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# POST-DISASTER ASSESSMENT ON THE FEASIBILITY OF ORGANIZING FREE AND FAIR ELECTIONS IN HAITI



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The opinions expressed herein are those of the authors and do not necessarily reflect the views of the United States Agency for International Development or the United States Government.



## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b>		i
<b>I. MANDATE</b>		1
<b>II. BACKGROUND</b>		1
<b>III. STRATEGY</b>		2
<b>IV. RESULTS OF INTERVIEWS</b>		3
<b>V. ANALYSIS AND POSSIBLE SCENARIOS</b>		4
1) The Terms of Office of the Elected Officials According to the Constitution Of 1987 and Its Provisions		5
2) The Current Status Of The Elected Officials' Terms Of Office		8
3) Three Possible Scenarios		10
<b>VI. CONDITIONS AND REQUIREMENTS FOR FREE AND FAIR ELECTIONS</b>		12
<b>VII. DONOR FUNDING AND COORDINATION</b>		18
<b>VIII. CONCLUSIONS AND RECOMMENDATIONS</b>		18
<b>APPENDIXES</b>		
- <b>LIST OF PERSONS INTERVIEWED</b>		20
- <b>ANALYSIS OF THE CONSTITUTION</b>		

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## ACRONYMS

ASEC	Assembly of the Communal Section
BEC	Communal Electoral Office
BED	Departmental Electoral Office
CASEC	Council of the Communal Section
CEP	Provisional Electoral Council
CEPPS	Consortium for Electoral and Political Processes
CIDA	Canadian International Development Agency
CIN	National Identification Card
COP	Chief of Party
IDP	Internally-Displaced Person
IFES	International Foundation for Electoral Systems
MINUSTAH	United Nations Stabilization Mission in Haiti
NDI	National Democratic Institute
OAS	Organization of American States
ONI	National Identification Office
PDNA	Post-Disaster Needs Assessment
PNH	Haitian National Police
RPC	Reallocation and Polling Centers
UN	United Nations
UNDP	United Nations Development Programme
USAID	United States Agency for International Development

## EXECUTIVE SUMMARY

During the months of March and April 2010, the International Foundation for Electoral Systems (IFES) carried out a technical assessment, including an evaluation on the current state of the electoral registry in light of the massive changes in the population, the enfranchisement of Internally-Displaced Persons (IDP), and security environment. IFES also evaluated the needs and challenges facing the Haitian Provisional Electoral Council (CEP), and its decentralized Departmental and Communal Electoral Offices (BEDs and BECs) in the future organization of elections, including but not limited to out-of-country voting, identification cards and voter lists, infrastructure, communications, resources, the overall political environment and the role of civil society. This assessment includes an analysis of the Constitution with regards to scheduling future elections, as well as their sequencing and the legal implications for extending mandates.

The IFES team was comprised of the Chief of Party, one national consultant and one international legal expert who spent a period of two weeks in country. The team's strategy was to meet as many stakeholders as possible during the first month and a half of the mission, both in Port-au-Prince and in the field, to gather all the necessary information, and then spend the last two weeks drafting the final report.

Interviews were led in a similar fashion with each of the 99 individuals the team met with. Those individuals represented civil society, including the private sector, governmental authorities and decentralized offices of the CEP. The interviews were based on the following questions:

- 1) Do you know about the upcoming institutional vacuum and its impact on governance?
- 2) Do you recommend that elections be held? Do you think they are possible? Will the electorate be interested in going to the poll?
- 3) If yes, what are the minimal requirements/crucial issues to be addressed to have good elections; if not, what do you propose?

Except for a small number of civil society representatives in Port-au-Prince, all other interviewees were very adamant that elections should take place so that "elected officials replace elected officials". However they were all equally forceful in voicing their opinion against "elections for the sake of elections". The main concerns they believed had to be addressed and solved before elections could take place included the following:

- 1) Lack of credibility and trust in the CEP
- 2) Political parties' poor representation and representativeness
- 3) Lack of understanding and information of the electorate in governance in general and the electoral process in particular
- 4) Organization of general elections (presidential, legislative, and local at the same time) considering the electorate's high level of illiteracy
- 5) The need to assist the population in improving their current humanitarian situation to increase their motivation and avoid manipulation

6) The disenfranchisement of displaced people and the replacement of lost National Identification Cards (CINs)

According to the Post-Disaster Needs Assessment's (PDNA) sub-group on the democratic process, and representatives of the National Democratic Institute (NDI), the political parties, mainly from the opposition, were against elections under President Préval and with the current CEP. However, they also believed that their stance was more posturing than conviction and that they would register and run if and when elections were announced.

The few individuals representing civil society who were against elections due to their lack of confidence in the current government and CEP promoted the idea of a "Government of National Unity" but had no concrete proposal on how to achieve it.

According to the Constitution, there are no provisions for the extension of the term of any of the elected posts. In the present situation, the term of office of the President expires on February 7, 2011, the local officials' term in early 2011, and those of the members of the House of Representatives, and the Senators elected for 4 years expire on May 8, 2010. Therefore, the CEP faces the daunting task of organizing elections for all elected posts before the end of the year.

IFES developed three possible scenarios that are deemed technically possible:

**Scenario A:** National and local elections at the same time before the end of the year.

**Scenario B:** Presidential, legislative, Municipal Council (1 Mayor and 2 deputy Mayors) and town delegate elections together before the end of the year, and Assembly of the Communal Section (ASEC) and Council of the Communal Section (CASEC) elections as soon as possible in 2011;

OR

Presidential, legislative and Municipal Council elections together before the end of the year, with town delegate, ASEC and CASEC elections as soon as possible in 2011.

**Scenario C:** Presidential and legislative elections together before the end of the year, then Municipal Council, town delegate, ASEC and CASEC elections as soon as possible in 2011.

Each scenario presents various advantages and disadvantages, **but IFES believes that scenario C is the most reasonable, feasible and logical** for the following reasons:

- It would ensure the participation of the electorate in both elections
- It would separate the two-round national elections from the one-round local elections
- It would also give more time for the displaced people to decide whether they will stay permanently in their new location or go back to their place of origin

- It would allow for the possible adoption of amendments to the Constitution at the 1<sup>st</sup> session of the 49<sup>th</sup> legislature, thus possibly simplifying the organization of the local elections

IFES believes the **operational branch of the CEP** is technically capable of organizing any of the three scenarios mentioned above; assuming their preparations are not delayed any longer, and the following problems and issues are addressed and solved:

1. The lack of credibility and trust in the current Provisional Electoral Council: Giving the mandate of organizing the upcoming elections to the current CEP would mean that the electoral process would be considered flawed and questionable from the start.
2. Financial resources: It is highly anticipated that the next electoral process, as well as the activities that must take place before the beginning of the electoral calendar, will be fully financed by the international community. Therefore, one of the international community's priorities must be to make at least a portion of these funds available as soon as possible so that both the CEP and the National Identification Office (ONI) can begin the necessary preparations for the replacement of lost identification cards and the reallocation of displaced persons to the polling center closest to their current place of residence, no later than May 2010.
3. Production and distribution of National Identification Cards (CINs): The production and distribution of CINs is the legal responsibility of the ONI. It includes the production and distribution of CINs to new registrants as well as to already-registered citizens who have lost theirs. Given the ONI's past difficulties in producing and distributing CINs on time, the CEP is proposing a joint operation for the implementation of this activity and that of updating the electoral lists.
4. Electoral Lists: The two major problems with the Civil Registry, and therefore the electoral lists, are: (1) the removal of the deceased and (2) the reallocation of the people displaced after the earthquake to polling centers. While it will not be possible to remove the names of the deceased from the lists in the near future due to administrative and legal difficulties, it is important to note that there are very effective mechanisms in place to prevent another person from using a deceased's identity to vote, mainly the photo on the CIN and on the electoral lists, and the use of the indelible ink.

All displaced people will have to be located and their names put in the polling centers closest to their new location. The CEP proposes to open "Reallocation and Polling Centers" (RPCs) to allow for all voters to choose the center where they will want to vote on polling day. This operation will also include ONI agents who would be responsible for addressing changes to and the replacement of lost CINs, while the registration of new citizens will continue to be done in the ONI's communal offices. This solution was discussed with the Director General of the ONI who agreed to this plan in principle. One other option could be that the ONI delivers temporary documents to citizens who lost their CINs and new registrants on the very same day they come to the reallocation and polling center. This would resolve the CIN production and distribution

problem. This temporary document would have to be recognized by the Ministry of Justice as equivalent to the CIN for the purpose of these elections only. The only cards that would still need to be distributed would then be the ones already printed or in the process of being printed, for which an operation that is similar to but smaller than the one described above could be organized.

