

## Constitutional Reform in Haiti

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## **I. The 1987 Constitution: historical background and salient features.**

### ***The Constitution's origin: a response to dictatorship.***

March 29, 2010 marked the 27<sup>th</sup> Anniversary of the referendum adopting the 1987 Constitution. Drafted in the wake of the overthrow of the Duvalier dictatorship, after decades of dictatorial rule; the 1987 Haitian Constitution represented a “victory” over the authoritarian regime.<sup>1</sup> Ratified by popular referendum with nearly 90 percent of the people voting in favor,<sup>2</sup> this document has been described both as an “emotional reaction” and an attempt to take “revenge against Duvalierists” by excluding key representatives of the Duvalier regime from the political process.<sup>3</sup> Indeed, one of the main selling points of the Constitution was Article 291, which banned Duvalier’s aides from public office for a period of 10 years.

An ambitious and progressive document, the 1987 Constitution aims to promote ideological pluralism, electoral competition, separation of powers and an independent judiciary. It abolishes the death penalty (which could previously be imposed for the crime of treason, defined as taking up arms against the Republic of Haiti); introduces a career civil service; and establishes a Provisional Electoral Council to be followed by a Permanent Electoral Council to oversee electoral processes (a function that was previously carried out by the National Government Council).<sup>4</sup>

This text combines local features with elements of the 1958 French Constitution, and enshrines the concepts of freedom and human rights. Since its inception, however, the 1987 Constitution has never been fully observed and has often sown discord among Haitians.<sup>5</sup> Its weaknesses and ambiguities, as well as the state’s capacity to implement many of its provisions, have been widely debated. Immediately after its adoption, the Constitution was suspended for three years amidst political instability.<sup>6</sup> It was only in 1990 that the first national election under the new Constitution could be held bringing to power Jean Bertrand Aristide, the first President to be elected by universal suffrage in a free and fair election.<sup>7</sup> Soon thereafter a coup in 1991 sent Aristide into exile and resulted in the establishment of a military regime. Democracy was only restored in 1994 when the junta was ousted by a US military intervention, in the wake of which President Aristide was restored to power and the Constitution reestablished. When Aristide’s mandate expired in 1996 he had to step down as the Constitution only allows for a single five-year term, a reaction to having had two “Presidents for life.” Rene Préval, then Prime Minister, was elected President.

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<sup>1</sup> It replaced the 1983 Constitution, which had contributed to creating a highly personalized, authoritarian state where the constitutionally granted individual rights were never respected in practice.

<sup>2</sup> Report of the “Symposium on the Haitian Constitution” held on April 28, 2007, at the Florida International University College of Law, p.2.

<sup>3</sup> Ibid.

<sup>4</sup> Article 292 empowers the CEP with determining which candidates are “Duvalierists” and have to be disqualified.

<sup>5</sup> Report of the Symposium on the Haitian Constitution, op.cit., p.7.

<sup>6</sup> William O’Neill and Elliot Schrage, “Paper Laws, Steel Bayonets: the Breakdown of the Rule of Law in Haiti,” *New York: Lawyers Committee for Human Rights*, (1990): 4-10.

<sup>7</sup> Louis Aucoin, “Haiti Constitutional Crisis”, *Boston University Law Review Journal*, Vol.17:115, (1999): 118.

A confrontation between the Executive and the Legislature soon led to a political impasse and a succession of constitutional crises culminating in 1999 in the (unconstitutional) decision of President Préval to rule by decree.<sup>8</sup> Politics became further polarized when the 2000 general elections once again brought Aristide to power in a contentious vote. The Organization of American States reported fraudulent manipulation of the vote by the Provisional Election Commission, which was largely controlled by Aristide's party, *Famille Lavalas*.<sup>9</sup> From then until 2004, when anti-Aristide protests culminated in a wave of violence, no institution "had enough constitutional power and political legitimacy" to deal with the crisis and impose a solution.<sup>10</sup> More recently, the ousting by the Senate of Prime Minister Michele Pierre-Louis in October 2009 triggered political uproar and claims of unconstitutionality by her supporters. 18 of the Chamber's 29 Senators voted against the Prime Minister, complaining about Haiti's dire economic state. Invoking the Constitution, Pierre-Louis's supporters challenged the vote stating that the Senators had no power to remove the Head of Government without specific instruction by the President.<sup>11</sup>

### ***Salient features of the 1987 Constitution***

#### *a. Banning the personality cult*

Following decades of dictatorship, the 1987 Constitution (Article 7) explicitly forbids a personality cult and bans the use of names or images of living persons on money and stamps as well as public places and artwork all of which had been hallmarks of the Duvalier regime.

