



**7** February 2021

**End of constitutional presidential mandate**

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## End of constitutional presidential mandate

By Gédéon Jean, Lawyer at the Port-au-Prince Bar, specialist in international human rights law and Executive Director of the Centre for Analysis and Research in Human Rights (CARDH).

Produced observations:

\* Centre de Recherche et de Formation Économique et Sociale pour le Développement (**CRESFED**)

\* Commission Épiscopale Nationale – Justice et Paix (**CE-JILAP**)

\* Conseil Haïtien des Acteurs non Étatiques (**CONHANE**)

\* Programme alternatif de Justice (**PAJ**)

Has also produced observations:

\* Guerby Blaise, Lawyer at the Port-au-Prince Bar and PhD in criminal law and procedure.

CARDH thanks all the institutions and individuals who provided comments whose names are not included in this analysis.

## **CARDH**

*Centre d'analyse et de recherche  
en droits de l'homme*

3, Rue Charlevoix  
Bourdon, Port-au-Prince, Haiti  
(509) 28 11 79 44/36 10 69 09  
info\_cardh@yahoo.com  
www.cardh.org

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## Accronyms

CARDH\*: Centre d'analyse et de recherche en droits de l'homme [*Center for Analysis and Research in Human Rights*]

CEP\*: Conseil électoral provisoire [*Provisional Electoral Council*]

CEEI\*: Commission d'évaluation électorale indépendante [*Independent Electoral Evaluation Commission*]

CIEVE\*: Commission indépendante d'évaluation et de vérification électorale [*Independent Evaluation and Verification Commission*]

*\*In-text French acronyms*

## I. Abstract

1. The Vienna Declaration and Program of Action, adopted on 25 June 1993 by the Second World Conference on Human Rights, affirms that human rights are guaranteed under the rule of law. This is implemented through the independence of control institutions (*administrative control, judicial control, control of constitutionality and conventionality, etc.*), but above all, through the respect of the Constitution, considered to be the ultimate norm of any country, regardless of its political regime, given its fundamental role of organizing the regular operation and balance of State entities.
2. The implementation of the Constitution is therefore the primary duty of any government. Thus, policy-makers, civil society and human rights organizations, as well as the economic sector have the responsibility to uphold scrupulous respect for the Constitution by those who govern and those who are governed. It is in this sense that CARDH, in its report on human rights in 2019, stressed the fact that, according to the Constitution, President Jovenel Moïse's term of office will come to an end on 7 February 2021.
3. Indeed, the five years that make the presidential term of office (Article 134 (1)) are not calendar, i.e. cumulative regardless of the beginning of the term, but constitutional, which means that they fall within time frames clearly defined by the Constitution: 7 February 2016 to 7 February 2021, 7 February 2021 to 7 February 2026 ... and can in no way be adjourned or extended.
4. Thus, paragraphs 1 and 2 of article 134 stresses: "*the term of office of the President-elect is deemed to have begun on February 7 of the year of the election*", i.e. February 7, 2016, "*in the event that the ballot cannot be held on the scheduled date*", i.e. the last Sunday of October 2016 (the fifth year of Martelly's presidential term).
5. Corroborating the Constitution, Article 239 of the Electoral Decree of 2 March 2015 (Special No. 1), states that in order to harmonize constitutional time and electoral time "*(...) the term of office of the President of the Republic shall end on the seventh (7th) of February of the fifth year of his term of office **regardless of the date of his taking office.***"
6. That is why President Joseph Michel Martelly, having been sworn in on May 14, 2011, left the presidency on February 7, 2016, stating in his end-of-term speech before the National Assembly: "*(...) my term of office is coming to an end (...) and shall cease on February 7 of the fifth year of the term, regardless of when I took office.*"<sup>1</sup>

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<sup>1</sup> G. Jean, « Crises électorales en Haïti, la Commission indépendante d'évaluation et de vérification électorale CIEVE : L'inédit et la fin d'un système », CARDH, Imp. PressMax, p.129

7. The Constitution and legal precedents are therefore clear: President Moïse's constitutional mandate ends on 7 February of the coming year. There should be no doubt about it.
8. However, it must be stressed that, in addition to the acceleration of poverty (4.5 million Haitians are in food insecurity), the climate of insecurity, the institutional collapse and the widespread corruption that the country is already facing, in this period of COVID-19 pandemic, a deep and unprecedented institutional and political crisis has started.
9. This crisis has already been triggered by a dysfunctional Parliament, the imminent end of the presidential mandate, and a Provisional Electoral Council (CEP) whose mandate has come to an end, thus having no prerogative to organize presidential, legislative and local elections. The red flag has been raised, and the grim picture of a major crisis has been painted. It is now time to stop ignoring them and to start focusing on a sustainable and well-considered solution, theoretical or practical, able to pull the country out of the announced socio-political and institutional blitz.