5. Security: Like all other institutions, the Haitian National Police (PNH) was crippled by the earthquake (destruction of police stations, 279 officers confirmed dead/around 250 missing, out of a total of 9,000). Many of its members are in the same humanitarian situation like the general population, even if they do have employment. In addition, 4,000 prisoners are on the loose due to the destruction of the main jail in Port-au-Prince, and only 450 have been recaptured to date. Moreover, none of the people alleged to have been involved in the violence in the Center Department during the 2009 senatorial elections have been prosecuted. Certain political leaders were banned from running in the legislative elections, and it is assumed that this will also be the case for the next elections. However, it will not prevent these individuals from creating tension or promoting violence again. Finally, although forces from the United Nations Stabilization Mission in Haiti (MINUSTAH) will be deployed nationwide, it is important to remember that their mandate is mostly to observe and support the PNH in its task, not to handle the situation directly.
6. Public Information/Voter Education: Given the general population's lack of understanding of governance issues, they must be given the necessary knowledge and adequate information to make educated choices. The only way to achieve such a goal is through a well-conceived, nationwide civic education campaign. Apart from the regular voter education/motivation campaign (when and where to vote and how to cast a ballot) that must be organized before the elections, it is absolutely crucial to also organize a longer-term campaign aimed at informing voters about the criteria on which to base their choices, why exercise their right to vote, the role of each institution, what to expect of their elected officials and how to make them accountable, and what the electoral process means. In addition to radio and TV programs and spots, there must be field-based events such as debates and town hall meetings organized in every communal section in the country with the participation of grassroots organizations that are an integral part of the community. Sketches, flipcharts and video projections should be utilized to help disseminate information and knowledge, as well as to generate discussions and questions during those events. in these
7. Political parties: The vast majority of the interviewees pointed out that most of the political parties are even weaker than they were before the earthquake, that there are too many of them, that most have only a small number of members, no vision or platform to speak of, and little resources to run a campaign. It is also true that most candidates get little support from the political parties who very seldom redistribute the funds they received from the State. However, for truly inclusive and competitive elections, this team believes that one of the donors' priorities should be to provide funds for technical assistance projects that will help promote and develop truly representative and well structured political parties.

8. Civil Society/Observation: As previously mentioned, some of the representatives of civil society in Port-au-Prince are against elections due to their lack of confidence in the government and in the CEP. Their concern is that elections can be easily manipulated by the ruling party who is, according to them, the only one with the resources at this time. However, it is very likely that they, along with the organizations who support the elections, will want to participate if and when elections are announced. Given the current situation, it is of the utmost importance that they be given assistance so that they can be involved in the public information and observation process “en masse”.

IFES was able to meet with representatives of the United States Agency for International Development (USAID) and the Canadian International Development Agency (CIDA) during this assessment. Although both have clearly expressed interest in funding the electoral process, no decisions have been made as to who would do what when the time comes. CIDA has confirmed the availability of the funds that were to be transferred to the UNDP Trust Fund for the legislative elections of February 2010, and their readiness to allocate them to the preparation and organization of the next elections, if and when they are announced. IFES tried to contact the European Commission’s representatives on several occasions but was not successful.

Based on meetings and discussions held with international partners, there appears to be a general consensus on each organization continuing to work in the same areas as before: MINUSTAH will support the CEP in logistics and security, Organization of American States (OAS) will continue working with the ONI and the United Nations Democracy Programme (UNDP) will manage the Trust Fund. Both UNDP and MINUSTAH are currently involved in the preparation of the budget and the electoral calendar, and a UN expert has recently arrived in country to help with the electoral lists.



## POST-DISASTER ASSESSMENT ON THE FEASIBILITY OF ORGANIZING FREE AND FAIR ELECTIONS

### I. MANDATE

The International Foundation for Electoral Systems (IFES) was asked to carry out a technical assessment to provide the United States Agency for International Development (USAID) with a comprehensive analysis of Haiti's political processes in a post-quake environment. This assessment includes an analysis of the Constitution with regards to scheduling future elections as well as their sequencing and the legal implications for extending mandates.

In addition, IFES was to assess the current state of the electoral registry in light of the massive changes in the population, the enfranchisement of Internally-Displaced Persons (IDPs) and the security environment, and then develop a scenario-based options paper for addressing these issues.

Within the new post-quake environment, IFES was also to evaluate the needs and challenges facing the Haitian Provisional Electoral Council (CEP) and its Departmental and Communal Electoral Offices (BEDs and BECs) in the organization of future elections, including but not limited to out-of-country voting, identification cards and voter lists, infrastructure, communications, resources, the overall political environment and the role of civil society.

### II. BACKGROUND

Legislative elections for the replacement of the entire House of Representatives and one third of the Senate were scheduled to take place on February 28, 2010 in nine provinces and March 3, 2010 in the Center Department. The second round was tentatively scheduled for April 11 and 14, 2010, respectively. Presidential and local elections were then expected to take place at the end of the same year.

On January 12, 2010, a devastating earthquake hit Haiti, rendering elections impossible according to the existing timetable. The capital city of Port-au-Prince and other towns in the West and the Southeastern departments sustained major damage, and countless lives were lost. A number of government officials are reported either dead or missing and many government buildings are either completely destroyed or severely damaged.

One day before the electoral campaign was set to begin on January 28, 2010, the CEP announced that the legislative elections were postponed indefinitely. Three days later President Préval announced that he would not extend his term in office beyond its scheduled conclusion on February 7, 2011. This statement implied that the current government had just over one year to begin rebuilding the country before handing over the massive task to the new leadership.

The extension of current terms of office and delays in future electoral processes must be assessed in terms of its legality, impact on a very dissatisfied electorate, and options for setting future electoral processes as well as their sequencing. As dissatisfaction with elected officials increases and the electorate starts to demand change, the government of Haiti will have to disseminate accurate information about the next electoral process. Information to the electorate regarding Haiti's future political processes will be crucial in supporting peace and stability in the post-quake environment.

At some point in the not-so-distant future, elections will be necessary to both fulfill constitutional obligations as well as fill the now empty seats of those officials who perished in the quake. However, it is first essential to evaluate the legal framework and institutional capacity of the government institutions, as well as the political environment, before any technical assistance plan can be put in place.

### III. STRATEGY

Following the earthquake, USAID requested that remaining funds under the CEPPS/IFES project be reprogrammed to conduct an assessment of the situation and what would be the minimal conditions and requirements for organizing credible and inclusive elections.

The IFES/Haiti Chief of Party (COP) Sophie Lagueny—who was evacuated on January 22, 2010—returned to Haiti on March 2, 2010. She proceeded to recruit a national consultant on March 3, 2010, while IFES Washington contracted the international legal expert that was to conduct the analysis of the Constitution. The Legal Expert worked mostly from home but spent 12 days in country, from March 15 to 27. This short stay facilitated his comprehension of the situation on the ground, and enabled him to meet with national experts and other stakeholders involved in the reform of the Constitution.

The team's strategy was to meet as many people as possible during the first month and a half of the mission, both in Port-au-Prince and in the field, to gather all the necessary information and then spend the last two weeks drafting the final report.

All interviews were conducted in the same manner with each individual interviewed. It started with a presentation of the mission and its mandate. The conversation was then based on the following questions:

- 1) Do you know about the up-coming institutional vacuum and its impact on governance?
- 2) Do you recommend that elections be held? Do you think they are possible? Will the electorate be interested in going to the poll?
- 3) If yes, what are the minimal requirements/crucial issues to be addressed to have good elections; if not, what do you propose?

IFES met with 37 people in Port-au-Prince and Arcahaie in the West Province, 12 in Miragoane, Nippes Province, 13 in Les Cayes, South Province, 11 in Jacmel, South-East Province, 9 in Mirebalais and Hinche, Center Province, 11 in Saint Marc, Artibonite Province, and finally, 6 in Cap Haitien, North Province. Those 99 people (Appendix 1) represented civil society, governmental authorities, decentralized offices of the CEP and the private sector.