#### *b. Extensive civil liberties and other human rights guarantees*

While civil liberties had been, at least in theory, guaranteed by the previous Constitution, in practice they were rarely observed. The 1987 Constitution expanded provisions with regard to civil liberties and human rights. In particular, Title III of the Haitian Constitution deals with the nature of citizenship (Articles 16 to 18), fundamental rights (Articles 19 to 51) and citizens' duties (Articles 52). According to Article 16 of the Constitution, citizenship entails the combination of civil and political rights and Article 17 adds that "all Haitians regardless of sex or marital status, who have attained eighteen years of age, may exercise their political and civil rights if they meet the other conditions prescribed by the Constitution and by law". Article 18 further states that "Haitians shall be equal before the law, subject to the advantages conferred on native-born Haitians who have never renounced their nationality". The Constitution further guarantees a series of fundamental rights, notably the right to life (Articles 19 to 23), freedom of expression (Articles 28 to 29.1), freedom of conscience (Articles 30 to 30.2) and freedom of assembly and association (Articles 31 to 31.3). It also lists a number of socioeconomic rights such as the right to education (Articles 32 to 34.1), freedom to work (Articles 35 to 35.6), the right of

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<sup>8</sup> Ibid. 119

<sup>9</sup> Peter Dailey, "Haiti: the Fall of the House of Aristide", *The New York Review of Books*, Vol. 50.4 · March 13, 2003.

<sup>10</sup> Ibid. 7.

<sup>11</sup> Article 129-3 of the Constitution grants Parliament the power of "*interpellation*" (the process of summoning members of the Government to question their actions) which may lead to a motion of no confidence. However, Article 129-4 and 129-5 pertain to the power of the President to accept the resignation of the Prime Minister.

ownership - namely that the state can expropriate private property provided that a “just” compensation determined by an expert is offered to the owner (Articles 36 to 39), the right to information (Article 40). Additionally, the Constitution in its preamble makes reference to the 1948 Universal Declaration of Human Rights. While it is noteworthy that socioeconomic rights found entry into the new Constitution, these provisions have largely existed on paper only due to a lack of political leadership, poverty and a failure to allocate limited resources to address education, housing, medical care and job creation.

An element of novelty is the section on the right to security (Articles 41 to 51) which states that no Haitian can be deported or forced into exile, and that no Haitian should need a visa to enter or leave the country. During the Duvalier dictatorship exile had become a way to get rid of political opponents and requiring Haitian citizens to have entry and exit visas was a way of monitoring movement and raising revenues for the state.<sup>12</sup>

### *c. Forbidding dual Haitian and foreign nationality*

The Constitution categorically forbids dual nationality (Article 15). Moreover, it states that one’s Haitian nationality is lost by: a. naturalization in a foreign country; b. by holding a political post in the service of a foreign country; c. or by continuous residence abroad of a naturalized Haitian without duly granted authorization by a competent official. Anyone who loses his or her nationality in this manner may not reacquire it (Article 13). The Haitian Diaspora, one of the largest in the world, has long claimed that this provision has prevented them from participating in the country’s economic and political life.<sup>13</sup> Even those who have not been naturalized in a foreign country, and could in principle vote in an embassy or consulate are often impeded by administrative obstacles due to the weakness of Haiti’s diplomatic service.<sup>14</sup> Subsequently, a “Ministry for the Haitians Living Abroad” was established in 2002 and some advantages were granted to foreigners of Haitian origin.<sup>15</sup>

Haitians living abroad, often belonging to a well-educated and rather affluent middle-class in their country of adoption, are already making a significant contribution to the Haitian economy through remittances. According to UNDP, they remitted slightly more than \$1.2 billion to the country in 2007, twice as much as the international aid Haiti receives.<sup>16</sup> The bulk of the Diaspora resides in the US, France, Canada, the Dominican Republic, the Bahamas and other Caribbean countries. Notwithstanding their level of integration, which varies depending on the countries of naturalization, Haitians support their homeland through remittances and return trips, as well as development and business projects. Some also try to influence Haitian politics through transnational networks and lobbies. However, the Diaspora is not a monolithic bloc and splits around political figures and class divisions make their demands not fully coherent, including its members’ quest for dual nationality (for instance in France not all of the Diaspora is pro-dual nationality).<sup>17</sup>

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<sup>12</sup> Report of the “Symposium on the Haitian Constitution,” op.cit.

