choose his Prime Minister in consultation with the President of the Senate and the President of the House of Representatives. In both cases, the choice must be ratified by the Parliament."

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14 Mirlande Manigat *Handbook of Constitutional Law*, University of Quisqueya, Haiti's National Library, October 2004, page 145.

15 Op cit, *Manuel of Constitutional Law*, page 41. See also Mirlande Manigat *Haitian Constitutional Law Treatise*, University of Quisqueya, volume II, page 641.

16 This provision is similar in its purpose to Article 149 that will be analyzed later.

The inability to replace the Prime Minister due to the absence of the House of Representatives already places the Haitian State in a serious state of vulnerability[17], and the absence of a prime minister would be fatal to its functioning. Articles 133 and 155 are unequivocal on this point.

> "Article 133: The Executive power is vested in:
>
> a. The President of the Republic, who is the Head of State.
>
> b. The Government headed by a Prime Minister."

> "Article 155: The Government is composed of the Prime Minister, the Ministers and Secretaries of State. The Prime Minister is the head of the Government."

5 The Inauguration of an Interim President In Case Of Vacancy

> "Article 149: In case the office of the President of the Republic becomes vacant for any reason whatsoever, the President of the Supreme Court of the Republic, or in his absence, the Vice President of that Court, or in his absence, the most senior judge and so on by order of seniority, <u>shall be invested</u> temporarily with the office of the President of the Republic <u>by the National Assembly</u> duly convened by the Prime Minister. The election of the new President for a new five (5) year term shall be held at least forty-five (45) days and no more than ninety (90) days after the opening of the vacancy, in accordance with the Constitution and the Electoral Law. " (*Underline added for emphasis.*)

Consequently, it will become impossible to appoint an interim president after May 8, 2010. Thus, we must absolutely understand the state of vulnerability[18] in which the Haitian State is placed and see how the absence of the President would be fatal for its functioning.

6 Control of Governmental Action by the Parliament

> "Article 156: The Government conducts the politics of the Nation. It is responsible before Parliament under the terms stipulated in the Constitution."

7 Support for the Laws Presented By the Government and the President

> "Article 161: The Prime Minister and the Ministers may appear before both Houses to support the draft laws and the objections of the President of the Republic as well as to respond to questionings."

The Executive Branch will not be able to submit laws to regulate any situation whatsoever.

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17 All conditions for a total and complete failure of the Haitian State are in place.

18 See note 7. An even stronger reason, this comment applies in the case of the Presidency.

8 Constitution of the Electoral Council, Permanent or Provisional

> "Article 192: The Permanent Electoral Council consists of nine (9) members chosen from a list of three (3) names proposed by each of the Departmental Assemblies:
>
> > 3 are chosen by the Executive Branch;
> >
> > 3 are chosen by the Supreme Court;
> >
> > 3 are chosen by the National Assembly."

Within the constitutional framework, it will be impossible to form a Permanent Electoral Council.

9 Presentation of the General Accounts and Budgets to the Legislative Chambers

> "Article 227-3: The General accounts and budgets stipulated in the preceding article, accompanied by the report from the High Court of Accounts and Administrative Disputes must be submitted to the Legislative Houses by the Minister of Finance no later than fifteen (15) days after the opening of the legislative session. The same applies to the annual balance sheet and statement of operations of the Central Bank and to all other accounts of the Haitian State."

Consequently, the Haitian State will be without general accounts and budgets for as long as there will not be a new House of Representatives.

10 Approval of the Income and Expenditures of the State and the General Budget of the State

> "Article 228: Each year the Legislative body issues:
>
> > a. The statement of receipts and expenditures of the Government for the year or proceeding years;
> >
> > b. The State's General Budget containing the outline and the portion of funds allocated to each Ministry for the year."

In the absence of the Legislative body, the State may not receive credits because the General Budget of the State will not be adopted. Article 231 of the Constitution and Article 6 of the Law on *Public Accounting* which allow the acquisition of credits are only applicable when the houses are adjourned. Yet, an adjournment is the suspension of the activities of the same session, which clearly excludes the situation in which there is no more Legislative Power.

Article 231 of the Constitutions states:

> "Article 231: If for any reason whatsoever the Legislative Houses do not issue the budget on time for one or more Ministerial departments before they adjourn, the budget(s) of the Departments concerned shall remain in force until the vote and adoption of the new budget."

Mirlande Manigat's proposal, in her *Handbook of Constitutional Law*, confirms our assumptions regarding the interpretation of Article 231 of the Constitution:

> "Session: Period during which a Parliamentary Assembly is authorized to sit. In between regulatory sessions established by the Constitution, the Head of the Executive Power (Monarch or President of the Republic) may convene the Assembly in an *extraordinary session* (...)."[19]

As of October 1, 2010, Haiti will be without a budget. Article 1 of the *Law on Public Accounting* establishes the end of the fiscal year on September 30.

> "Article 1: The General Budget is the legal document that provides for and authorizes all annual receipts and expenses of the State for the exercise beginning each year on October 1 and ending on September 30 of the following year."

Obviously, a State cannot function without a budget, but in this case, it is likely that the Haitian State would only be entitled to ordinary appropriations. Such interpretation is justified when taking into account the theory of necessity[20] and Articles 6 and 7 of *the Law on Public Accounting*. These articles read as follows:

> "Article 6: Ordinary credits are the authorizations recorded in the initial financial law of each fiscal year, as they result from the expense forecasts.
>
> Supplementary credits are those which must be provide for duly justified insufficiency in ordinary credits open to the general budget. They are added to the balance of these credits and are used under the same conditions.
>
> Special credits are those which are sought due to unforeseen circumstances, and which are used for expenses not already provided for in the General Budget.
>
> "Article 7: The supplementary and extraordinary credits can only be granted by law. However, if the Legislative body is not in session, the President of the Republic may open

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19 Op.cit., Manuel *of Constitutional Law*, page 222.
This is in accordance with Article 231.1 of the Constitution, which reads as follows:
"Article 231.1**:** If, by fault of the Executive Branch, the Budget of the Republic has not been voted, the President of the Republic shall immediately call the Legislative Chambers in an Extraordinary Session, for the sole purpose of voting on the State Budget.". (Underlining added for emphasis.)

20 On this matter, see:
http://fr.jurispedia.org/index.php/Circonstance_exceptionnelle_en_droit_administratif__(en), which states, in reference to this theory:
"A totally conflicting concept can be supported, the concept calling upon the state of necessity. It is believed then that certain situations may cause by themselves a breakdown in the normal legal order and justify any action taken under the state of necessity. Man, driven by necessity, may resort to legally prohibited means to save his own life (self-defense). Similarly, the State can misinterpret the legal rules imposed on it if faced with exceptional situations. This theory has long been advocated by German lawyers (Notstaatsrecht): "necessity becomes law." This theory was applied in Switzerland by Milloui jurisprudence that happened regarding the concentration of power by the federal Assembly during the First World War. (our underlining)
It is, however, important to add that the American. Supreme Court has rejected this theory twice.

these credits by decree, countersigned by the Minister of Finance and the Ministers concerned.

The supplementary and extraordinary credits become effective upon signature, regardless of the date of publication in the *Moniteur*.

Decrees related to supplementary and extraordinary credits are submitted by the Minister of Finance for approval by the Legislative Body in the first two weeks of its ordinary session."