## II. Introduction

10. The role of the Constitution is essentially to: (i) organize the powers and institutions forming the State, as well as their interrelations; (ii) define the political regime as well as the political entity of the State (federal State, unitary State...); (iii) proclaim in a general and explicit manner the fundamental rights of citizens. Seen as superior or supreme law, some constitutionalists consider it to be “the law of all laws<sup>2</sup>”. As such, it has a body responsible for ensuring that all other laws are in conformity with it (review of the constitutionality of laws and international treaties)<sup>3</sup>: Constitutional Council, Constitutional Court, Supreme Court, etc. In any modern and democratic society, or at least one that tends towards the construction of the rule of law, the term of office of a President and parliamentarians is defined by the Constitution.

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<sup>2</sup> Hans Kelsen, for example, (11 October 1881-19 April 1973), an Austro-American jurist, instigator of the “Pure Theory of Law” and founder of normativism and of the principle of the Hierarchy of Norms.

<sup>3</sup> According to articles 54 and 61 of the French Constitution, the Constitutional Council is, first and foremost, responsible for ensuring compliance with the Constitution, which is considered the supreme norm in French law. To this end, it monitors the constitutionality of laws and international treaties, i.e. verifies their conformity with the Constitution. In Haiti, the role of the Constitutional Council, established by the amended Constitution, is to “ensure the constitutionality of laws. It is the judge of the constitutionality of laws, regulations and administrative acts of the Executive Branch” (Article 190). It should be noted that this body has not yet been established.

This control is carried out by “exception” during litigation (before the American judge, the Haitian judge, before the constitutional amendment of 2011) or by “action” when a specific body is seized (French Constitutional Council, Haitian Constitutional Council, not yet established).

11. With the intent to anticipate the institutional crisis linked to the end of President Jovenel Moïse's mandate, in 2019, when the country was in lockdown and the President was close to resigning because of major anti-governmental demonstrations, the Centre for Analysis and Research in Human Rights (CARDH), on a strictly legal basis, addressed the issue in its report "The State of Human Rights in 2019", published in February 2020<sup>4</sup>. Moreover, CARDH has publicly stressed the urgent need to address the issue of the presidential mandate during numerous meetings and debates held in 2019 and 2020 on the Haitian crisis, bringing together various political and international cooperation actors.
12. In an attempt to revive anti-government mobilization, the presidential term of office seems to have become the spearhead of the opposition. Political parties are in turn beginning to openly support the end of President Jovenel Moïse's tenure on 7 February 2021.
13. However, what is more worrisome is the fact that President Moïse is now publicly stating that his term of office would last until 7 February 2022, as he made it clear to the opposition in his brief speech on the occasion of the National Flag Day on 18 May 2020. The absence of Parliament, a serious anomaly in the construction of democracy and the principles of the rule of law, and the inefficiency of the judiciary and certain institutions can only amplify this concern.
14. Furthermore, it is important to stress that this declaration was made at a time when the Moïse administration took advantage of the global crisis triggered by the COVID-19 pandemic to declare a state of emergency, allowing it to systematically violate the principles of human rights and good governance<sup>5</sup>, and to issue orders unrelated to the situation. For example, three decrees on matrimonial regimes were issued by the Head of State, amending the civil code, without any supervision by the legislature, currently nonexistent.
15. However, a code fundamentally consists of regulating social operation in a specific field. This is why the prerogative to codify falls to the legislative power with regard to the principle of the separation of powers. These decrees therefore transform citizens' social operation without respecting the separation of powers.

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<sup>4</sup> CARDH, "The State of Human Rights in 2019: The Dark Year!", 18 February 2020.

<sup>5</sup> CARDH :

- « COVID-19, Bilan du « deuxième » état d'urgence sanitaire en Haïti, L'administration Moïse-Jouthe persiste dans la violation des principes de droits humains », 21 May 2020
- « COMMUNIQUÉ DE PRESSE, Journée internationale de la liberté de la Presse, La gestion de l'administration Moïse-Jouthe du COVID-19 : violation de la liberté de la presse et des droits des journalistes », 4 May 2020
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- « COVID-19, état d'urgence mondiale limité par les droits humains, Haïti : non-respect des principes de droits humains et de bonne gouvernance », 8 April 2020

16. In this context, which is akin to a dictatorship, the present legal analysis demonstrates that the end of the presidential term of office is indeed 7 February 2021, and provides to President Jovenel Moïse, as well as the Core Group and any other interested party, with a clear and documented reference on the issue.