#### IV. RESULTS OF INTERVIEWS

Except for a small number of civil society representatives in Port-au-Prince, all other interviewees were very adamant that elections should take place so that “elected officials replace elected officials”. Given Haiti’s history and failed experiences, they did not believe that a government of transition or any other form of provisional governance mechanism would work or last. However they were all equally forceful in voicing their opinion against “elections for the sake of elections”.

The Post-Disaster Needs Assessment’s (PDNA) subgroup on the democratic process had already met with a significant number of political party representatives, mainly from the opposition, and did not hesitate to share their findings and conclusions. Therefore, IFES chose to concentrate on meeting with stakeholders and representatives of other sectors of society. However, in order to get a second opinion as to the situation regarding the political parties, the team met with both the Chief of Party and the head of the political party assistance project of NDI, whose extensive network and knowledge would allow for a more in-depth analysis of the situation, and certainly help confirm or contradict the PDNA’s findings.

The mission’s meetings regarding political parties determined that a majority of those interviewed were against elections under President Préval and with the current CEP. They promoted the use of article 149 of the Constitution, i.e. wait for the vacancy of the presidency so that the Vice President (since there is no President) of the Supreme Court can take office, and conduct elections “at least forty-five (45) and no more than ninety (90) days after the vacancy occurs”. The analysis of article 149 can be found on pages 7 and 8 of this report.

The PDNA sub-group as well as NDI’s representatives seemed to believe, however, that the political parties’ current stance was more posturing than conviction, and that they would register and run when and if elections were announced.

The few individuals representing civil society who were against elections, due to their lack of confidence in the current government and CEP, promoted the idea of a “Government of National Unity”. However, when asked how to arrive at such a government, who would lead the process, what would be the mechanism, what mandate and for how long, they had obviously not thought that hard about this suggestion and had no concrete proposal to offer. Given the profile of those individuals, it is worth taking into consideration that they might have been driven by personal interest. A government of national unity would mean that they would be part of it or its satellite institutions, and thus gain access to the decision-making process and other prospects, which would be much more difficult if elections were held.

Those in favor of elections were very specific in what they thought was needed in order to ensure that those elections would be free, fair and inclusive. The main concerns that they believed had to be addressed and solved before elections could take place included the following:

- 1) Lack of credibility and trust in the CEP
- 2) Political parties’ poor representation and representativeness

- 3) The electorate's lack of understanding of and information about governance in general, and the electoral process in particular
- 4) The organization of general elections (presidential, legislative, and local at the same time) considering the electorate's high level of illiteracy
- 5) The need to assist the population in improving their current humanitarian situation to increase their motivation and avoid manipulation
- 6) The disenfranchisement of displaced people and the replacement of lost National Identification Cards (CINs)

It is important to note that, except for the West (Port-au-Prince, Gressier, Léogane, Petit Goave and Grand Goave) and the South-East (Jacmel), the situation in the other eight departments seemed nearly unchanged, apart from having been indirectly affected due to the exodus that took place following the earthquake. Those displaced people—although some are said to have already gone back to their original locations—represent an additional burden on departments that were already in a difficult socio-economic situation. (See table below for distribution.)

In addition, it is also important to mention that this mission felt very strongly that the North Department—and, most probably by extension, the other two departments (Northeast and Northwest) that comprise the northern part of the country—are being affected in an abstract but very serious manner: they live in constant fear that they might themselves be hit by an earthquake in the not-so-distant future, with an equally high probability that it be followed by a tsunami; while national and local authorities are doing absolutely nothing to prepare for them.

Department	Deceased	Missing	Injured	Affected	In Shelters	Displaced
Artibonite	N/A	N/A	N/A	N/A	N/A	162509
Center	N/A	N/A	N/A	N/A	N/A	90997
Grand'Anse	9	N/A	19	3970	N/A	120000
Nippes	12	N/A	96	45260	N/A	20250
North	N/A	N/A	N/A	N/A	N/A	33045
North-East	N/A	N/A	N/A	N/A	N/A	8500
North-West	N/A	N/A	N/A	N/A	N/A	48062
West	222108	855	310102	1268985	1280249	32253
South	N/A	N/A	N/A	N/A	N/A	88599
South-East	441	14	711	196670	21242	N/A
	<b>222570</b>	<b>869</b>	<b>310928</b>	<b>1514885</b>	<b>1301491</b>	<b>604215</b>

*Source: Information Center, Prime Minister's Office - Translation: IFES COP*

## V. ANALYSIS AND POSSIBLE SCENARIOS

This section analyzes the situation based on the concerns and opinions gathered and presented above, as well as extensive technical discussions with representatives of the CEP, the ONI and the Electoral Unit of MINUSTAH. It first presents the situation within the context of the Constitution. It then proposes several scenarios for the timing and sequencing of elections, with both their advantages and disadvantages. Finally, it details the conditions and requirements to be addressed and solved before elections can take place, regardless of which scenario is selected.

*1) The terms of office of the elected officials according to the Constitution of 1987 and its provisions:*

A detailed analysis of the sequencing and timing of elections, the possible extension of mandates and the impact and consequences of the vacancy of the House of Representatives on the functioning of the State within the framework of the Constitution is annexed to this report.

However, to allow for a better understanding, the articles relevant to this section have been included.

**LOCAL AUTHORITIES:**

Articles 63, 63-1, 66, 68, and 85 of the Constitution govern the structure of the local authorities, their terms of office, and their replacement. Local authorities include the municipal councils (1 mayor and 2 Deputy Mayors), the town delegates and vice-delegates, the Assemblies of the Communal Sections (ASEC), and the Councils of the Communal Sections (CASEC).

These articles read as follows:

*“ARTICLE 63: Each Communal Section is administered by a council of three (3) members elected by universal suffrage for four (4) years. They may be re-elected an indefinite number of times.*

*[...]*

*ARTICLE 63-1: The Administrative Council of the Communal Section is assisted in its work by an Assembly of the Communal Section.*

*ARTICLE 66: The Communes have administrative and financial autonomy. Each Commune of the Republic is administered by a Council, known as the Municipal Council, of three (3) members elected by universal suffrage.*

*ARTICLE 68: The Municipal term is four (4) years, and its members may be re-elected for an indefinite number of terms.*

*ARTICLE 85: In each Departmental Capital, the Executive Branch appoints a Representative, who bears the title of Delegate. A Vice-Delegate placed under the authority of the Delegate is also appointed in each Arrondissement Capital.<sup>1</sup>”*

Article 63 describes the Council of the Communal Section (CASEC) as a body of 3 members with a mandate of four years, but it is worth noting that article 63-1 only mentions the Assembly of the Communal Section (ASEC) as a body assisting the CASEC in its work. Nowhere does it mention that it must be elected or what the length of its term is. We can only assume that it lasts as long as the CASEC.

Article 66 and 68 governs the Municipal Council, a body of 3 members with a term of office of 4 years.

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<sup>1</sup> Unofficial translation by IFES COP

Article 85 governs the “appointment” by the executive branch of a delegate for each of the departmental capitals, and of a delegate and vice-delegate for each of the arrondissement capitals. Nowhere does it mention terms of office or elections for those posts. On the contrary, it uses the verb “nommer” (to appoint), which would logically mean that no elections are required, and even goes as far as mentioning which authority is responsible for nominating them.

There are no provisions for the extension of the term of the elected local authorities. Once their term has expired they cannot be extended, so elections must take place before their vacancy occurs.

#### **THE HOUSE OF REPRESENTATIVES:**

Article 92 and 92.1 of the Constitution cited below govern the House of Representatives’ term of office, its length, and starting date, and by extension those of the legislature.

*“ARTICLE 92: Representatives are elected for four (4) years and may be reelected an indefinite number of times.*

*ARTICLE 92-1: They take office on the second Monday of January, and sit in two (2) annual meetings. The duration of their term comprises a legislature.”<sup>2</sup>*

There are no provisions for the extension of the members of the House of Representatives’ term of office. Elections must take place before their term of 4 years has expired so that the newly elected representatives can take office on the second Monday of January following their elections.