<sup>13</sup> Speaking to the press, Prime Minister Jean-Max Bellerive publicly defined article 15 as an impediment to investment and therefore a “threat for democracy”. See Poder 360, 18 December 2008.

<sup>14</sup> ICG Report “Peacebuilding in Haiti: Including Haitian from Abroad”; No.24, 14 December 2007.

<sup>15</sup> Leslie Voltaire, the then Minister for the Haitians Living Abroad formulated the so called “Voltaire laws” which grant privileges to foreigners of Haitians origins. See ICG (2007) op. cit, p.18.

<sup>16</sup> UNDP “Haiti”- Human Development Report 2009 at [http://hdrstats.undp.org/en/countries/country\\_fact\\_sheets/cty\\_fs\\_HTI.html](http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_HTI.html)

<sup>17</sup> See ICG (2007), op. cit., p. 17.

Indeed, some of the Diaspora aspires to see its economic contribution reflected in political representation. Prior to the January 2010 earthquake, as the country was preparing for presidential elections, representatives of the Diaspora had launched a vigorous push for dual citizenship. Before the quake, some in Haiti viewed the issue as an attempt to take over the country by nationals who do not have a real understanding of life in Haiti. This resistance has dissipated since the January quake. In any case, this provision of the Constitution has not always been observed and many Haitians are de facto dual citizens or have been able to acquire a Haitian passport on the black market. Allowing dual citizenship would in all likelihood make the participation of the Diaspora in the political process more efficient and transparent.<sup>18</sup>

*d. Promoting decentralization*

The drafters tried to bring democracy to the local level through an intricate system of decentralization. Realizing that the concentration of power in Port-au-Prince had contributed to tyranny, they saw decentralization as an antidote to those abuses. The Constitution defines three levels of decentralized government entities – communes, municipalities and departments - which, in theory, enjoy financial autonomy but have in practice always lacked resources.<sup>19</sup> At the summit of the pyramidal structure is the Interdepartmental Council that was designed to give voice to all geographic levels and assist the Executive in developing decentralized policies (Articles 87.2 and 87.3).<sup>20</sup>

The principle of decentralized government is enshrined in the Constitution's preamble. However, while the Constitution establishes the general framework of decentralization and defines the country's political subdivisions, it leaves to the legislators the task of developing the system's rule and regulations. If fully implemented, the system would not only be radically democratic but also extremely complex and costly. Yet, to date decentralization laws have either not been formulated or only partially implemented. Implementation delays are due to the unwillingness of national authorities to cede power to lower levels, to the shortage of trained staff and to the inability of the local authorities to generate their own financial resources through tax collection, tariffs and fees.<sup>21</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> The Constitution defines communal sections as the smallest political subdivision. The communes or municipalities, which include varying numbers of communal sections, represent the intermediate level of local government. The final level of local government is the department, which includes a varying number of communes. The country is subdivided into 568 communal sections, 140 communes or municipalities, and 10 departments. According to a 2006 evaluation by USAID, "the decentralization system the Constitution mandated has never been implemented fully, except for after the 1997 elections during President Préval's first government when full elections were held. Soon after, however, all elected officials were suspended because of a new political crisis and appointed officials replaced them". See S. Ramirez, A. Lafontant, M. Enders, "Local Governance and Decentralization in Haiti", USAID July 2006, p.8.

<sup>20</sup> The interdepartmental council has never existed in practice.

<sup>21</sup> USAID, id.p.4.

*e. Curbing executive powers*

The principal novel features of the 1987 Constitution are institutional in nature. Twenty-nine years of dictatorship had demolished all counterbalancing institutions to the presidency. In response, the 1987 Constitution attempts to contain executive powers by limiting presidential tenure to a maximum of two non-consecutive five-year terms (Article 134.3)<sup>22</sup>; by dividing the executive functions between the President and the Prime Minister (Article 133)<sup>23</sup>; and by separating the army from the presidency. Indeed, under Article 143, the President is the nominal head of the armed forces but has no personal command over them. The entire chapter of the Constitution dedicated to the Army (Articles 264-268) has become obsolete since Aristide disbanded the Haitian Army in 1994, a move that many have criticized as unconstitutional.