11 Control of Public Expenses by a Parliamentary Committee

"Article 233: For the purpose of maintaining constant and careful supervision over public expenditures, a fifteen-member Parliamentary Committee composed of nine (9) Representatives and six (6) Senators shall be elected by secret ballot at the beginning of each ordinary session, to report on the management of the Ministers to enable the two (2) Assemblies to give them authorization."

Thus, there can be no control of public expenses by this committee as of May 8, 2010.

12 Capacity to Amend the Constitution

"Article 282: The Legislative Power, upon proposal from one of the (2) Houses or the Executive Branch, may declare, with supporting justification, that the Constitution should be amended."

This matter will be discussed in detail on page 23 and following.

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We conclude that the significance of the constitutional rupture will be such that it will cause a near total dysfunction of the Haitian State as of May 8, 2010.

iii. The Consequences of the Absence of the House of Representatives

The absence of the Chamber of Deputies will suspend the exercise of certain "powers" it is given by the Constitution. These powers are as follows:

1 Bring charges on the Head of State, Prime Minister, Ministers, and Secretaries of State before the High Court of Justice

"Article 93: Beside the duties conferred upon it by the Constitution as a branch of the Legislative power, the House of Representatives has the ability to bring charges on the Head of State, the Prime Minister, the Ministers and the Secretaries of State before the High Court of Justice, by a majority of two-thirds (2/3) of its members. The other powers of the House of Representatives are assigned to it by the Constitution and by law."

2 The right to question and challenge the Government or a member thereof

"Article 129-2: Every member of the two (2) Houses has the right to question and challenge a member of the Government or the entire Government on facts and acts of the Administration."

3 The election of the Prime Minister in consultation with the President of the House of Representatives[21]

"Article 137: The President of the Republic shall choose a Prime Minister from among the members of the Parliament's majority party. In the absence of such a majority, the President of the Republic shall choose his Prime Minister in consultation with the President of the Senate and the President of the House of Representatives. In either case, the President's choice must be ratified by Parliament."

4 The pronouncement of indictment of the President of the Republic and of the Prime Minister

"Article 186: The House of Representatives, by a majority of two-thirds (2/3) of its members, shall pronounce the indictment:

a. of the President of the Republic for crime of high treason or any other crime or offense committed in the exercise of his duties;

b. of the Prime Minister, the Ministers and the Secretaries of State for Crimes of high treason and embezzlement or abuse of power or any other crimes or offenses committed in the exercise of their duties;

c. of the Members of the Permanent Electoral Council and of the Superior Court of Accounts and Administrative Disputes for serious offenses committed in the exercise of their duties;

d. of the Judges and the officers of the Public Prosecutor's Office before the Supreme Court for abuse of authority;

e. of the Protector of the People."

iv. The Limited role of the Senate

According to Article 95.1 of the Constitution, the Senate is always in session. This allows the Senate, despite the absence of the House of Representatives, to continue exercising certain constitutional powers it is entrusted with. These powers are as follows:

1 The Right to Investigate

"Article 118: Each House has the right to investigate matters brought before it."

[21] See comments on page 9 regarding this matter.

2 The Right to Question and Challenge without a Vote Of Censure

"Article 129-2: Every member of the two (2) Houses has the right to question and challenge a member of the Government or the entire Government on facts and acts of the Administration."

"Article 129-3: The request for a challenge must be seconded by five (5) members of the concerned body. It results in a vote of confidence or censure adopted by a majority of that body."

3 Vote Of Censure against a Minister[22]

"Article 172: When one of the two (2) Houses, as a result of a challenge, calls into question the responsibility of a Minister by a vote of censure passed by the absolute majority of its members, the Executive dismisses the Minister."

4 Approval of Certain Important Appointments for the Operation of the State

"Article 141: With the approval of the Senate, the President appoints the Commander-in-chief of the armed forces, the Commander-in-chief of the police, the ambassadors and the consuls general, by decree adopted in the Council of Ministers."

"Article 175: the Supreme Court justices are appointed by the President of the Republic from a list of three (3) persons per seat submitted by the Senate…."

"Article 200-6: The candidates to this office shall submit their applications directly to the Office of the Senate of the Republic. The Senate elects the ten (10) members of the High Court (of Accounts and Administrative Disputes[23]), who select their President and Vice President among them."

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Thus, we can conclude that it is very unlikely that the Senate will be able to control the government for two reasons. In constitutional terms, in addition to the total loss of budget control, the Senate will have limited power of constraint on the government members who could simply ignore any challenge or questioning. In practical terms, the Senate has, after the earthquake, minimal premises and resources to ensure its survival as an institution and as a counterbalance to the government. Finally, it seems that all programs in support of the Parliament will come to an end in the next few months.

How can we then preserve the balance of institutional powers in Haiti under such circumstances? How can we imagine that the Parliament, still in the process of learning to function, could still be a parliament after months of near non-existence?

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22 This motion of censure differs from that covered in Articles 129.4 and 129.6.

23 The words in parentheses were added in order to ensure the comprehension of the text of this article.

v. The President Cannot Legally Sign Decrees

The absence of the Legislative Power will very quickly become significant if the judicial vacuum created by the vacancy of the entire House of Representatives as of May 8, 2010, is not quickly filled. Indeed, the State may become rapidly ungovernable in the short-term if it does not have the laws necessary to govern even routine affairs.

While some may think that the Executive Branch can compensate by using decrees, there is a serious obstacle. Mirlande Manigat, in her *Handbook of Constitutional Law*,[24] leaves no room for this possibility.

> "Decree-Law: A decree having the force of law adopted by the Executive Branch, whether by empowering the Parliament according to the Constitution in particular cases, or by misappropriation of legislative prerogatives by the Executive. (…) The Constitution of 1987 has only granted this prerogative to the National Council of Government, and only until the meetings of the Houses (Article 285-1[25])."

This Article 285.1 weighs even more if one refers to Article 150 which states:

> "Article 150: The President of the republic shall have no powers other than those accorded to him by the Constitution."

However, according to Article 136,[26] the President must ensure the continuity of the State and that it functions normally. In the absence of constitutional provisions and by using the theory of "the state of necessity", the President must issue decrees in order to implement the measures required in the absence of Parliament and, in particular – as we have emphasized above – adopt a budget.

> "Referee and guardian of the Constitution, responsible for ensuring the continuity of the State and the normal functioning of the institutions, the Head of State enjoys no explicit constitutional provisions for this task. He should be given sufficient and clearly defined means of action and intervention in case of *force majeure* - referred to in constitutional jargon as "the state of necessity", distinct from the state of war. Even if it means forcing him in such circumstances to consult the Presidents of the two Chambers, the Prime Minister, and the Constitutional Council that analysts, experts, and observers rightly demand to be created."[27]

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[24] Op. cit., Handbook *of Constitutional Law*, page 196.

[25] "**Article 285.1:** The National Council of Government is authorized to issue decrees that have force of law when taken in the Council of Ministers, in accordance with the Constitution, until the Representatives and Senators elected under this Constitution take office."

[26] "**Article 136:** The President of the Republic, Head of State, ensures that the Constitution is respected and enforced, and that the institutions are stable. He ensures the regular operation of the public authorities, as well as the continuity of the State."

[27] written by Constitutionalist Claude Moïse in the ongoing debate on the prospect of a possible amendment of the Basic Charter, *Reflection on Today's Constitutional Issue* - Introductory Text, April 8, 2007. http://radiokiskeya.com/spip.php?article3513

b. Possible Solutions

Insofar as it has now become impossible to hold elections for renewal of the House of Representatives before May 8, 2010, it is imperative to find a solution that would avoid a complete rupture in the constitutional order.