#### **THE SENATE:**

Articles 95 and 95.3 govern the length of the term and the manner in which the Senate must be replaced:

*“ARTICLE 95: Senators are elected for six (6) years and may be reelected an indefinite number of times.*

*ARTICLE 95-3: One-third (1/3) of the Senate is replaced every two (2) years.”*

Given the fact that it has never been possible to regularize the elections of the first Senate elected in 1991 under this Constitution so the members of all future Senates could be in office for 6 years, article 288 has yet to become obsolete. It therefore continues to apply for the Senate elected in 2005. Article 288 reads as follows:

*“ARTICLE 288: For the purpose of the next elections, the term of the three (3) Senators elected for each Department shall be established as follows:*

- a. The Senator who has received the largest number of votes shall have a term of six (6) years;*
- b. The Senator receiving the second largest number of votes shall have a term of four (4) years;*
- c. The Senator in third place shall be elected for two (2) years.*

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<sup>2</sup> Unofficial translation by IFES CoP

*Thereafter, each elected Senator shall have a term of six (6) years.”<sup>3</sup>*

There are no provisions for the extension of the senators’ term of office.

#### **THE PRESIDENCY:**

There are no provisions for the extension of the President’s mandate, as specifically expressed in article 134-3 of the Constitution.

*“ARTICLE 134-1: The duration of the President’s term of office is five (5) years. This term begins and ends on the 7<sup>th</sup> of February following the date of the elections.*

*ARTICLE 134-2: The Presidential elections shall take place on the last Sunday of November of the fifth year of the President’s term.*

*ARTICLE 134-3: The President of the Republic’s term may not be extended. He may serve another term only after an interval of five (5) years. He may in no case run for a third term.<sup>4</sup>*

The individuals who are against organizing elections in the near future mention article 149 as the legal grounds on which they base their argument.

*“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, shall be invested temporarily in 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 term of five (5) years shall be held at least forty-five (45) and no more than ninety (90) days after the vacancy has occurred, in accordance with the Constitution and the Electoral Law.<sup>5</sup>”*

However, they do not seem to have taken the following into consideration:

- 1) **“...for any reason whatsoever...”**: it is impossible to believe that the founders of the Constitution considered “not respecting it” as one of the “reasons” that would lead to the vacancy of the presidency. Therefore, it cannot include it becoming vacant due to elections not being held on time.
- 2) **“...invested temporarily with the duties of the President of the Republic by the National Assembly...”** : There will be no National Assembly and therefore no mechanism for the investiture of the interim president as of May 8, 2010.

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<sup>3</sup> Unofficial translation by IFES COP

<sup>4</sup> Unofficial translation by IFES COP

<sup>5</sup> Unofficial translation by IFES COP

Therefore, this article can only be applicable in case the president dies, resigns, becomes physically or mentally incapacitated or is impeached, and in the current situation, only if the presidency had become vacant before the end of this legislature on May 8, 2010.

*2) The current status of the elected officials' terms of office*

Haiti's recent history has been so tumultuous and difficult that its Constitution has yet to be respected and applied fully—this includes the timely organization of elections. Thus, it has never been possible to regularize the term of office of the Senate elected in 1991 according to article 288 of the Constitution and those that came after.

This state of affairs has prompted the drafting and adoption of the Haitian Elections Law of 2008 including transitory provisions without which regularizing such situation would be impossible. Those transitory provisions are as follows:

*“ARTICLE 232: The length of the term of the officials elected in 2006 is fixed as follows:*

- a) The President of the Republic is in office until February 7, 2011;*
- b) The Senators elected for 6 years are in office until the second Monday of January 2012, in case the elections will take place no later than December 2011. In a different case, they stay in office until the end of their term of 6 years, on May 8, 2012;*
- c) The Senators elected for 4 years are in office until the second Monday of January 2010, in case the elections will take place no later than December 2009. In a different case, they stay in office until the end of their term of 4 years, the second Monday of May 2010;*
- d) The Representatives are in office until the second Monday of January 2010 in case the elections will take place no later than December 2009. In a different case, they stay in office until the end of their term of 4 years, the second Monday of May 2010;*
- e) The Members of the Councils and Assemblies of the Territorial Communities are in office until January 2010 on the dates fixed for their successors to take office.<sup>6</sup>”*

The Elections Law of 2008 provides details for the eligibility and elections of each of the official posts to be elected as per the Constitution: the Presidency, the Senate and the House of Representatives, the Municipal Councils (Mayors and Deputy Mayors), and the Councils of the Communal Sections (CASEC). In addition, it also includes elections for the town delegates and vice-delegates, and the Assemblies of the Communal Sections (ASEC) that are not required by the Constitution.

Incidentally, it is worth mentioning, although outside of the scope of this report, that indirect elections need to be organized as well: to this day, elections for the Departmental and Municipal Assemblies, the Interdepartmental Council, and the Departmental Councils have never taken place. The elections of the Departmental Assemblies would then allow for the nomination of the Permanent Electoral Council in accordance with article 192 of the Constitution.

The last national and local elections were held as follows:

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<sup>6</sup> Unofficial translation by IFES CoP

- Presidency: November 2005 (no second round)
- National Assembly: November 2005/April 2006
- Municipal Councils, Town Delegates, ASEC and CASEC: December 2006 and re-runs in early 2007

Therefore, the de facto status of the elected officials' terms is as follows:

#### **LOCAL AUTHORITIES:**

Article 232 (e) of the Elections Law states that the terms of office of all territorial community officials will last until January 2010. However it was amended on May 12, 2009 to take into account that those officials had taken office as late as June 2007 due to the fact that the local elections were held in December 2006 and re-runs in early 2007.

The amended paragraph reads as follows:

*"ARTICLE 232: (e) The Members of the Councils and Assemblies of the Territorial Communities are elected for four (4) years and are in office until their successors elected during the elections planned for the end of the year 2010 are installed. In a different case, they stay in office until the end of their term of four (4) years."*

The CEP must therefore organize local elections before the end of 2010.

#### **THE NATIONAL ASSEMBLY:**

The replacement of the ten 2-year senators should have taken place at the end of 2007, but instead occurred in April/June 2009. They are in office until January 13, 2014.

The ten 4-year senators' term should have expired in January 2010, if elections had taken place before the end of 2009. However, the elections were scheduled for February/April 2010 but cancelled following the January 12 earthquake. Their term of office expires on May 8, 2010.

The ten 6-year senators are in office until January 9, 2012 if elections are held before the end of 2011. If not, they will stay in office until May 8, 2012.

The terms of the members of the House of Representatives expire on May 8, 2010. Subsequently, there will be no legislative power in Haiti as of that date and until elections are organized.

There will only be 18 senators remaining in office. Even in the absence of the House of Representatives, they can exercise the following limited powers for which a quorum exists: 1) The right to investigate (article 118); 2) The right to question a member of the government or the entire government on facts and actions of the administration (article 129.2); 3) The right to approve the commander-in-chief of the armed forces, the commander-in-chief of the police, the ambassadors and consuls general (article 141).

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<sup>7</sup> Unofficial translation by IFES CoP

Legislative elections for the House of Representatives, the 4-year Senators and the posts of two of the senators who died in the earthquake must be organized as soon as possible.

### **THE PRESIDENCY:**

President Préval was elected on the first round of the Presidential and Legislative Elections held in November 2005 but took office in May 2006. It is worth mentioning again that article 134-3 of the Constitution specifically prohibits the extension of his term. It expires on February 7, 2011 as provided in article 134-1 of the Constitution.

The CEP must organize presidential elections before the end of the year, and specifically on November 28, 2010 as provided in article 134-2 of the Constitution which reads as follows:

*“ARTICLE 134-2: Presidential election shall take place the last Sunday of November in the fifth year of the President's term.<sup>8</sup>”*

The mandate of the CEP is to organize elections to replace elected officials as soon as required.

Given the current situation, it is now faced with the daunting task of organizing national and local elections to ensure the replacement of the entire House of Representatives, the one-third of the Senate elected for 4 years, the posts of the two senators who perished in the earthquake, the president and all local officials, theoretically before the end of the year.

### *3) Three possible scenarios*

Given the above, IFES envisages three possible scenarios for the sequencing and timing of all required elections. Only the scenarios that are deemed technically possible have been taken into consideration.

#### **SCENARIO A – National and local elections at the same time before the end of the year**

The organization of such elections might be technically possible (although it has never been done in Haiti before), and would certainly not be as expensive as organizing separate elections, particularly in terms of logistics and polling staff.

Such elections would also be as close to respecting the Constitution as possible given the circumstances, since the only vacancy would be that of the House of Representatives and one-third of the Senate.

This scenario's main problem is the length of time it would require for each voter to cast seven ballots in one day, considering the actual number of voters per polling station (450), and keeping in mind that a large majority of the population does not know how to read or write.