Inspired by the 1958 French Constitution, the Haitian Constitution introduces a semi-presidential system by providing for a President who is directly elected by universal suffrage (Article 134) but shares its executive functions with the Prime Minister. The President “chooses the Prime Minister among the members of the party that has obtained the majority in Parliament” (Article 137); in the absence of a majority the President chooses his Prime Minister in consultation with the President of the Senate and the leader of the Chamber of Deputies; the choice must then be ratified by the Parliament. The President promulgates the laws, signs all international treaties and agreements, and submits them for ratification to Parliament. He presides over the Council of Ministers and enacts presidential decrees. Furthermore, the President appoints certain high-level functionaries, receives the credentials of ambassadors of foreign countries and exercises his/her right to commute prison sentences. Almost all of the President’s acts have to be countersigned by a Minister or approved by the Parliament. An ambiguity arises with regard to the roles of the President and the Prime Minister concerning the procedure of appointing the Ministers under Article 158, which states that the Prime Minister chooses the members of his cabinet “in agreement” with the President but does not specify the process.

*f. Strengthening the legislative power*

While the French 1958 Constitution introduced semi-presidentialism with the intention of creating a strong presidency, various features of the Haitian Constitution institutionalize the Parliament’s supremacy at the expense of presidential power.<sup>24</sup> First of all, unlike in the case of France as well as other modern regimes with parliamentary features, the President has no power to dissolve the Parliament in case of political deadlock. Indeed, while the Parliament has several checks on executive powers, the President has no counterbalancing dissolution power.<sup>25</sup> On the other hand, Article 129.2 grants Parliament the power of *interpellation*, which refers to the procedure whereby Parliament summons

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<sup>22</sup> The President is elected for five years by direct universal suffrage. He cannot be reelected for a second consecutive mandate. President Préval has been arguing that this provision directly affects the country’s political stability by preventing continuity in leadership.

<sup>23</sup> The Prime Minister has to come from the party with the majority in Parliament (Article 137). In case no party achieves a majority, the President consults with the Presidents of the Senate and the Chamber of Deputies and the person chosen as Prime Minister must then be ratified by both Chambers.

<sup>24</sup> Louise Aucoin, “Haiti Constitutional Crisis”, *Boston University Law Review Journal*, Vol.17:115, 1999, p. 121.

<sup>25</sup> *Ibid.*, 126.

individual Ministers to appear before it to answer questions. Moreover, the Haitian Constitution introduces elements of strong parliamentary regimes by establishing *investiture*, the procedure by which the Parliament approves the Prime Minister and members of his cabinet, as well as his/her program of Government (Article 158); and by stating that “the Legislature makes the laws on all matters of public interest” (Article 111). Parliament has the power to interpret the Constitution’s provisions and intervene in criminal trials. It has impeachment powers and could put the President and the Prime Minister, Ministers and State Secretaries on trial for treason or any other crime committed while in office, in which case the Chamber of Deputies acts as a prosecutor and the Senate acts as a High Court of Justice (Articles 185 and 186).<sup>26</sup> The drafters’ intent to strengthen the Parliament and curb the Executive is also reflected in the regulatory power granted to the Prime Minister in Article 159, which is clearly subordinate to the laws of the Parliament.<sup>27</sup>

This imbalance of powers between the two arms of the Government has contributed to Haiti’s political instability. For example, after many false starts, legislative elections finally took place in April 1997. The split of Aristide’s Lavalas Movement between the *Organisation du peuple en lutte* and the *Famille Lavalas* led to a political stalemate and the resignation of Prime Minister Rosny Smarth in June 1997. The Prime Minister’s resignation required the President to appoint a new Prime Minister who would then choose a new Government who in turn would have to be approved by the Parliament through *investiture*. The Haitian Parliament kept rejecting all proposed Prime Minister candidates until the President decided, in January 1999, to declare that the Parliament’s term had expired and that he would rule by decree. The President’s acts were deemed unconstitutional by the opposition in light of the Constitutional provision that “in no case may the House of Deputies or the Senate be dissolved or adjourned” (Article 111.8). This crisis underscored the relative power of the legislative branch over the executive.<sup>28</sup>

Scholar Louis Aucoin <sup>29</sup> notes that, in spite of the clarity of the provisions establishing parliamentary supremacy, an ambiguity arises out of other articles of the Constitution which could be interpreted as granting the President broad rulemaking authority aimed at insuring governmental continuity during a political crisis. For example, Articles 136 and 138 respectively call for the President to ensure the regular operation of the public authority and the continuity of the state and for the President to guarantee national independence and territorial integrity.

Aucoin adds that the issue is further clouded by the confusion of authority between the Prime Minister and the President contained in Article 159.<sup>30</sup> That Article states that the Prime Minister has the power to issue rules and regulations but can never suspend or interpret laws, acts or decrees. “One could argue that Article 159 impliedly endows the President with a power to issue decrees, which is independent of and superior to the Prime

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<sup>26</sup> On the other hand, the President could neither dissolve parliament nor appeal directly to the voters via referenda.