In this regard, we are asked if it is constitutionally possible to extend the terms of the members of the House of Representatives and the Senate, and to determine new dates for future elections and their succession in time.

i. Extension of the Term of the Representatives (and of the Legislature)

The Representatives' term is regulated by Articles 92, 92.1, 92.3 and 130 of the Constitution. These provisions rule on the following matters:

1 The Length of The Representative's Term

> "Article 92: The representatives are elected for four (4) years and may be reelected indefinitely."

2 The Length of The Legislature's Term

> "Article 92-1: They take office on the second Monday in January, and sit in two (2) annual sessions. The duration of their term comprises a legislature."[28]

3 Establishment of the Renewal Period

> "Article 92-3: The House of Deputies is replaced in its entirety every four (4) years."

4 Replacement of a Member While In Office

> "Article 130: In case of death, resignation, disqualification, judicial interdiction, or acceptance of a position incompatible with that of a member of the Legislative body, the Representative or Senator shall be replaced in his Electoral District for only the remainder of his term by a by-election through the convocation of the Primary Electoral Assembly by the Permanent Electoral Council during the same month of the vacancy."

The Constitution is very prolific on the issue of a Representative's term. Indeed, it not only establishes the period of time within which a representative may exercise his term, but also the period of time within which the House of Representatives, and by extension the legislature, may exercise its legislative duties and other duties.

Prima facie, it does not seem possible under the provisions of the Constitution to extend the Representatives' term of office. But such a conclusion must be justified in terms of constitutional law.

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[28] See the section in this analysis entitled "Terms of Office and Constitutional Time" on page 17 regarding the legality of the current term of the Representatives which, according to Article 232, par. d) of the Electoral Law, ends on May 8, 2010."

ii. Extension of the Term of the Senators

The Senators' term is regulated by Articles 95 and 95.3 of the Constitution: These articles read as follows:

> "Article 95: Senators are elected for six (6) years and may be reelected indefinitely."
>
> "Article 95-3: One-third (1/3) of the Senate is replaced every two (2) years."

Prima facie, it does not seem possible to extend the term of office of the Senators who have a six-year term under the provisions of the Constitution.

iii. The choice of New Dates for the Upcoming Elections and Their Succession in Time

1 The Two Legislative Chambers

Neither the Constitution nor the *Electoral Law* determine the dates on which elections must be held to replace members of the House of Representatives and the Senate, but we must ensure that the Haitian State has a Parliament, so that there is no rupture in the constitutional order.[29]

2 The Presidency

For the presidency, the Constitution establishes mandatory dates for holding elections. This is stipulated in Articles 134.2 and 149 that read as follows:

> "Article 134-2: Presidential election shall take place the last Sunday in November of the fifth year of the President's term."
>
> "Article 149: Should the office of the President of the Republic become vacant for any reason whatsoever, the President of the Supreme Court of the Republic, or in his absence, the Vice President of that Court, or in his absence, the most senior judge and so on by order of seniority, shall be invested temporarily with the office of the President of the Republic by the National Assembly duly convened by the Prime Minister. The election of a new President for a new five (5) year term shall be held at least forty-five (45) days and no more than ninety (90) days after the vacancy occurs, as provided in the Constitution and the Electoral Law."

3 The Role of the Electoral Council

In order to ensure the continuity of the Haitian State, the Constitution has specified that an independent institution be responsible for organizing and controlling the electoral process leading to the renewal of the country's political institutions. For this purpose, we must refer to Articles 191 and 194 of the Constitution that read as follows:

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[29] Mirlande Manigat, in her book, *Treatise on Haitian Constitutional Law*, University of Quisqueya, volume II, page 558, reports the fact that Haiti has in fact operated without a Parliament.

> "Article 191: The Permanent Electoral Council is responsible for organizing and controlling with complete independence, all electoral operations throughout the territory of the Republic until the results of the election are announced."
>
> "Article 194-2: Before taking office, the members of the Permanent Electoral Council take the following oath before the Supreme Court:
>
> I swear to respect the Constitution and the provisions of the Electoral Law, and to perform my duties with dignity, independence, impartiality and patriotism."

In accordance with the role entrusted to the Permanent Electoral Council, Article 130 of the Constitution also gives it the authority to call "partial" elections. Article 130 reads as follows:

> "Article 130: In case of death, resignation, disqualification, judicial interdiction, or acceptance of a position incompatible with that of a member of the Legislative body, the Representative or Senator shall be replaced in his Electoral District for only the remainder of his term by a by-election through the convocation of the Primary Electoral Assembly by the Permanent Electoral Council during the same month of the vacancy."

Oddly however, Article 19 of the *Electoral Law* confers the convocation of the electoral assemblies for legislative and presidential elections upon the President of the Republic. This article reads as follows:

> "Article 19: Electoral Assemblies are convened, upon request from the Permanent Electoral Council, by presidential decree establishing the purpose, the location, and the date of the convocation."

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We can, therefore, conclude that the Electoral Assembly should be called in order to hold elections before the end of 2010 in order to fill the positions of members of the Chamber of Deputies and a third of the Senate, and avoid a gap in the Presidency, whose term ends February 7, 2011.

c. The Constitutional Aspect

i. The Existing and Applicable Rule of Law

The terms of the Legislative Chambers and the President, and scheduling elections dates, as mentioned, are stipulated in the Constitution, and, as such, an independent institution is responsible for organizing and overseeing the electoral process according to these provisions. In order to comply with the constitutional provisions, this responsibility has been entrusted to the Court of Cassation.

> "Article 183: When litigation is referred to it, the Supreme Court, sitting as a full Court, shall rule on the unconstitutionality of the laws."

Mirlande Manigat commented on the judiciary control exercised by the Supreme Court:

> "From that date and until 1987 (with the exception of 1983), this responsibility has been entrusted to the Supreme Court (Article 183). But it must be requested; its jurisdiction is therefore not automatic, and the mechanisms of jurisdiction are dependent upon the courts' proceeding."[30]

To understand fully the importance and dynamics of these constitutional provisions, it is important to grasp the legal value and nature of a Constitution.

ii. Constitutional Law: Nature and Legal Value

The defining characteristic of a State of Law is the existence of a Constitution.

A Constitution is defined by all written or customary legal documents[31] that determine the type of Government, and the acquisition and exercise of power by the State. A Constitution is also the totality of legal regulations drafted and revised according to a procedure superior to that used for ordinary law.

Mirlande Manigat defines the material and formal aspect of a constitution as follows:

> "A written text of a legal nature, drafted at a given time by the authorities of a country, sometimes endorsed by popular referendum, that proclaims the major principles of national life, determines the duties and responsibilities, defines the Powers of the State, the nature of the political system, the relations between the governors and the governed."[32]

The Constitution of a State has a superior rank; it is at the highest level in the hierarchy of legal norms that govern the components of a State and its citizens. **The strength of the rule of law which is enacted by the legal norms is based on the fact that any deviation can and must be sanctioned by the judiciary authority**. The judicial control of the legality of all laws and acts is at the foundation of the existence of a democratic society, a society of law.

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30 Op., cit., *Handbook of Constitutional Law*, page 63.

31 In Canada, although the Governor General of Canada and Lieutenant Governors of the provinces have the power to disallow legislations passed by the Parliaments in question, this power is no longer exercised and has now become obsolete. This explains the fact that a constitution also consists of unwritten rules.