In order to remedy this problem, it would be necessary to either increase the number of polling stations so that the number of voters per station is lower, or organize those elections over a 2-day

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<sup>8</sup> Unofficial translation by IFES CoP

period: for example, legislative and presidential one day, then local the following day or all both days. Again, this might be confusing to the voters who are mostly illiterate.

A different and better option would be for the local elections—requiring only one round—to take place with the second round of the national elections. The ballots for the House of Representatives, the Senate and the President would then be comprised of only two candidates each, which would make voting easier for the electorate. There is also the possibility that some of the candidates running for the House of Representatives, the third of the Senate or the Presidency win 50% + 1 of the votes, thus not requiring a second round.

Either option would increase security risks for the sensitive materials, present major difficulties in terms of voter education and training of polling staff, complicate the packaging of polling kits and increase logistical and human resources needed.

**SCENARIO B - Presidential, legislative, mayoral and town delegates elections together before the end of the year, ASEC and CASEC elections as soon as possible in 2011**

**OR**

**Presidential, legislative and mayoral elections together before the end of the year, town delegates, ASEC and CASEC elections as soon as possible in 2011**

In both cases, each election would require a slightly smaller number of ballots (5 and 2, and 4 and 3 respectively) for each voter to cast, and might present less difficulties for the largely illiterate electorate.

Although having two separate elections would not double the cost in comparison to having all elections at the same time, it would certainly be more expensive. In addition, one of the main disadvantages of such option is related to the electorate's interest and motivation. Because the electorate has shown much more interest in presidential and mayoral elections in the past, and will most likely continue to do so, it is entirely possible that only a small percentage would participate in ASEC and CASEC or town delegates, ASEC and CASEC elections organized separately.

The other disadvantage of organizing ASEC and CASEC (or including town delegates) elections separately in 2011 is that those posts would have become vacant so communal sections (and departmental and arrondissement capitals) would be without official leadership until the elections are held. It would require either an extension of their terms of office (which is unconstitutional), the creation of some type of provisional local authorities, or they could be managed temporarily by the municipal councils elected during the elections held at the end of 2010.

**SCENARIO C - Presidential and legislative elections together before the end of the year, then mayoral, town delegates, ASEC and CASEC elections as soon as possible in 2011**

At first glance, this scenario seems to be the most logical, reasonable and feasible, although it would mean that the terms of the local authorities would have expired before the elections are held. It would therefore require an extension of their terms—which is unconstitutional—or the creation of

provisional municipal commissions as was done by the Ministry of Interior in 2005. Those provisional municipal commissions could be given the additional mandate of running the communal sections in their area.

It would ensure the participation of the electorate who is usually more interested in the elections of the president and the mayors, which means that there will be a post of interest to them in each election.

It would separate the two-round national elections from the one-round local elections, thus simplifying all electoral preparations for the CEP and its partners and decreasing the number of ballots (3 and 4 respectively) to be cast by each voter in one day.

It would also give more time for displaced people to decide whether they will stay permanently in their new location or go back to their place of origin. This is particularly important for all local elections where even a small difference in number of voters and votes in one constituency can change the outcome of an election.

Finally, it would allow for the possible adoption of amendments to the Constitution at the 1<sup>st</sup> session of the 49<sup>th</sup> legislature. If those amendments included one mayor instead of a Municipal Council comprised of three members, and the disappearance of ASECs, as was proposed by the Constitutional Commission to the 8<sup>th</sup> session of the 48<sup>th</sup> legislature, it would significantly simplify the organization of the local elections. Of course, those amendments would have to be adopted under President Préal and before the end of his term in order to be effective under the next president. If such is not the case, those amendments would be effective in early 2016, and the local elections to be organized in 2011 would then remain as-is.

Incidentally, it is worth mentioning here that article 284.3 of the Constitution specifically prohibits the use of a referendum to amend it:

*“ARTICLE 284-3: Any popular consultation tending to modify the Constitution by referendum is strictly forbidden.”<sup>9</sup>*

## VI. CONDITIONS AND REQUIREMENTS FOR FREE AND FAIR ELECTIONS

IFES believes the operational branch of the CEP is technically capable of organizing any of the three scenarios mentioned above, assuming their preparations are not delayed any longer and the following problems and issues are addressed and solved:

### 1) The current Provisional Electoral Council:

**If there is one issue where there is consensus, it is the lack of credibility and trust in the current CEP.** Every individual interviewed has mentioned that one of the most crucial issues to be addressed first and foremost is the replacement of all members of the current CEP. As previously mentioned, the Permanent Electoral Council was never nominated as provided in article 192 of the

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<sup>9</sup> Unofficial translation by IFES COP

Constitution, due to the fact that indirect elections of the Departmental Assemblies have never taken place.

*“ARTICLE 192: The Permanent Electoral Council consists of (9) nine 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.*

*The above-mentioned institutions ensure, as much as possible, that each of the Departments are represented.<sup>10</sup>”*

It is therefore article 289 in the transitory provisions of the Constitution that applies:

*“ARTICLE 289: While awaiting the establishment of the Permanent Electoral Council as provided in this Constitution, the Provisional Electoral Council of nine (9) members, responsible for enforcing and drafting the Electoral Law that will govern the next elections, is nominated as follows:*

- 1. One by the Executive Branch, not a civil servant;*
- 2. One by the Episcopal Conference;*
- 3. One by the Advisory Council;*
- 4. One by the Supreme Court;*
- 5. One by agencies for the protection of Human Rights that do not participate in the electoral competitions;*
- 6. One by the Council of the University;*
- 7. One by the Reporters Association;*
- 8. One by the Protestant religions;*
- 9. One by the National Council of Cooperatives.<sup>11</sup>”*

It is important to note that all interviewees also question the application of article 289 by the current authorities. **Therefore, IFES strongly believes that giving the mandate of organizing the upcoming elections to the current CEP would mean that the electoral process will be considered flawed and questionable from the beginning, but it is equally important that the process for the nomination of a new CEP be strictly adhered-to and that each sector mentioned in the article be allowed to choose and appoint their representative without interference or pressure. The impartiality and credibility of the CEP will have a direct impact on the next electoral process.**

Visits to some of the decentralized offices of the CEP (BEC of Arcahaie, Mirebalais, Saint Marc, and BED of South-East, South, Center, Nippes, and North departments) drew this team’s attention to their very difficult situation. The BEDs have a vehicle but no funds for repairs and maintenance or fuel. If they have computers they do not work, usually due to not having electricity to operate them. There rarely is municipal power, inverters do not work and generators are either broken or without fuel. BECs do not have transportation at all, no computers or equipment and supplies of any type and no funds either. If requested to perform a task by the CEP, the BEDs fill the vehicle and the BECs use public transport using their own funds, although they have not been paid since

<sup>10</sup> Unofficial translation by IFES COP

<sup>11</sup> Unofficial translation by IFES COP

October 2009, and a few of them since they took office. They all report that the situation is the same country-wide.

Although this situation is appalling and should be remedied in the long-term through capacity-building assistance projects, it is important to point out that it has had no incidence on the preparations and organization of past electoral processes. This situation has existed since well before the earthquake, yet it has not prevented the CEP from organizing elections. This is mainly due to the fact that most field activities are, in reality, carried out by MINUSTAH.

#### 2) Financial resources :

Given the current situation, it is most likely that all activities, including the necessary preparations that must take place before the beginning of the electoral calendar, will be financed in full by the international community. Therefore, one of the international community's priorities must be to make at least a portion of these funds available to the CEP and the ONI so that both institutions can begin the necessary preparations for the activities described in (3) and (4) below, no later than May 2010, if elections are to be held before the end of the year.

While the CEP is currently preparing its regular electoral budget and calendar, IFES has proposed to assist them and the ONI in preparing a joint plan of action and budget for the implementation of the activities mentioned below.

#### 3) Production and distribution of National Identification Cards (CIN) :

This activity is the legal responsibility of the ONI. It includes the production and distribution of CINs to new registrants as well as already-registered citizens who have lost theirs. The total number of those cards is estimated at 550,000 (including those not distributed before the earthquake).

Given the past difficulties of the ONI in printing and distributing cards in a "reasonable" period of time, the CEP is proposing a joint operation described in (4) below.

#### 4) Electoral Lists:

The two major problems with the Civil Registry—and therefore the electoral lists—are the removal of the deceased and the localization of the people displaced after the earthquake.