<sup>27</sup> L. Aucoin., op. cit., 123.

<sup>28</sup> Ibid., 132.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., 135-136.

Minister's regulatory power. This interpretation could lend support to the broader view of the President's rule-making powers".<sup>31</sup>

In 1999, Préval claimed that his actions declaring the legislative term over and his intention to rule by decree were constitutional. Yet for many they were reminiscent of the authoritarian rule that the Constitution had sought to overturn.<sup>32</sup> Yet the President and his opponents in the Legislature had little doubt that the Constitution and its ambiguities had contributed to the stalemate.

*g. Creating independent, non-partisan implementing institutions*

While the Constitution mandated the formation of an independent electoral council - the *Conseil Electoral Permanent* - as the only body charged with organizing elections, the Provisional Electoral Council (*Conseil Electoral Provisoire*--CEP), established in early 1987 as a transitional measure, was to fulfill this requirement until the Permanent Council could be established. This, however, never happened. The CEP enjoyed extensive powers: it designed electoral rules, kept voter rolls, declared winners and adjudicated electoral disputes.<sup>33</sup> The Constitution strengthened the *Cour Supérieure des Comptes et du Contentieux Administratif*, which was both an auditing body as well as a court in the conventional sense. The Court was supposed to oversee the expenditures and the revenues of the central Government, to participate budget formulation, and to review public finance questions and contracts. Finally, the Constitution created the *Office de la Protection des Citoyens*, which was intended to protect Haitians from Government abuses and to investigate charges of abuse by public officials at every level, including the police and military.<sup>34</sup>

## **II. The Constitutional reform**

### ***The process***

Constitutional reform has been one of the main priorities of Préval's current presidency, and this effort has been strongly supported by the international community. However, several politicians and civil society actors saw his engagement as the expression of a personal agenda whereby the President aimed to consolidate his power at the expense of other Government institutions.<sup>35</sup> In March 2007 the Government of Haiti launched what it called a national dialogue on the Haitian Constitution to commemorate the 20<sup>th</sup> anniversary of the 1987 Constitution. A Presidential Commission was established to recommend a course of action and identify possible amendments to the Constitution before June 2009.

According to the procedure foreseen by the Constitution, "the Legislature may declare that the Constitution should be amended" based on the recommendation of one of

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid., 140.

<sup>33</sup> Report of the Florida Symposium., op. cit., p. 6.

<sup>34</sup> Ibid.

<sup>35</sup> Tone Faret, "Haiti – a step in the wrong direction"; Norwegian Peacebuilding Center; 10 November 2009; p.2 <http://www.peacebuilding.no/eng/Publications/Articles/Haiti-a-step-in-the-wrong-direction>



the two Houses, or of the Executive Branch (Article 282). This petition must be supported by two-thirds of each of the two Houses. “At the first session of the following Legislature, the Houses shall meet in a National Assembly and decide on the proposed amendment” (Article 283).

On 14 September 2009, the Haitian Parliament approved the constitutional reform bill, which would have to be ratified during the first session of the new Legislature, following the legislative elections originally scheduled for February and March 2010. This “second” Legislature could ratify the proposed amendments, assuming that two thirds of the Houses are present and cast a two-thirds majority vote in favor (Article 284-1). The amendments would then enter into force only after the inauguration of a new President (Article 284-2). If all had proceeded according to plan, with a new President in place on February 7, 2011, the reforms could have entered into force sometime in 2011. The devastating January 12, 2010 earthquake required a postponement of the legislative elections and thus the entire Constitutional reform process is currently on hold.

### *The debate*

There is broad consensus in Haiti and among the Diaspora that the 1987 Constitution suffers from several shortcomings and needs to be reformed. The Haitian state lacks the capacity to implement and enforce the Constitution. The key pro-reform argument is that the Constitution is not balanced, excludes the Diaspora from more active participation in Haiti’s development and that amending the Constitution is too onerous.<sup>36</sup> Furthermore, the multiple elections required by the Constitution impose a heavy electoral calendar constituting a significant financial burden on Haiti, and often resulting in a paralysis of Government’s activities during electoral years which leads to disillusionment among voters. Combined with a widespread lack of confidence in and disenchantment with the political establishment, the frequency of elections has generated a degree of electoral fatigue and voter apathy, explaining plummeting voter turnouts. According to President Préval and his supporters who launched the discussion on reform, the country’s long-term stability is at stake under a Constitution that bans consecutive presidential terms; allows Parliament to easily dismiss the Prime Minister and requires national elections every two years –largely financed with foreign aid.<sup>37</sup>