### III. 7 February 2021: End of presidential mandate

#### A. Constitution

##### i) Article 134, paragraphs 1 and 2

17. According to article 134, paragraphs 1 and 2, of the Constitution: *“The presidential term of office shall be five (5) years. This period shall begin and end on 7 February following the date of the elections. The presidential election shall be held on the last Sunday of October of the fifth year of the presidential term. The President-elect shall take office on February 7 following the date of his election.”*
18. **The five years defined by the Constitution are not calendar, but consistent with the 2021 timeline.** The amendment made in 2011, under the presidency of René Préval (May 9, 2011), was essentially aimed at harmonizing the electoral time with the constitutional time: 2011-2016, 2016-2021. This is explicit, both in the letter and the spirit of the Constitution.
19. Thus, in order to avoid any deleterious attempt by a President to remain in power beyond the scheduled date, the second paragraph of article 134 continues in the following terms: *“In the event that the ballot cannot take place before 7 February, the President-elect shall take office immediately after the validation of the ballot and his or her term of office shall be deemed to have begun on 7 February of the year of the election.”*
20. Whatever the date and year of the elections held after the presidency of Joseph Michel Martelly, the Constitution states peremptorily that the President-elect will end his term on 7 February 2021.

#### B. Electoral Decree of March 2, 2015 (*Le Moniteur*, Special No. 1): Article 239

21. The 2015 Electoral Decree takes up the wording of article 134 (2) of the Constitution and expressly states its letter and spirit, consisting essentially of *“harmonizing constitutional and electoral time.”*
22. Article 239 of the said decree stipulates: *“On the occasion of elections held outside constitutional time, for whatever reason, the terms of office of elected officials shall end as follows: a) The term of office of the President of the Republic shall end on 7 February of the fifth year of his term of office, regardless of the date of his taking office.”*

### **C. Principle of strict application of the Constitution**

23. Given its central role in the organization of the State, constitutional law is part of public law. One of the fundamental principles underlying the Constitution is its strict application by governments, including the President, who is considered to be the first person responsible for respecting it. As such, article 136 of the Haitian Constitution makes the President the guarantor of the proper operation of institutions. His role is therefore to apply the Constitution, not to interpret what it defines in clear and simple terms, as is the case, for example, of the presidential mandate.

### **D. Legal precedent: End of President Martelly's term of office, February 7, 2016.**

24. Winner of the presidential elections of 28 November 2010 (first round) and 20 March 2011 (second round) and having been sworn in on 14 May, Mr Joseph Michel Martelly completed his term of office and officially handed in the presidential hat to Parliament on 7 February 2016, despite the vacuum caused by the political-electoral crisis.

25. In his speech before the National Assembly, President Martelly had to declare: *"This 7 February 2016 (...) my mandate is coming to an end. Indeed, according to Article 134 (1) of the mother law, the presidential term of office is five (5) years. This period begins and ends on February 7 of the fifth year of the term, regardless of the date of taking office."*

26. As demonstrated, the Constitution clearly sets the term of office of the President at February 7, 2021. This is reinforced by the principle of strict application of the Constitution and the legal precedent created by the departure of President Martelly on 7 February 2016.

27. However, it is worth recalling the electoral process, in particular the *"Political Agreement for institutional continuity at the end of the term of office of the President of the Republic in the absence of an elected President for the continuation of the electoral process begun in 2015"*, which provisionally brought Mr. Jocelerme Privert to power with the aim of completing the process, in accordance with the terms and spirit of article 134 (2).