It is estimated that there are approximately 350,000 deceased people on the Civil Registry. This number includes people who have died since 2005 as along with those who perished during the earthquake; many of them are believed to have been less than 18 years old. Since there has never been a link between the ONI/Civil Registry and the institution in charge of issuing death certificates, the removal of the deceased has never been done. Although it will not be possible to do it in the near future due to administrative and legal difficulties mentioned above, it is important to note that this issue does not represent a problem for the elections: there are very effective mechanisms in place to prevent another person from using a deceased's identity to vote, mainly the photo on the CIN and on the electoral lists and the use of the indelible ink.

Displaced people will have to be located and their names put in the polling centers closest to their new location. However, it is important here to point out the difference between the estimated 600,000 “displaced” people who have left Port-au-Prince, and now live with relatives in other towns and/or departments (although many are said to have returned); and the estimated 1,300,000 who are in shelters but still in or close to the towns where they lived before the earthquake. While the former will have to be reallocated to a polling center close to where they now live, it is not necessarily true of the latter in its entirety.

In order to do so, the CEP proposes to open “Relocalization and Polling Centers” (RPCs) to allow for all voters to choose the center where they will want to vote on polling day. In accordance with the Electoral Law, this operation must be completed on time for the electoral lists to be closed two months and published one month before polling day, and it is estimated that it will take a minimum of three months, including preparations, to complete.

IFES and the Electoral Registry Director of the CEP have met on several occasions to discuss the issue and propose a solution. The following plan of action has been developed:

- Open 1,500 RPCs corresponding to the number of polling centers in the country and including the camps, with two CEP agents and one ONI agent
- Open 50 mobile RPCs with one agent from each of the institutions to reach the most remote areas in the country
- In each RPC, the ONI agent will be responsible for address changes and replacement of lost CINs
- In each RPC, the CEP agents will be responsible for relocating voters to the polling center closest to his/her new place of residence

The needs in equipment, materials and human resources are as follows:

- 1,550 laptops equipped with the secured electoral list for the CEP—one per RPC
- 300 laptops for the communal offices of the ONI who will be responsible for registering new citizens (not possible in the RPC because would require additional equipment—i.e., cameras and scanners—and increase the total cost significantly) and entering the data transferred from the RPCs in their area of responsibility
- Recruitment, training and salaries for 3,050 CEP agents and 1,550 ONI agents for the RPCs and 300 ONI agents in the communal offices
- Transportation for the 50 mobile RPCs (motorcycles or MINUSTAH?)
- Transportation stipend to ONI agents for daily (or every two days) transfer of data from RPCs to ONI Communal Offices
- Weekly transfer of data from Communal Offices and RPCs to ONI/CEP HQs by MINUSTAH
- Consumables for ONI (registration forms for the PRCs, and blank cards, ink and others for the HQ)

IFES also discussed this plan with the Director General of the ONI who agreed in principle to the operation. According to the Director General, the current capacity of the ONI is the production of

approximately 100,000 cards per month (800 cards per hour, six hours per day). Using the machine more than six hours per day would stretch its capacity and create the risk of breakdown which would be catastrophic for the whole operation since there is only one machine. While the printing of CINs have been outsourced to the DELARUE Printing House in the past, a better solution would be to fund the purchase of additional printing machines of lesser capacity but cheaper than the one already at the ONI.

In addition, it appears that one of the bottlenecks in their system is the limited capacity of the software used to compare the digital prints of the new registrants to avoid double entries. In order to remedy this problem, additional servers will be necessary to increase the capacity of the software, which will be useful for the long term as well. There would also need to be a temporary increase in human resources at ONI headquarters in the section in charge of processing the information received from the communal offices.

The other main problem is the distribution of cards once printed. There are approximately 250,000 cards from before the earthquake that still need to be distributed. While the ONI cannot be blamed for the citizens' lack of interest in claiming their cards, there is no doubt that it will need to be much more proactive if all cards, including those to be replaced, are to be distributed before the next elections. It has been proposed that the RPCs, both fixed and mobile, remain open once the electoral lists are closed so that they can be used by the ONI for the distribution of CINs. Citizens would be told when requesting a new CIN to return to the same RPC to claim their card starting at a date and time to be determined. Distribution of cards to new registrants will be done in the communal offices of the ONI.

To avoid the ONI's many bottlenecks and problems, one other option could be that the ONI delivers temporary documents to citizens who lost their CINs on the very same day they come to the RPC. This would require additional equipment such as one laptop per RPC for the ONI agent—i.e., printers, ink, paper—but would resolve the CIN production and distribution problem. This temporary document would have to be recognized by the Ministry of Justice as equivalent to the CIN for the purpose of these elections only. The only cards that would still need to be distributed would then be the ones already printed or in the process of being printed, for which an operation similar but smaller to the one described above could be organized.

Further discussions are in progress to decide which of the two options is the most applicable, feasible and appropriate. A final plan of action and budget will then be prepared for presentation to the donors. This budget will include the costs of the media campaign that will need to be organized to inform the people about this operation.

#### 5) Security:

Like all other institutions, the Haitian National Police (PNH) was crippled by the earthquake (destruction of police stations, 279 officers confirmed dead with around 250 missing out of a total of 9,000). Many of its members are in the same humanitarian situation than the general population, even if they do have employment.

In addition, 4,000 prisoners are on the loose due to the destruction of the main jail in Port-au-Prince. Only 450 have been recaptured to date.

None of the people alleged to have been involved in the violence in the Center Department during the 2009 senatorial elections have been prosecuted. Certain political leaders were banned from running in the legislative elections and it is assumed that it will also be the case for the next elections. However, it will not prevent them from creating tension or promoting violence again.

Finally, although MINUSTAH forces will be deployed nationwide, it is important to remember that their mandate is mostly to observe and support the PNH in its task, not to handle the situation directly.

#### 6) Public Information/Voter Education:

Given the general population's lack of understanding about governance issues, the citizenry must be given the necessary knowledge and adequate information to make educated choices. The only way to achieve such a goal is through a well-conceived, nation-wide civic education campaign.

Apart from the regular voter education/motivation campaign (when and where to vote and how to cast a ballot) that will have to be organized before the elections, it is absolutely crucial to also organize a pre-election, longer-term campaign aimed at informing the voters on what criteria to use to base their choices, why exercise their right to vote, the role of each institution, what to expect of the people they elect and how to make them accountable, and what the electoral process means.

In addition to radio and TV shows and spots, there must be field-based events organized in every communal section in the country with the participation of grassroots organizations that are an integral part of the community. Interactive tools such as flipcharts and video projections should be used to promote understanding and generate debate on key issues.

#### 7) Political parties:

The vast majority of the interviewees pointed out that most of the political parties are even weaker than they were before the earthquake and that there are too many of them—most with a small number of members, no vision or platform to speak of and little resources to run a campaign. It is also true that most candidates get little support from the political parties who very seldom redistribute the funds they received from the State.

However, for truly inclusive and competitive elections, IFES believes that one of the donors' priorities should be to provide funds for technical assistance projects that will help promote and develop truly representative and well structured political parties.

#### 8) Civil Society/Observation:

As previously mentioned, some of the representatives of the civil society in Port-au-Prince are against elections due to their lack of confidence in the government and in the CEP. Their concern is that elections can be easily manipulated by the ruling party who is, according to them, the only one with the resources at this time.

However, it is very likely that they, along with the organizations who do support the elections, will want to participate if and when elections are announced. Given the current situation, it is of the utmost importance that they be given assistance so that they can be involved in the public information and observation process “en masse”, as local observation is, at this time, the only means available to counterbalance the presence of political party representatives and their actions on polling day.

## **VII. DONOR FUNDING AND COORDINATION**

IFES was able to meet with representatives of USAID and the Canadian International Development Agency (CIDA). Although both have made their interest in funding the electoral process very clear, no decisions have been made as to who would do what when the time comes.

CIDA has confirmed the availability of the funds that were to be transferred to the United Nations Development Programme (UNDP) Trust Fund for the legislative elections of February 2010, as well as their readiness to allocate them to the preparation and organization of the next elections, if and when they are announced.

IFES tried to contact the European Commission’s representatives on several occasions but was not successful.

Given the uncertainty as to if and when elections will take place, the donor community does not seem to be in a position to make decisions at this time. They not only await an official decision and announcement from the Haitian Government, but will also need the electoral budget and calendar which the CEP is currently preparing.