The key anti-reform argument is that the Constitution remains an effective tool to prevent the return to personalized tyrannical rule, and that the process of reforming the Constitution is in itself politically destabilizing and too costly for the nation.<sup>38</sup>

In the context of the reform debate, some amendments have been more controversial than others. Introducing the rights to dual nationality, in order to encourage greater participation of the Diaspora in the country’s political life, as well as reforming the electoral system generate broad consensus. Security issues (notably the destiny of the disbanded Army) have sown discord and were not included in the final version of the proposed

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<sup>36</sup> Former Prime Minister Alexis’ keynote speech in the Report of the Symposium on the Haitian Constitution; *id.*, p.9.

<sup>37</sup> President Préval quoted in “News and opinion on the situation in Haiti”; McClatchy newspaper, November 10, 2007.

<sup>38</sup> Former Prime Minister Alexis’s keynote speech; *op. cit.*, p.9.

amendments. The reforms seek to address some of the institutional ambiguities highlighted in this paper but leaves the most controversial issues, such as the lack of public accountability of the legislative power, unchanged. However, it does attempt to establish greater symmetry in the relations between the executive and legislative authorities. While academics generally agree that this is a key reform issue, others fear that allowing for an imbalance in favor of the Legislature was necessary to keep the Executive in check, and thus prevent a return to authoritarianism. The proposed changes, however, are generally moderate in that they do not alter the spirit or the essence of the 1987 Constitution.

### **III. Key amendments (as voted by the Haitian Parliament on 14 September 2009)**

#### ***Gender equality***

The Preamble features a reference to constitutionally guaranteed gender equality “*in all instances of power and decisions.*” Moreover, new provisions (Articles 17.1 and 31.1.1) establish a gender quota of at least 30% for all levels of political life and especially in the civil service.

#### ***Haitian nationality***

A key amendment removes Article 15 which prohibited dual nationality. New Article 11 grants Haitian nationality “to all individuals born to a Haitian father or to a Haitian mother who themselves had not repudiated their own nationality at the time of the birth of their child.” However, new Article 12 states that no Haitian citizen can assert his/her foreign nationality in the territory of the Republic of Haiti and that all citizens will be subject to all rights and obligations deriving from Haitian nationality when in Haiti.

#### ***Institutional rules***

One of the most important constitutional reforms aims at reducing the number of elections as Haiti’s heavy electoral calendar brings unsustainable costs and voter fatigue, among other problems. This objective is addressed through harmonizing the length of the mandates of elected officials (it is now five years for Senators, Deputies, and local representatives which also matches the President’s term) and with the introduction of new parameters to reduce the number of run-off elections.

Another aim was to ensure that presidential, senatorial, deputy, and local representatives’ elections are held at the same time. However, the constitutional amendments as they currently read do not guarantee that this will happen. As outlined further in the sections below, elections for the Senate, the Chamber of Deputies, and President are to take place at “the end of the fifth year of their mandate.” One of the suggested formulations considered during the constitutional reform process mandated that the election for each of these positions would take place “the last Sunday of November of the fifth year of their mandate.” The more ambiguous formulation in the approved version of the amendments does not guarantee the elimination of multiple election dates. As such, the onus will be upon the law to further clarify election dates and ideally, to insure they occur simultaneously.

*a. Territorial Divisions and Decentralization (Articles 61-87)*

The mandate of local representatives at the communal, municipal, and department levels will be extended from four to five years (Articles 63, 68, and 78 respectively). The intricate decentralized system is otherwise left unchanged in spite of recommendations by the international community to simplify local governance by reducing the number of bodies and administrative levels as well as the cost of elections.<sup>39</sup>

*b. The Chamber of the Deputies (Articles 89-93)*

Amended Article 90 clarifies ambiguities regarding the delimitation of electoral constituencies stating that “the delineation is based on the demographic weight of communities.” The election of the Deputies takes place at “the end of the fifth year of their mandate” (Article 90.1). One Deputy is chosen for each electoral constituency. Deputies are elected by the absolute majority of the vote cast in the electoral assembly “by the valid votes in conformity with the electoral law” (Article 90.1). The wording “valid votes” seems to have been included as a constitutional insurance against electoral fraud which has frequently plagued elections in Haiti.

To reduce the number of run-off elections, the electoral system was amended to introduce a “qualified first-past-the-post” system. In the case that the candidate with the highest number of votes does not obtain an absolute majority they can be declared the first-round winner nonetheless if they garner 25% or more of the votes than the candidate with the second highest number of votes (Article 90.2).