32 Op cit, *Handbook of Constitutional Law*, page 33.

iii. The Interpretation of the Constitutional Regulations[33]

According to Mirlande Manigat, a Constitution must favor the superiority of the letter over the Spirit of the law, style over substance.

> "The text combines words and expressions reflecting concepts that result from the science of legal drafting including all of its grammatical requirements and syntactic rigor.
>
> A fundamental principle justifies this obligation of style: the **superiority of the letter over the spirit of the law**. This means that what is valid, legal, legitimate, compulsory, or permissive is what is written and not what the drafters had in mind, nor, after them, legislators and those who enforce the norms, the rulers and the ruled."[34]
>
> (…)
>
> There is of course a "spirit" of the Constitution which can complete its "letter."

The principle of the superiority of the letter over the spirit, i.e. a strict interpretation, forbids the judge, and *a fortiori*, all those who are responsible for enforcing it, to substitute their own interpretation to the clear meaning of the letter of the law. To that effect, the judge must, however, decide whether the text is clear or not and whether to interpret it or not. As such, there are no clear criteria to assess the clarity of a text. In order to interpret the rule of law, the judge first looks at the wording of the text. Usually, he looks at its grammar, and then its logic[35], and decides whether the text should be interpreted. He may also decide to interpret it if the text, as clear as it may be, leads to an absurd or unreasonable result. He must then seek the ultimate purpose of the law, and the text must be interpreted in order to serve the needs of the society at the time the text is being interpreted.

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33 In Canada, due to the organic nature of the Constitutional Law, its interpretation should be flexible since it is difficult to modify and must respond to social changes. This choice should be justified by the desire of the drafters not to constrain the courts to strictly adhere to the state of the law at the time of its adoption. The interpretation of a constitution is completely different from the interpretation of a law. A constitution is drafted in anticipation of the future. It aims to provide a permanent framework for the legitimate exercise of governmental authority. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be able to evolve over time in order to meet new social, political, and historical realities that often its drafters did not envision. (See the article by Judge Bastarache, Justice of the Supreme Court of Canada, "Difficulties in Determining the Legislative Intent in the Context of the Canadian Legislative Bilingualism and Bilegalism." http://www.realiter.net/spip.php?article1665)

34 Op cit, *Handbook of Constitutional Law*, pages 56 and 57.

35 The interpretation of the rule of law is subject to a certain logic: a logic that can be legally justified. In his work, *Logique juridique, nouvelle rhétorique* (*Legal Logic; New Rhetoric*), Perelman lists, in reference to the experience of professional attorneys, 13 types of arguments that enable the interpretation of the law. These arguments are not based on formal logic because they are related to style, but to the substance of the reasoning, the establishment of premises from the texts. They are discursive operations, distinct from intuition, i.e. from the immediate and complete understanding of a thought process. The Oxford Dictionary defines the word **discursive**: "Extracting a proposal by a series of successive reasonings", and **discussion** : "action of discussing, examining alone or with others, by comparing opinions."; "exchange of arguments, of contradicting views."

Article 134 of the Constitution is a clear example of an interpretation that may lead to an absurd or unreasonable result if not interpreted according to its ultimate purpose. The beginning of the article, which states, "**The President of the Republic is elected by direct universal suffrage by an absolute majority of voters**,"[36] is subject to two interpretations. The first, which is a literal interpretation, leads to the conclusion that one must consider all ballots cast by those who voted, including blank ballots, called "white votes", to determine if an absolute majority of votes has been reached by one candidate. The second invokes the ultimate purpose of the law, and justly concludes that one must consider only ballots[37] of the voters who validly designate a candidate, thus those who actually contribute to the determination of the majority.

In a society where the rule of law does not prevail, one does not seek to give a just interpretation of the law but rather to add another law, which, far from contributing to the solution, in many cases further complicates the situation.[38]

iv. The Interpretation of the Provisions of the Haitian Constitution of 1987

We must now determine if we can interpret Articles 92, 92.1, 92.3, 95 and 95.3 to extend the terms of office of the Representatives and Senators on the one hand, and Articles 149, 191 and 194.2 to determine the date of new elections and their succession in time on the other hand.

1 Articles 92, 92.1 and 92.3

These articles read as follows:

> "Article 92: The representatives are elected for four (4) years and may be reelected indefinitely."
>
> "Article 92-1: They take office on the second Monday in January, and sit in two (2) annual sessions. The duration of their term comprises a legislature."[39]
>
> "Article 92-3: The House of Deputies is replaced in its entirety every four (4) years."

We must therefore decide if the text of these articles is clear. If such is not the case, it will have to be interpreted. Even though there are no criteria to evaluate their clarity, we cannot but conclude that these articles are clear both in terms of grammar and logic. The words used do not allow the conclusion that there can be any possible ambiguity in the interpretation of the purpose and subject of these articles. They are inherently comprehensible and understandable; they respect the four cardinal points of legislative drafting: clarity, coherence, conciseness, and readability. Thus, the term of office of the members of the House of Representatives cannot be extended.

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36 What is the difference between votes cast, expressed universal suffrage and voters? Successive electoral laws have stumbled over this matter, and the vote counts have led to controversies in 1990, 1997, 2000 and 2006. Text from the constitutionalist Claude Moïses, see endnote 16 and also Articles 90.1 and 94.2, 281.1 of the Constitution of 1987.

37 The vote is the choice made by a person called to **elect** a candidate.

38 Our comment refers to the provisions of Articles 162.1, 162.2, 163.2, and 166 of the Electoral Law regarding the mention of "no candidate" on the ballot paper to resolve a simple problem of interpretation and application of electoral law.

39 See the section in this analysis entitled "Terms of Office and Constitutional Time" on page 23 regarding the legality of the current term of the Representatives which, according to Article 232, par. d) of the Electoral Law, ends on May 8, 2010."

In short, we could not constitutionally argue that a term could last more than four years or that the Legislature could last longer than four years either.

2 Articles 95 and 95.3

These articles state:

> "Article 95: Senators are elected for six (6) years and may be reelected indefinitely."
>
> "Article 95-3: One-third (1/3) of the Senate is replaced every two (2) years."

As for Articles 92, 92.1 and 92.3, these articles must be applied as stated.

3 Articles 149, 191 and 194.2

These articles state:

> "Article 149: Should the office of the President of the Republic become vacant for any reason whatsoever, the President of the Supreme Court of the Republic, or in his absence, the Vice President of that Court, or in his absence, the most senior judge and so on by order of seniority, shall be invested temporarily with the office of the President of the Republic by the National Assembly duly convened by the Prime Minister. The election of a new President for a new five (5) year term shall be held at least forty-five (45) days and no more than ninety (90) days after the vacancy occurs, as provided in the Constitution and the Electoral Law."
>
> "Article 191: The Permanent Electoral Council is responsible for organizing and controlling in complete independence, all electoral operations throughout the territory of the Republic until the results of the election are announced."
>
> "Article 194-2: Before taking office, the members of the Permanent Electoral Council take the following oath before the Supreme Court:
>
> I swear to respect the Constitution and the provisions of the Electoral Law, and to perform my duties with dignity, independence, impartiality and patriotism."

Here, we find ourselves in a situation where the founders of the Constitution did not provide specific deadlines for calling elections, except for the Presidency in case of vacancy[40]. Therefore, the Electoral Council may request that the President calls for elections at the most appropriate time. In doing so, it has the obligation to request that the elections be called to avoid any discontinuity in the exercise of the legislative power.