Based on meetings and discussions held with international partners, it seems that the general consensus is that each will be doing what they have been doing in the past: MINUSTAH will support the CEP in logistics and security, the Organization of American States (OAS) will continue working with the ONI, and UNDP will manage the Trust Fund. Both UNDP and MINUSTAH are currently involved in the preparation of the budget and the electoral calendar, and a United Nations (UN) expert has recently arrived in country to help with the electoral lists.

## **VIII. CONCLUSIONS AND RECOMMENDATIONS**

As previously indicated, IFES believes the operational arm of the CEP has the capacity to organize elections before the end of the year, whichever scenario is selected. However, IFES recommends that national elections (presidential and legislative) be held before the end of 2010, and local (municipal councils, town delegates, ASEC and CASEC) elections held no later than mid-2011. As far as the electoral process is concerned, there is no doubt that the main difficulty will be the updating of the electoral lists and the replacement of lost cards. The donor community must make this the absolute priority.

The other crucial issues to be addressed and given special attention are: (1) the implementation of an effective nation-wide public information campaign and (2) support to political parties. IFES believes that these two areas, coupled with support to the CEP, are the main pillars for organizing

free, fair and transparent elections; however, they each require time and resources. As time goes by, they will become more and more difficult to complete before the end of the year.

The deficit in trust and confidence the CEP faces must be addressed and reversed. While replacing the nine members would be a first step, the CEP as a whole must recognize its weakness in communications and transparency that fosters mistrust and suspicions. It must make the necessary changes and take action to restore confidence and trust in their ability to run free and fair elections.

In parallel to the election-related activities, the one major concern is the humanitarian situation the population is currently facing. All interviewees insisted that, for the population to be interested in elections and to avoid their possible manipulation, the citizens must see some changes in their situation in the months to come. The Haitian Government, with the support of the international community, must clearly communicate their plan of action to assure the electorate that it is doing everything in its power to begin the process of change and reconstruction, and to improve living conditions in Haiti.

Haiti needs a legitimate government chosen through free and fair elections. The first widely accepted elections in Haiti would be the first building block towards the reconstruction of a sustainable society.

**LIST OF PERSONS INTERVIEWED**

<b>First Name/LAST NAME</b>	<b>Title/Organization /Location</b>	<b>Province</b>
Pierre-Antoine ARCHANGE	Procurement Manager, UNDP	West
Philippe AUGUSTIN	Director, Electoral Register Unit, CEP	West
Pierre-Louis OPONT	Director-General, CEP	West
David LENOTRE	Chief of Operations, Electoral Assistance Section, MINUSTAH	West
Ernesto BOLANO	Electoral Register Technical Advisor to ONI/CEP, OAS	West
Gerard LATULIPPE	Chief of Party, NDI	West
Ronald COVIL	Director-General, ONI	West
Noel LAGUERRE	Executive Director, CNO	West
Rosny DESROCHES	Executive Director, Civil Society Initiative	West
Claude MOISE	Member, Presidential Commission on the reform of the Constitution	West
John BEAUVOIR	Head of Political Party Assistance Project, NDI	West
Sylvain COTE	Program Manager, Canadian Parliamentary Center	West
David PAYNE	Chief of Party, Parliament Assistance Project, SUNY	West
Steven BENOIT	Member of the House of Representatives	West
Mirlande MANIGAT	Constitutionalist and Secretary-General of the RDNP political party	West
Reginald BOULOS	President, Haitian Chambers of Commerce Federation	West
Louis SIEGEL	Chief of Party, ARD LOKAL	West
Natalie PATENAUDE	First Secretary (Cooperation), Canadian Embassy	West
Gary REX	Deputy Political Counselor, US Embassy	West
Dana BEEGUN	Deputy Chief, Governance Office, USAID	West
Carl ANDERSON	Senior Advisor, Governance Office, USAID	West
Alix FILS-AIME	Head of the Presidential Commission on Disarmament and Reintegration (CNDDR)	West
George HENRY	Coordinator, Haitian Chambers of Commerce Federation	West
Leopold BERLANGER	Vice-President/Director-General, Vision 2000 radio station	West
Max-Alex JOSEPH	President, BEC Arcahaie	West
Lodeus JEAN-JULIO	Vice-President, BEC Arcahaie	West
Wilner NEUS	Secretary/Treasurer, BEC Arcahaie	West
Nestor YVON	Mayor, Arcahaie	West
Sully ROGINEAU	Director-General, Townhall, Arcahaie	West
Yannick MEZILE	President, Haitian Federation of Small and Medium Enterprises	West
Sime LOREUS	Member, UTRAC	West
Jean-Pierre ALSINDOR	Secretary-General, FHPME	West
Jacob LAZARE	Deputy Treasurer, Haitian Federation of SMEs/President, AMO	West
Pierre Evans ST JEAN	Member, ANAMDECH	West
Lucien GILLES	Member, Haitian Federation of SMEs	West
Theard FRITZ	Vice-President, Haitian Federation of SMEs/Vice-President, ODEMA	West
William CLERVILLE	Treasurer, Haitian Federation of SMEs/President, ANAMDECH	West

Sergo LOUISSAINT	Coordinator, OSEMAV	West
Joseph DUCKENS	President, BED Miragoane	Nippes
Mezalon JOSSELIN	Secretary/Treasurer, BED Miragoane	Nippes
Marie Carme SINEAS	President, Chamber of Commerce	Nippes
Pierre WILNOR	Mayor, Petit-Trou de Nippes	Nippes
Frederic ENOC	Mayor, Arnaud	Nippes
Helemarque PATRICK	Mayor, Petite Riviere de Nippes	Nippes
Sainteus JEAN-THOMAS	Mayor, Baraderes	Nippes
Telisme DUTELIEU	Mayor, Anse-a-Veau	Nippes
Premier LEMANN	Mayor, L'Asile	Nippes
Arthur ISAAC	Mayor, Grand Boucan	Nippes
Odney EMMANUEL	Mayor, Plaisance du Sud	Nippes
Vincent JAMIL	Town Delegate, Miragoane	Nippes
Amede BONEL	President, BED Les Cayes	South
Anthonyne ELDWIGE	Vice-President, BED Les Cayes	South
Jean DESIR	Secretary/Treasurer, BED Les Cayes	South
Rogavil BOISGUENE	Coordinator, Elections Unit, MINUSTAH	South
Pierre DENNERY	President, Chamber of Commerce	South
Nathan LETANG	President, Citizens Initiative	South
Fritzner CHARLES	Owner Radio/Tele Metropole du Sud	South
John DECIPE	Coordinator, ACTES	South
Roosevelt GUERRIER	Executive Director, CCIPS	South
Michel EVEILLARD	Former Coordinator of South Province for CEP Member Cherubin	South
Jean PERRIN	Former Mayor, Camperrin	South
Maxime GUILLAUME	Coordinator, Community Projects	South
Pierre-Yvon CHERY	Mayor, Les Cayes	South
Eleonor METOR	President, BED Jacmel	South-East
Patrick CORMIER	Secretary/Treasurer, BED Jacmel	South-East
Roland ZENNI	President, Chamber of Commerce	South-East
Jean-Charles LAMOUSNERY	President, Peasants Association	South-East
Claire Marie MASSE	President, CAPROVA	South-East
Patrick CORMIER	Vice-President, CAPROVA	South-East
Lorence MIDI SAINT	Secretary, CAPROVA	South-East
Jeanne-Marie BENOIT	Counselor, CAPROVA	South-East
Ronald ANDRIS	Deputy Mayor, Jacmel	South-East
Dieussaint MARCELIN	Pastor, Jacmel	South-East
Joan RATON	Charge d'Affaires, Ministry of Tourism, Jacmel	South-East
Eliassaint WILKY	President, BEC Mirebalais	Center
Marcellus LUXON	Vice-President, BEC Mirebalais	Center
Noel RAYNOLD	Director-General, Townhall, Mirebalais	Center
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Donatien RONALD	Vice-President, BED Hinche	Center
Rodwgeze BRIZARD	Secretary/Treasurer, BED Hinche	Center
Michel Ange DESROSIERS	Deputy Mayor, Hinche	Center
Veliton JOSEPH	Legal Counsel, Townhall, Hinche	Center
Eliodor CLERVIL	President, Chamber of Commerce	Center
Jonas NAZAIRE	President, BEC St Marc	Artibonite
Bernard SAMUEL	Vice-President, BEC St Marc	Artibonite
Nerva EXILHOMME	Secretary/Treasurer, BEC St Marc	Artibonite
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Jacqueline JEAN-PIERRE	Former Coordinator of Initiative Committee, NDI	Artibonite
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Gerda BIEN-AIME	Coordinator, CNO	Artibonite
Paul WISLY	President, MADBA	Artibonite
Marc-Arthur MESIDORT	President, GADH	Artibonite
Baunars CHARLES	Mayor, St Marc	Artibonite
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Fritz JOSEPH	Mayor, Cap Haitien	North
Malherbe DORVIL	President, Chamber of Commerce	North
Elvire EUGENE	President, AFASDA	North