The Deputies’ mandate is extended from four to five years (Article 92) and starts on the second Monday of January following the election (Article 92.1). If elections can not take place before the second Monday of January, the elected Deputies take office immediately after the validation of the election and their mandate is considered to have begun on the second Monday of January in the year in which they began their mandate (Article 92.1).

*c. The Senate (Articles 94-97)*

Three Senators are chosen per Department and, like the Deputies, they are elected “at the end of the fifth year of their mandate” (Article 94.3). The duration of the Senator’s mandate is reduced from six to five years to coincide with the Deputies’ term, and starts on the second Monday of January following the election (Article 95). This would be the end of the system, modeled after the U.S., under which a third of the Senate seats would be up for election every two years. This revision seeks to prevent constitutional crises such as in 2009 when the Senate had to operate with less than two-thirds of its legal membership because the terms of the first ten senators – three from the ruling party – had ended in early 2008.<sup>40</sup>

If elections cannot take place before the second Monday of January, the elected Senators take office immediately after the validation of the election and their mandate is considered to have begun on the second Monday of January in the year which they began their mandate (Article 95).

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<sup>39</sup> ICG, “Consolidating Stability in Haiti”; 18 July 2007, p.3

<sup>40</sup> ICG, “Haiti 2009: Stability at Risk”; Briefing No. 19, 3 March 2009; p. 5.

In order to reduce the number of runoffs for the three Senate seats Articles 94.4, 94.5, and 94.6 are introduced. According to Article 94.4, the candidate with the highest number of votes, if not in the absolute majority, must have 25% or more votes than the person in sixth place. In the case where there is no sixth candidate, the Senate candidate most favored in the first round is declared the winner. According to Article 94.5, the candidate in the second position, if not in the absolute majority of the remaining candidates, must have 25% or more than the candidate in fifth place in order to be declared winner. In the case there is no candidate in fifth place, the person in second place is declared the winner. Finally, according to Article 94.6, the candidate with third highest number of votes, if not in the absolute majority of the remaining candidates, must have 25% or more than the candidate in fourth place. In the case there is not candidate in fourth place the candidate in third place is declared the winner.

*d. The President of the Republic (Articles 134-135)*

The length of the President's mandate remains five years. The President will be elected by the absolute majority of the votes cast in conformity with the electoral law (Article 134). In an attempt to reduce the number of elections (mirroring amendments on Parliamentary elections) the candidate with the highest number of votes, if not in the absolute majority, can be declared winner if they have a margin of 25% or more votes than the person in second place. If the first round of voting does not result in such an absolute or relative majority, a second round must be held.

The Presidential election is to be held at "the end of the fifth year of the Presidential mandate" (Article 134.2). The President-elect takes office on February 7 following the date of his election. In cases where voting can not take place before February 7, the President-elect shall assume office immediately after confirmation of the election and his term is supposed to have begun on February 7 the year of election (Article 134.2). The Haitian Parliament rejected the proposed amendment to allow the President to serve two consecutive five-year terms.

The reform does not entail any significant expansion of presidential power. To maintain stability during the temporary inability of the President to carry out his duties (*empêchement*), a new provision requires the suspension of any interpellation of the Government in that period (Article 149.2). In the case that the office of the President is vacant due to resignation or removal, the Council of Ministers, chaired by the Prime Minister, exercises executive power until the election of another President (Article 149).

According to Article 137 the President chooses a Prime Minister from among the members of the party having an absolute majority in Parliament. Accordingly, the majority is established "on the basis of electoral results of those elected in each house. Failing such majority, the President of the Republic chooses the Prime Minister in consultation with the President of the Senate and the House of Deputies" (Article 137). Previously, a ratification of the Parliament was also necessary. The new formulation also differs in that the Prime Minister is chosen from the party with the **absolute** majority in Parliament.

## ***The relationship between the Executive and the Legislative***

There are several amendments aimed at rebalancing the legislative and the executive branches. Article 119.1 enables the Executive to request an immediate vote on a proposed law, thus strengthening his/her means to influence the lawmaking process. Article 129.3 increases the quorum for the procedure of “*interpellation*” from five members to one quarter of the members of the concerned Chamber. This reform ensures that the process of interpellation will only be used if there is a significant consensus among members of legislature whereas before a small minority could require Ministers to halt their work and appear in either Chamber. Article 129.6 adds a new restriction on the Legislature by limiting their power to have a vote of censure against the Prime Minister to one per one year period. Previously, there was no limit on the number of no-confidence votes that could be called.