Indeed, the Electoral Council had obtained that the first round of elections be called for 28 February (nine departments) and 3 March (Center), but they had to be cancelled due to the earthquake of 12 January.

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[40] See Articles 134.2 and 149 of the Constitution of 1987.

It will now have to choose new dates for the elections[41] as soon as possible, given the unique situation Haitians currently face, and the fact that Haiti will be without parliament as of May 8, 2010. There is reason to conclude that the spirit of the Constitution allows the Electoral Council to determine the best time to hold the next elections.

> "There is, of course, a "Spirit" of the Constitution, which can complement the letter."[42]

There is also reason to conclude that, in this case, the Supreme Court cannot judge the cancellation of the legislative elections of February/March 2010 or their postponement to a later date to be unconstitutional.

On the other hand, in the case of the extension of the Representatives' and Senators' terms, the Supreme Court could declare that there has been an usurpation of power, both on the part of Parliament and on the part of the individuals who stayed in office, and declare null and void the actions taken by that Parliament or those individuals.

If elections were to be held outside of the timeframe imposed by the Constitution, the Supreme Court's intervention could not lead to the cancellation of those elections, but only to sanctions against members of the Electoral Council for not having initiated the electoral process more quickly.

v. The Differences between the French and Creole Versions of the Constitution of 1987

1 Creole, Common Language and Official Language

It is only since the Constitution of 1987 that Creole has been added as an official language,[43] whereas the Constitution of 1957 stated only that "All Haitians are united by a common language: Creole."

The first sentence in Article 5 of the Constitution actually poses as fact that French is not the language used by all Haitians. Consequently, this imposes on the State, the leaders, the public servants, the Parliamentarians responsible for lawmaking, the Court clerks drafting minutes, to speak and write in the only language understood and spoken by all. Not everyone knows how to read and write (pending application of Articles 32 and 33 of the Constitution), but they can all understand a clear text in Creole, intelligibly read by others.[44]

2 Both Versions Are Equal and State the Law

It is generally accepted that without specific provisions on the prevalence of bilingual versions, both are applicable. The Constitution of 1987, and specifically Article 5, does not contain any regulation indicating the prevalence of one of these official languages over the other.

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41 As seen above, it is the President who is responsible, according to Article 19 of the Electoral Law, for convening electoral assemblies.

42 Op cit, *Handbook of Constitutional Law*, page 57.

43 French was declared the official language of Haiti in Article 24 of the Constitution of 1918.

44 Creole and the "Constitution, Article 5 and Rationality, February 7, 2010.
See: http://haiti-nation.com/index.php?option=com_content&view=article&id=117:le-creole-et-la-constitution&catid=51:le-creole-haitien&Itemid=75

> "Article 5: All Haitians are united by a common language: Creole. Creole and French are the official languages of the Republic."

We can therefore confirm that these two languages should be equally applicable.

However, it has been irrevocably established that the subtleties of a language can lead to some differences in the comprehension and the drafting of a rule of law. In some cases, it has been argued that the interpretation of a provision of the Constitution from the French version did not correspond with the understanding invoked by those who speak Creole.

In such a case, we must understand that "in the interpretation of a bilingual law, no presumption favors the apparent meaning of one over the other. Both linguistic versions state the law. Better yet, neither "is" the norm; they are, rather, access points to the meaning of the norm, and, perhaps, the intent of the legislator".[45]

3 The Method for Resolving Differences

If one version is ambiguous, the rule is simple: One must refer to the clearer version in order to determine the common meaning in both versions of the law.

When the versions conflict with each other, there are cases in which both versions are clear but incompatible. In such a case, we choose the version which seems to better reflect the intention of the drafters as can be determined by resorting to the ordinary rules of interpretation.

4 No Official Text of the Constitution in Creole

In spite of the Constitution giving official status to the Creole language, there has never been an official text of the Constitution of 1987 in Creole. The text in Creole is a translation written by a Haitian militant, Pòl Dejan.[46] Consequently, any claim that the Creole version should be applied is without legal basis.

vi. Terms of Office and Constitutional Time

1 The Representatives' Term of Office

According to Article 92.1 of the Constitution, the Representatives begin their term on the second Monday of January. Article 92.1 states:

> "Article 92-1: They take office on the second Monday in January, and sit in two (2) annual sessions. The duration of their term constitutes a legislature."

However, although one cannot amend the Constitution without following the procedure stipulated in Articles 282 and following, Article 232 paragraph (d) of the *Electoral Law* stipulated that the Representatives' term of office ends on May 8, 2010.

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45 Robert Leckey, *Harmonizing the Law in a Multilingual Environment with Multiple Legal Systems: A Canadian Perspective*, p.44 and 45.
(see: http://www.unidroit.org/english/publications/review/articles/2008-1&2/039-058.pdf)

46 See: http://www.tlfq.ulaval.ca/axl/amsudant/haiti-const-bilng.htm

2 The Senators' Term of Office

As previously mentioned, a senator's term lasts six years, and one becomes a senator on the day he takes the oath stipulated in Article 109 of the Constitution. However article 288 states that:

> "Article 288: For the next electoral consultation, the terms of the three (3) Senators elected for each department will be established as follows:
>
> a) The Senator with the highest number of votes will enjoy a term of six (6) years;
> b) The Senator with the second highest number of votes will have a term of four (4) years;
> c) The third Senator will be elected for two (2) years. Subsequently, each elected Senator will be invested for a term of six (6) years."

In spite of the Constitution, Article 232 paragraph (b) of the *Electoral Law* stipulates that the term of the Senators elected for six years in 2006 would end on the second Monday of January 2012, if elections were held no later than December 2011; otherwise, they would remain in office until May 8, 2012. In paragraph (c) of this same article, it is established that the term of the senators elected for four years in 2006 would end on the second Monday of January 2010 if the elections were held no later than December 2009; otherwise, they would remain in office until May 8, 2010.

3 The President's Term of Office

Some are tempted to believe that the current President can remain in office past February 7, 2010, due to the fact that he assumed his position after February 7, 2005. Such a claim would be difficult to sustain, however, since it goes against the very letter of Articles 134.1 and 134.3 of the Constitution.

> "Article 134-1: The term of the President is five (5) years. This period begins and will end on the 7th of February following the date of the elections."
>
> "Article 134-3: The President of the Republic's term may not be extended. He may only serve an additional term after an interval of five (5) years. In no case, he may run for a third term."

The matter of term extension could be put into question even more since this President will be at the end of his second term.

Finally, it is true that the date of February 7 could pose a real problem at the constitutional level, but only if the current President had been installed according to Article 149. Mirlande Manigat also comments on this problem:

> "If the President were to die, for example, on the 1st of May, the Provisional President would have to organize elections within 3 months, therefore before the 1st of August. Assuming the

> technical problems were resolved, according to Article 134.1 the newly elected would have to wait until February 7 of the following year to take office."[47]

The matter of the duration of the President's term is subject to debate because the Constitution set its length by a date (February 7) and a time frame (5 years). The two provisions are clear, but their applications do not correspond. In such a case, we must ascertain the purpose of these two apparently contradictory provisions. In legal terms, the date of February 7 must be seen as the end date[48] of the term of office, and the five years as the sequence in which the president must be replaced by holding an election.