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## POST-EARTHQUAKE CONSTITUTIONAL ANALYSIS OF THE INTERRUPTION OF THE LEGISLATIVE AND EXECUTIVE POWERS



March – April 2010

By Claude Rioux

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## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b>	i
<b>I. MANDATE</b>	<b>1</b>
<b>II. ANALYSIS</b>	<b>1</b>
<b>A. The Problem</b>	<b>1</b>
i. The Earthquake: Postponement of the Elections	1
ii. The Consequences of the Absence of Legislative Power	2
iii. The Consequences of the Absence of the House of Representatives	6
iv. The Limited role of the Senate	7
v. The President Cannot Legally Sign Decrees	8
<b>B. Possible Solutions</b>	<b>10</b>
i. Extension of the Term of the Representatives (and the Legislature)	10
ii. Extension of the term of the Senators	11
iii. The choice of New Dates for the Upcoming Elections and Their Succession in Time	11
<b>C. The Constitutional Aspect</b>	<b>12</b>
i. The Existing and Applicable Rule of Law	12
ii. Constitutional Law: Nature and Legal Value	13
iii. The Interpretation of the Constitutional Regulations	13
iv. The Interpretation of the Provisions of the Haitian Constitution of 1987	15
v. The Differences between the French and Creole Versions of the Constitution	17
vi. Terms of Office and Constitutional Time	18
vii. The Installation of the Representatives, Senators and the President	20
<b>D. An Actual Situation of Rupture of the Constitutional Order: Legal Solutions</b>	<b>22</b>
i. Reinstatement of a Previous Constitution	22
ii. Revision According to the Procedure Stipulated in the Constitution	23
iii. Other Known Solutions	24
<b>E. The Adoption of a New Constitution</b>	<b>25</b>
i. The Use of a Constituent Entity	25
ii. The Adoption of Transitional Constitutional Provisions	26
<b>III. CONCLUSION</b>	<b>28</b>
Appendix I. Constitutional Reform Timetable	29
Appendix II. List of Persons Interviewed	30
Appendix III. Bibliography and Other Documents	31

## 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.<sup>12</sup> 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.”<sup>13</sup>

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

<sup>12</sup> The second round was scheduled for April 11 and 14 respectively.

<sup>13</sup> 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.)<sup>14</sup>

Thus, there will be a rupture in the constitutional order and, as underlined by Mirlande Manigat,<sup>15</sup> 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:

("...").<sup>16</sup>

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."

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

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

<sup>16</sup> 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<sup>17</sup>, 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, 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 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<sup>18</sup> 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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<sup>17</sup> All conditions for a total and complete failure of the Haitian State are in place.

<sup>18</sup> 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* (...).”<sup>19</sup>

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<sup>20</sup> 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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<sup>19</sup> 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.)

<sup>20</sup> On this matter, see:

[http://fr.jurispedia.org/index.php/Circonstance\\_exceptionnelle\\_en\\_droit\\_administratif\\_\(en\)](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 Millouli 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<sup>21</sup>

“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.”

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<sup>21</sup> 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<sup>22</sup>

“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<sup>23</sup>), 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?

<sup>22</sup> This motion of censure differs from that covered in Articles 129.4 and 129.6.

<sup>23</sup> 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*,<sup>24</sup> 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<sup>25</sup>).”

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,<sup>26</sup> 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.”<sup>27</sup>

<sup>24</sup> Op. cit., *Handbook of Constitutional Law*, page 196.

<sup>25</sup> “**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.”

<sup>26</sup> “**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.”

<sup>27</sup> 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."<sup>28</sup>

#### 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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<sup>28</sup> 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.<sup>29</sup>

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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<sup>29</sup> 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.”<sup>30</sup>

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<sup>31</sup> 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.”<sup>32</sup>

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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<sup>30</sup> Op., cit., *Handbook of Constitutional Law*, page 63.

<sup>31</sup> 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.

<sup>32</sup> Op cit, *Handbook of Constitutional Law*, page 33.

iii. *The Interpretation of the Constitutional Regulations*<sup>33</sup>

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.”<sup>34</sup>

(...)

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<sup>35</sup>, 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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<sup>33</sup> 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>)

<sup>34</sup> Op cit, *Handbook of Constitutional Law*, pages 56 and 57.

<sup>35</sup> 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**,"<sup>36</sup> 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<sup>37</sup> 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.<sup>38</sup>

*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."<sup>39</sup>

"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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<sup>36</sup> 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.

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

<sup>38</sup> 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.

<sup>39</sup> 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<sup>40</sup>. 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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<sup>40</sup> See Articles 134.2 and 149 of the Constitution of 1987.

It will now have to choose new dates for the elections<sup>41</sup> 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.”<sup>42</sup>

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,<sup>43</sup> 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.<sup>44</sup>

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

<sup>42</sup> Op cit, *Handbook of Constitutional Law*, page 57.

<sup>43</sup> French was declared the official language of Haiti in Article 24 of the Constitution of 1918.

<sup>44</sup> 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](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".<sup>45</sup>

### 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.<sup>46</sup> 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.

<sup>45</sup> 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>)

<sup>46</sup> 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 7<sup>th</sup> 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 1<sup>st</sup> of May, the Provisional President would have to organize elections within 3 months, therefore before the 1<sup>st</sup> 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.”<sup>47</sup>

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<sup>48</sup> 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.”<sup>49</sup>

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 7<sup>th</sup> 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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<sup>47</sup> Op. cit., *Haitian constitutional law treatise*, Volume II, page 460.

<sup>48</sup> 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; [...]"

<sup>49</sup> 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<sup>50</sup>. 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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<sup>50</sup> 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.<sup>51</sup>

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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 (49<sup>th</sup> legislature) to study the constitutional amendments proposed by the 48<sup>th</sup> 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.”<sup>52</sup>

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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<sup>51</sup> 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."

<sup>52</sup> 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.”<sup>53</sup>

She notes that, in Haiti’s history, this procedure has been used seven times, the last time being in 1957.<sup>54</sup>

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

<sup>54</sup> 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.”<sup>55</sup>

A necessary or politically appropriate constitutional amendment should normally take five to eight years to come into effect once the procedure is started.<sup>56</sup> 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<sup>57</sup>, 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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<sup>55</sup> Op cit, *Handbook of Constitutional Law (Manuel de droit constitutionnel)*, page 69 et 70.

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

<sup>57</sup> 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.<sup>58</sup> 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.”<sup>59</sup>

## **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,”<sup>60</sup> 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.”<sup>61</sup>

In his article called “Small Constitutions: *Contribution to the Analysis of Transitional Constitutional Law*” (*Les petites Constitutions: contribution à l'analyse du droit constitutionnel transitoire*), Emmanuel Cartier outlines the two forms of legitimate exercise of constituent power:<sup>62</sup>

<sup>58</sup> 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.

<sup>59</sup> Text of constitutionalist Claude Moïse, see note 18.

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

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

<sup>62</sup> 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 parliamentary form where people exercise their right of suffrage in order to elect representatives of a sovereign Assembly<sup>63</sup> 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.<sup>64</sup>

## 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.”<sup>65</sup>

### 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.<sup>66</sup>

“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

<sup>63</sup> 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>

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

<sup>65</sup> Op. cit., *French Review of Constitutional Law (Revue française de droit constitutionnel)*, page 520.

<sup>66</sup> 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.”<sup>67</sup>

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<sup>68</sup> 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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<sup>67</sup> Jules-Maps Bagalwa Mapatano, Crises of State and Migrations : the Congolian Zairese Diaspora in Switzerland (Crises de l'État et migrations: la diaspora congolaise zairoise en Suisse), p.239 The part cited is available on the following internet site:  
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<sup>68</sup> 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.<sup>69</sup>

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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<sup>69</sup> 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
<u>Last session</u>	<u>1st session</u>	<u>1st session</u>
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

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