The *Conseil Constitutionnel*, created as per Article 190bis, is given the power to address disagreements between the Executive and the Legislative and other constitutional issues, including electoral disputes. This makes the Articles pertaining to the *Cour de Cassation* (111-5 to 111-7) obsolete and these were removed.

### ***Judiciary power***

Strengthening the independence and the effectiveness of the Judiciary is one of the main goals of the constitutional reform. An important innovation is the creation of the *Le Conseil Supérieur du Pouvoir Judiciaire* (Article 184.2), which has powers of oversight and review of the entire judiciary. The CSPJ will supervise and evaluate the professional competence of judges and take disciplinary action in cases of malfeasance or corruption. The *Cour de Cassation* will be deprived of its power to hear constitutional, electoral or political issues. It will not be called to fill the vacuum created by the vacancy of the President (a role which is to be transferred to the *Conseil Constitutionnel*).

A more rational and effective procedure to appoint judges to the *Cour de Cassation*, *Cour d'Appel*, and the *Tribunaux de Première Instance* will begin with the list of candidates being submitted by the CSPJ (with appropriate justification of the choice based on their experience and credentials) instead of by the Senate; the Departmental and the Communal Assemblies respectively (Article 175). In the past, judicial independence and integrity has been hampered by the inability to follow the procedure of Article 175.<sup>41</sup> The procedure should in principle prevent undue Executive influence and increases the likelihood of appointing competent judges, which remains a critical issue. The CSPJ is supposed to submit only those candidates with the competence, integrity and outstanding performance that merits appointment to a judgeship.

The nine members of the *Conseil Électoral Permanent* are proposed as follows: by the Executive Branch (three); by the *Conseil Supérieur du Pouvoir Judiciaire* (three) and by Parliament (three) (Article 192).

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<sup>41</sup> “Under which the President is to appoint first instance courts judges and *juges de paix* from the lists submitted by the territorial assembles and the departmental and communal levels respectively. The departmental assemblies have never been established so the appointment procedure has never been followed”. ICG; “Haiti: Justice Reform and the Security Crisis”; Briefing No. 14, 31 January 2007; p. 8-9.

## ***Independent institutions***

### *Innovation: Le Conseil Constitutionnel*

A major element of the reform concerns the creation of the *Conseil Constitutionnel*, the highest judicial power of the state in constitutional matters. Modeled on the French institution of the same name, the *Conseil* will be charged with: ruling on the constitutionality of laws and regulations (Article 190bis); policing the boundaries between the legislative competences of the Parliament and of the Executive as well as between the Parliament's two Chambers; and ruling over conflicts between administrative tribunals (Article 190ter.7).

The *Conseil* is not formally a court; its procedures are not fully judicial and are not dictated by a set of procedural rules but rather by an organic law (Article 190ter.10). The *Conseil* examines the constitutionality of organic laws that are subject to its compulsory review before they are promulgated as well as the internal rules of the Senate and the Chamber of the Deputies before they are applied (Article 190ter.5).

Given the partisan history of the Haitian court system, the designation of the *Conseil* as a "Council" rather than a Court provides a clue to what is anticipated of its members: they are to be independent guardians of the republican constitutional tradition. The *Conseil* is composed of 9 members (Article 190bis.1) whose term lasts for nine years and is not renewable (Article 190ter.2). The President nominates the members of the *Conseil* (Article 190ter.).

In terms of their competences, the *Conseil* is to contain the following as per Article 190bis.1: three magistrates with 10 years of experience, of which one is appointed by the Executive Branch, one by the Legislative Branch, and one by the Judicial Branch; three high-level jurists, professors or lawyers of which one is appointed by the Executive Branch, one by the Legislative Branch, and one by the Judicial Branch; and three people of high professional standing of which one is appointed by the Executive Branch, one by the Legislative Branch, and one by the Judicial Branch.

### ***The environment***

A new provision (Article 256.1) says that the state may, if the need is demonstrated, declare an area a zone of ecological utility.

### ***The Army***

Amended Article 264 changes the denomination of "*Armed Forces of Haiti*" into "*the Army of Haiti*". However, the constitutional reform does not address the longstanding question of whether to reinstate the Army. "The issue of whether Haiti should have an army remains alive, as do questions about status of former soldiers and the army's potential role in a country with no external enemies and a history of military coups."<sup>42</sup>

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<sup>42</sup> Robert Perito and Jasenka Jovic, "Paper Versus Steel: Haiti's Challenge of Constitutional Reform," USIP, January 2007, p.3

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