On this subject, Mirlande Manigat says:

> "In the normal course of political life, there is a sequential order that can be followed: every 5 years elections are organized, and the President takes office on February 7 of the following year, which is two months later."[49]

If any doubt still remains regarding the combined effect in legal terms of a date and a duration, there is reason to believe that any doubt would have to disappear upon reading Article 134.1 of the Constitution, and Article II, section 1 of Amendment XX, section 1 of the American Constitution.

Article 134.1 reads:

> "Article 134-1: The term of the President is five (5) years. This period begins and will end on the 7th of February following the date of the elections."

Article II, Section 1 and Amendment XX, section read as follows:

> "Article II, Section 1: The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows: (…)"
>
> "Amendment XX, Section 1: The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin."

Both constitutions have the same effect; they establish a duration and an expiration date.

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47 Op. cit., *Haitian constitutional law treatise*, Volume II, page 460.

48 The term "forfeiture" in the law indicates the loss of the right to act or of the benefit from a law imposing sanctions on those who have not taken the necessary measures within the required time frame. This expression and *foreclosure* are often used interchangeably.
Paragraph *a* of Article 232 of the Electoral Law clearly confirms February 7 as the deadline for forfeiture. Indeed, this paragraph stipulates that
"**Article 232:** The length of the terms of those elected in 2006 is established in the following manner:

a) the President of the Republic is in office until February 7, 2011; […]".

49 Op., cit., Treatise on *Haitian Constitutional Law*, page 460.

vii. The Installation of The Representatives, Senators and the President

1 The Procedure Leading to Installation

To become a deputy, senator, or president, according to Articles 90.1 and 134, one must be elected by an absolute majority of votes cast.

> "Article 90-1: The Representative is elected by an absolute majority of votes cast in the Primary Assemblies, according to the conditions and in the manner prescribed by the Electoral Law."
>
> "Article 94-2: The Senator of the Republic is elected by universal suffrage by an absolute majority in the Primary Assemblies held in the geographic Departments, under the terms prescribed by the Electoral Law."
>
> "Article 134: The President of the Republic is elected by direct universal suffrage by an absolute majority of voters. If that majority is not obtained in the first round, a second round is held…"

According to the Electoral Law, the Electoral Council declares the candidates elected and ensures publication of the results in *Le Moniteur*.

> "Article 177**:** After being proclaimed by the Permanent Electoral Council, the results of the two rounds are officially sent to the Executive Branch for publication in the Official Journal of the Republic, *Le Moniteur*, within a period not to exceed eight (8) days.
>
> A copy of the results sent to the Executive is also sent to the Legislative Power[50]. The official results are posted by the BED and BEC."

Subsequently, each of the elected Deputies and Senators, and the President-elect must take the oath required by the Constitution in order to take office.

> "Article 109: The members of each House shall take the following oath:
>
> 'I swear to perform my duties, to maintain and safeguard the rights of the people, and to be faithful to the Constitution.'"
>
> "Article 135-1: Before taking office, the President of the Republic shall take the following oath before the National Assembly:
>
> 'I swear before God and the Nation, to faithfully observe the Constitution and the laws of the Republic, to respect and enforce the rights of the Haitian people, to work for the greatness of the country, and to maintain the nation's independence and the integrity of its territory."

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50 Delivery of the results to the legislative power is rather preposterous since at the time they are sent, there is no House of Representatives. The Legislature becomes an existing and operational entity only on the day the new Legislature begins.

2 The Date for Taking Office

According to Article 92.1, if the constitutional time is respected, the Representatives take office on the second Monday in January and for the next four years constitute a legislature.

> "Article 92.1: They take office on the second of Monday in January and sit in two (2) annual sessions. The duration of their term constitutes a legislature."

The senators, if the constitutional time is maintained, begin their term on the second Monday in January. The Senate is permanently in session.

Thus, one must understand that the Electoral Council must ensure that elections are held so that the Representatives and the Senators take office as stipulated in the Constitution, since there will be a rupture in the constitutional order. However, it must be understood that the inauguration will be postponed to a later date if the Representatives, Senators, and the President take their oath after the second Monday in January.[51]

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Consequently, the Electoral Council must hold elections before the end of the year, so that the elected Representatives and the Senators can start their mandates on January 10, 2011, and the President on February 7, 2011, in accordance with the Constitution. This will also permit Parliament (49th legislature) to study the constitutional amendments proposed by the 48th legislature, and possibly to adopt them before the new President's inauguration.

d. An actual Situation of Rupture of the Constitutional Order: Legal Solutions

The postponement of the dates for the election of the members of the House of Representatives to after May 8, 2010, will provoke a rupture of the constitutional order in Haiti. The importance of this rupture is explicitly established in Section A: *"The Problem"* above.

In this regard, Mirlande Manigat has posed the problem in the following terms:

> "In the political history of a country, it is not always necessary to prepare a new constitution. Depending on the situation – a total or partial rupture of the constitutional order – an alternative solution can be adopted."[52]

To alleviate a situation of rupture of the constitutional order, Mirlande Manigat evokes two possible solutions: the re-establishment of a previous Constitution or the revision of the current Constitution.

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51 Articles 129 and 152 confirm that a Representative's term in office starts when he is sworn in.
"Article 129**:** Each member of the Legislature receives a monthly salary after being sworn in.
"Article 152**:** The President of the Republic receives a monthly allowance from the Public Treasury starting when he is sworn in. "

52 Op cit, *Handbook of Constitutional Law (Manuel de droit Constitutionnel)*, page 67.

i. The Reinstatement of a Previous Constitution

Mirlande Manigat has the following comments regarding this alternative:

> "The purpose of this recourse is to avoid the country being plunged into a situation of a-constitutionality or a juridical void susceptible of being exploited by those holding power to establish personal power or a dictatorship. It consists in decreeing that from a certain point in time and for a certain period of time:
>
> -The functioning of the institutions will be regulated by such Charter from the past;
>
> -(….)
>
> -The decisions to be adopted to make the State function and resolve the current problems will be in conformity with this Constitution;
>
> -Above all, the elections designed to renew political personnel (President, parliamentarians) will be organized according to the prescribed provisions and methods."[53]

She notes that, in Haiti's history, this procedure has been used seven times, the last time being in 1957.[54]

ii. Revision According to the Procedure Stipulated in the Constitution

Succinctly, this requires modifying the Constitution according to the procedure set out in Articles 282 to 284 which reads as follows:

> "Article 282: On the recommendation of one of the two (2) Houses or of the Executive Branch, the Legislative Power may declare, with the reasons to support it, that the Constitution should be amended."
>
> "Article 281-1: This declaration must be supported by two-thirds (2/3) of each of the two (2) Houses. It may only be done during the last Ordinary Session of the Legislature and shall be published immediately throughout the territory."
>
> "Article 283: At the first session of the following legislature, the Houses shall meet in a National Assembly and rule on the proposed amendment."
>
> "Article 284: The National Assembly may not sit or deliberate on the amendment unless at least two-thirds (2/3) of the members of each of the two (2) Houses are present."
>
> "Article 284-1: No decision of the National Assembly may be taken without a majority of two-thirds (2/3) of the votes cast."

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53 Op cit, *Handbook of Constitutional Law (Manuel de droit constitutionnel)*, page 67.

54 Op cit, *Handbook of Constitutional Law (Manuel de droit Constitutionnel)*, page 67.

> "Article 284-2: The adopted amendment may enter into effect only after the inauguration of the next elected President. In no case whatsoever may the President under the Government that approved the amendment benefit from any advantages deriving from it."

Mirlande Manigat shares with us that the codification procedure is said to be rigid.

> "It allows the text to be classified in the category of rigid Constitutions and the analysis of its different segments, such as the implementation of the timetable, reveals a complexity which results in a prospective blockage and thus juridical sterility that, without doubt, the founders did not anticipate in their concern to avoid past manipulations.
>
> The revision is inserted into a virtual corset which does not allow the Constitution to be modified in a reasonable timeframe and to satisfy conjectural necessities."[55]

A necessary or politically appropriate constitutional amendment should normally take five to eights years to come into effect once the procedure is started.[56] The table in Annex I presents two hypotheses for the time required for the revision to become effective.

However, there is a second possible situation with regard to the first hypothesis; i.e. the declaration of amendment adopted by the current Legislature. The first hypothesis presents, by virtue of Article 284.2[57], a double situation in case the next Legislature – i.e. that of 2011 – would adopt the constitutional revision during its first session, between the second Monday in January and the second Monday in May, and thus, before or after the election of the new President.

In the first case, the revision would enter into force after February 7, 2011; in the second case, after February 7, 2015, because whatever the case may be, the constitutional revision cannot benefit the President under whom it was adopted. Thus, in the first case, the amendment would be adopted while President Préval is still in office (thus before February 7, 2011) in order to become effective under the following President. In the second case, if the amendment is adopted while the next president has already taken office (after February 7, 2011), the amendment would enter into force only under the president who will be in office after February 7, 2015.

It should be noted that the first case is very unlikely because it is difficult to believe that serious legislators could adopt amendments of such considerable impact for the nation as a whole in such a short period of time.

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55 Op cit, *Handbook of Constitutional Law (Manuel de droit constitutionnel)*, page 69 et 70.

56 Op cit, *Handbook of Constitutional Law (Manuel de droit constitutionnel)*, page 71.

57 This article reads as follows:
"Article 284.2**:** The amendment can only become effective after the next elected President has taken office. In no case can the President under whose government the amendment took place benefit from the advantages that arise from it."

iii. Other Known Solutions

Without having really examined previous times when all or part of a previous constitution were reinstated, it can be said that such a solution would most likely not be acceptable because the past Constitutions are probably not adequate to respond to the challenges the Haitian State is faced with after the earthquake on January 12, 2010.

However, recourse to a revision is probably no more adequate because of the timeframe necessary to make whatever changes, even if the current Parliament adopted the declaration of amendment to the Constitution. Indeed, we must first count on the elections of the House of Representatives and one-third of the Senate, as well as the election of a new President.[58] Even if such elections were successful, it would be necessary for the legislative chambers to consider each of the proposed amendments and to agree on a final text. Even if this were the case, as we have already pointed out, the constitutional revision could become effective under the President elected in 2011, we should probably consider other possible avenues because the "rebuilding of Haiti" must, according to the Haitian constitutionalist Claude Moïse, go through a revision of the constitution.

> "(…) can the country continue to live in perpetual danger of an institutional disequilibrium and unconstitutional public powers? How long must we wait, without being exposed to crises, to clarify the rules of the game, guarantee political stability, revisit the constitutional basis of the organization of our rule of law, and simplify the procedures, without sacrifice to the nature of the political regime and fundamental rights."[59]

e. The Adoption of a New Constitution

i. The Use of a Constituent Entity

To get out of the "situation of a-constitutionality, i.e. a legal vacuum susceptible to exploitation by those in power,"[60] and because of the inadequate process of constitutional change, there is only one alternative: that of revoking the Constitution of 1987 and of returning to a constituent entity.

> "The Constituent power is organized when there is a collapse of the legal and political order in a country that leads to the functional disappearance of the institutions and the declared nullity of the Constitution of the time."[61]

In his article called "Small Constitutions: *Contribution to the Analysis of Transitional Constitutional Law" (Les petites Constitutions: contribution à l'analyse du droit constitutionnel transitoir*e), Emmanuel Cartier outlines the two forms of legitimate exercise of constituent power: [62]

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58 To be able to adopt the constitutional revision before February 7, 2011, it would most likely be necessary for all of the Representatives to be elected in the first round and no election invalidated.

59 Text of constitutionalist Claude Moïse, see note 18.

60 Op cit, *Handbook of Constitutional Law (Manuel de droit constitutionnel)*, page 67.

61 Op cit, *Handbook of Constitutional Law (Manuel de droit constitutionnel)*, page 41.

62 French Review of Constitutional Law (Revue française de droit constitutionnel), 2007/3 (No. 71), page 532.

> "Democracies have two forms of legitimate exercise of constituent power. The first, in conformity with the theory of representative democracy, is the parliamentarian form where people exercise their right of suffrage in order to elect representatives of a sovereign Assembly[63] whose task is to adopt a new constitution. The second is the direct form where the people are directly invited to approve or reject a text elaborated by an authority that could be either an Assembly or a restricted executive committee."

Mirlande Manigat effectively observes in her *Handbook of Constitutional Law (Manuel de droit constitutionnel)* that the original power and the derived power have been used respectively 11 and 8 times.[64]

ii. The Adoption of Transitional Constitutional Provisions

To ensure the continuity of public power between the time when there is a rupture of a constitutional order and its re-establishment, sometimes we may resort to transitional provisions. These transitional provisions are either part of the new constitution or the subject of a separate document.

> "The rupture with the previous legal order translates into a formal discontinuity with the normative past without implying a material discontinuity. Indeed, with the exception of constitutional laws, the components of the previous legal order are included selectively into the new legal order. This inclusion, which gives it renewed validity, is most often implicit, but sometimes formalized by the texts, either during the period preceding the adoption of the final Constitution, or in the final Constitution itself."[65]

1 The Haitian Constitution of 1987

The method chosen to give birth to the Haitian Constitution of 1987 was by adding transitory provisions in the Constitution itself. It is Articles 285 and following that validated the transition between the Constitution of 1983 and the one of 1987.

2 A Transitional Administrative Law

The author of "Small Constitutions: *Contribution to the Analysis of Transitional Constitutional Law*," Emmanuel Cartier, describes the "transitional administrative law of the State" adopted by the transitional authority of the Coalition in Iraq on June 28, 2004, that he qualifies as being particularly interesting.[66]

> "This model of small constitution is particularly interesting as much for the richness of its content as for the superior form which is conferred upon it. The "administrative law" that will

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63 On this subject, see the article entitled, *The national sovereign conference, original constitutional power (La conférence nationale souveraine, un pouvoir constituant original)*, by Magalie Besse: http://www.droitconstitutionnel.org/congresParis/comC3/BesseTXT.pdf

64 Op. cit., *Handbook of Constitutional Law (Manuel de droit constitutionnel)*, page 71.

65 Op. cit., French Review of Constitutional Law (Revue française de droit constitutionnel), page 520.

66 Op. cit., *French Journal of Constitutional Law* (Revue française de droit constitutionnel), page 528.

> come into effect as soon as Iraq is formally given its sovereignty back specifies in its Article 3 that it applies until the formation of an Iraqi government elected in conformity with a permanent Constitution. This same article states that this law constitutes «the supreme law of the land (…)."

It was by virtue of this constitutional law that the general elections were organized in Iraq on January 30, 2005, a National Assembly created, a new constitution adopted on October 15, 2005, and permanent institutions established on December 15, 2005.

3 The Congolese Transitional Constitution of 2006

Finally, it is appropriate to point out the method chosen by the Congolese authority in 2006, as it is certainly more in conformity with constitutional law. However, it is important to note the circumstances and the manner in which this transitional constitution was established.

> "With the adoption by acclamation of the text of the transitional constitution by delegates of the inter-Congolian dialogue who met in Sun City, President Kabila was sworn in before the Supreme Court in Kinshasa, launching the transition at the same time. The Congolese constitutionalists who populated the law departments of the Congolese universities were excluded from the drafting of this transitional constitution. Of which {*sic*} the tutelary Western powers of Congo entrusted the drafting to 3 foreign jurists: a Canadian, a Senegalese, and a Genevan Swiss, Alain Jacques Siggs. This possibly suggested the contempt that they would have from then on towards the Congolese political and intellectual classes. Considered incapable of agreeing rapidly on the essential minimum, the rescue of their country."[67]

These comments lead us to emphasize the quality of the Congolese constitutional texts, both transitional and permanent, without of course prejudging the quality of the constitutional texts that the Congolese academics could have drafted.

4 The Drafting of the Future Haitian Constitution

Having performed five missions in the Democratic Republic of Congo and three missions in less than one year for IFES, including the current one, we have studied the Congolese and Haitian Constitutions, and have observed that the Haitian Constitution[68] is particularly deficient, both in substance and style. Admittedly, the Congolese Constitutions are more recent, but this does not explain the problems of law, interpretation, coherence and syntax found in the Haitian Constitution

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[67] Jules-Maps Bagalwa Mapatano, Crises of State and Migrations : the Congolian Zairese Diaspora in Switzerland (Crises de l'État et migrations: la diaspora congolaise zaïroise en Suisse), p.239 The part cited is available on the following internet site: http://books.google.ca/books?id=MVGi0cF9OGkC&pg=PA284&lpg=PA284&dq=constitution+transitoire+congolaise&source=bl&ots=k_rlurjFpU&sig=6bUEzynkVsAQXBRGtK1OL2dU9DE&hl=fr&ei=HnaWS53bCMKolAfcrfGzDQ&sa=X&oi=book_result&ct=result&resnum=7&ved=0CBYQ6AEwBg#v=onepage&q=constitution%20transitoire%20congolaise&f=false

[68] It is also useful to point out that during our 2 missions in Haiti, on behalf of the Canadian Parliamentary Center in 2009; we have also studied the 1987 Constitution.

of 1987. These problems are particularly crucial on electoral matters. The analysis performed for IFES last July revealed a great number of these problems.[69]

After reading the report of the Presidential Commission tasked with examining the modifications to be made to the Constitution of 1987, we are particularly worried because, far from correcting the problems of law, interpretation, coherence and syntax, the proposed texts add even more to the difficulties that the possible drafting of a new *Electoral Law* in Haiti would present.

In the Democratic Republic of Congo, engaging experts to draft the constitutional texts enabled the drafting of the law on voter identification and registration, the law on holding a referendum, and the electoral law, under optimum legal conditions.

III. Conclusion

This analysis details the whole array of consequences resulting from the discontinuity of power by first defining the problem with regards to the Legislative power, the House of Representatives, the Senate and the Presidency after the earthquake of January 12, 2010.

After discussing the possibility of term extensions and the choice of new election dates and their succession in time, the analysis stated the rules governing the implementation of constitutional provisions in order to ensure a full understanding of the impacts in case of discontinuity of power. Next, the analysis described all the solutions available to come out of a situation of a-constitutionality in order to also understand what all the possible solutions to regaining a better constitutional base are.

It is already very difficult to state the law, and even more so when the rule of law is not always respected. As far as the Haitian Constitution is concerned, not respecting it seems to be more the norm than the exception, to such an extent that it has become almost impossible to advocate the law because in certain circles, the premise is that "nobody will respect it". This premise is so anchored in Haitian reality that a law as fundamental as the Electoral Law of July 2008 is riddled with provisions that are unconstitutional.

Finally, it is important, in spite of the current situation that the Haitian society chooses to take immediate and concrete measures and actions so that shortly after the earthquake, a renewal is perceived in Haitian Governance. Such a renewal must undeniably go through the replacement of the members of the Parliament and the Presidency, as well as the reformulation or replacement of the Constitution of 1987 as is the wish of the Haitian constitutional experts.

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[69] See *Legal and Technical Analysis of the Haitian Electoral Law of July 18, 2008*, Claude Rioux and Sophie Lagueny, IFES, December 2009

Appendix I: CONSTITUTIONAL REFORM TIMETABLE

Procedures in articles 282 to 284.2 of the Constitution

Current Legislature	Legislature starting in January 2011	Presidency starting in February 2011
Current Legislature	**Legislature starting in January 2011**	**Presidency starting in February 2015**
Legislature ending in December 2014	**Legislature starting in January 2015**	**Presidency starting in February 2019**
Last session	1st session	1st session
Adoption by 2/3 of each of the 2 legislative bodies of the declaration of amendments	Quorum of 2/3 for each of the legislative bodies	Entry into force of the amendments after the investiture of the newly elected President
Publication	Adoption of the amendments by 2/3 of the National Assembly's members	
	Investiture of the newly elected President	

Appendix II: List of Persons Interviewed

Beauvoir, John	Responsable des projets en appui aux partis politiques, NDI
Benoît, Stevens	Membres de la Chambre des députés
Côté, Sylvain	Gestionnaire de programme du PAPH (Canada-Haïti) du Centre parlementaire canadien
Francoeur, Lucien	Secrétaire générale de la Chambre des députés
Gilot, Rony	Conseiller du Président de la Chambre des députés
Latulippe, Gérard	Directeur de NDI en Haïti
Levaillant, Louis J.	Président de la Chambre des députés
Manigat, Mirlande	Constitutionnaliste, professeur de droit à l'Université Quisqueya, auteur de nombreux ouvrages, candidate au Sénat aux élections de 2006,
Moïse, Claude	Historien, Membre de la Commission présidentielle sur la révision de la Constitution
Payne, David	Chef de projet en appui au Parlement, ARD
Siegel, Louis	Chef de projet en appui aux collectivités territoriales, SUNY

Appendix III: Bibliography and Other Documents

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Moïse, Claude — Texte du constitutionnaliste haïtien Claude Moïse dans le cadre du débat en cours sur les perspectives d'un éventuel amendement de la Charte fondamentale, **Réflexion sur la question constitutionnelle aujourd'hui**- Texte d'introduction, 8 avril 2007.

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Trouillot, Ertha Code de lois usuelles, Tome 2

3. Constitutional Laws and other legal documents

La Constitution haïtienne de 1987

La loi électorale haïtienne de 2008

La Constitution congolaise de transition

La Constitution congolaise de 2006

La Loi portant identification et enrôlement en République Démocratique du Congo

La Loi portant organisation du référendum constitutionnel en République Démocratique du Congo

La Loi portant organisation des élections présidentielle, législatives, provinciales, urbaines municipales et locales en République Démocratique du Congo

4. Other Documents

Le Rapport au Président de la République, Commission présidentielle, groupe de travail sur la Constitution de 1987

La Constitution de 1987 amendée

Documents provenant de la Première conférence nationale organisée par le Député Steven Benoît - Hôtel Ritz du 22 au 26 mars

Haïti : Résumé du PDNA du tremblement de terre, Évaluation des dommages, des pertes et des besoins, Haïti PDNA 2010

Haïti Demain : objectifs et stratégies territoriales pour la reconstruction, République d'Haïti - Comité interministériel d'Aménagement du territoire CIAT, mars 2010

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