### **E. Electoral process that brought Jovenel Moïse to power on 7 February 2017**

28. Presidential and legislative elections were held on 9 August and 25 October 2015 respectively to elect the 57<sup>th</sup> President of the Republic and the 50<sup>th</sup> legislature (deputies), as well as 20 senators. The political crisis prevented President Joseph Michel Martelly from completing these elections. Thus, on 22 December 2015, he established the Independent Electoral Evaluation Commission (CEEI), and on 6 February 2016, the day before his departure, he

jointly signed a political agreement with Parliament, entitled: “*Political Agreement for institutional continuity at the end of the term of office of the President of the Republic in the absence of an elected President for the continuation of the electoral process begun in 2015.*”

ii) Independent Electoral Evaluation Commission (CEEI)

29. By an order issued on 22 December 2015, President Joseph Michel Martelly established the Independent Electoral Evaluation Commission (CEEI) with the mandate to “*take all necessary steps to evaluate the electoral process and make recommendations to the Provisional Electoral Council and to the Government (...)*”<sup>6</sup>.”
30. In tacit recognition that the elections of 9 August and 25 October 2015 were contrary to democratic standards, the Independent Electoral Evaluation Commission recommended “*a more thorough technical review of the accountability of the electoral machinery*” and to reconsider “*the cases handled by the National and Departmental Electoral Dispute Offices.*”<sup>7</sup>”
31. Following the publication of the Commission’s report, popular mobilization continued, leading to a series of resignations of several electoral advisers, and the resignation of the President of the Council, Mr. Pierre Louis Opont, on 23 January 2016, only 14 days before the end of the presidential term.
32. Not provided for in the amended Constitution, which assigns respective responsibilities to the executive, legislative and judicial branches, this situation led President Martelly to “whip up” an extra-constitutional formula to complete the electoral process.

iii) “Political Agreement for institutional continuity at the end of the term of office of the President of the Republic in the absence of an elected President for the continuation of the electoral process begun in 2015.”

33. On 6 February 2016, the day before his departure, President Martelly, together with Parliament, represented by the President of the Senate and the President of the Chamber of Deputies, initialed the agreement: “*Political Agreement for institutional continuity at the end of the term of office of the President of the Republic in the absence of an elected President for the continuation of the electoral process begun in 2015.*”
34. The essence of this agreement was to corroborate the end of President Martelly’s term of office on 7 February 2016, as required by the Constitution, and to continue and complete the electoral process initiated in 2015, through a provisional President and the establishment of a new Electoral Council to follow

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<sup>6</sup> Presidential Decree of 22 December 2015

<sup>7</sup> G. Jean, « Crises électorales en Haïti, La Commission d’évaluation électorale indépendante (CEEI), contribution pour une sortie de crise », CARDH, Press Max, April 2016.

up on the recommendations of the Independent Electoral Evaluation Commission (CEEI), established by President Martelly himself.

35. (i) *End of the presidential term on 7 February, in accordance with article 134 (2) of the Constitution.* The Agreement stipulates that: “*the President of the Republic, through the National Assembly, shall make an address to the Nation concerning the end of his term of office and his departure from power on 7 February 2016.*”
36. Furthermore, at the end of his term of office, the President of the Republic shall “*inform Parliament, as co-depositary of sovereignty, of the vacuum in executive power caused by this situation. The President of the National Assembly, in a respective message, shall acknowledge the message of the President of the Republic and note the presidential vacuum, leading to the dysfunction of the Executive Power. Once the vacuum has been noted, the President of the National Assembly shall entrust the Prime Minister in office with the management of current affairs and announce the election by the National Assembly of a provisional President.*”
37. Following the indirect election organized by the National Assembly on the basis of the said agreement and not the Constitution, President Jocelerme Privert had to recall, in his inaugural speech, that his mission rests on three pillars, including: “*the continuation and strengthening of the electoral process.*”
38. ii) *Formation of a new Provisional Electoral Council (CEP) with a view to “relaunching the finalization of the electoral process.”* The agreement provides for the formation of a CEP whose mission is to complete the electoral process. “*(...) this new President will have to form a new CEP, whose mission is to restart the electoral process after evaluating the steps taken and implementing the technical recommendations of the Independent Electoral Evaluation Commission, organize the second round of the presidential election and install the President-elect.*”
39. iii) *Establishment of the Independent Electoral Evaluation and Verification Commission (CIEVE).* In accordance with his above-mentioned mission, Interim President Jocelerme Privert consulted political actors and established the Independent Electoral Assessment and Verification Commission (CIEVE) on 27 April 2016.
40. The mandate of the new Commission was to “*streamline the voting process by analyzing the registration lists, Partial Electoral Lists (PELs), Tally Sheets, Minutes, Incident Reports, ballots and complaints already recorded.*” In accordance with its terms of reference, the Commission recommended the “*resumption of the electoral process*”, which, unfortunately, was not followed by the Provisional Electoral Council, nor the Presidency.

41. The presidential election was held on 20 November 2016. Obtaining 55.67% of the vote and declared elected in the first round according to the CEP results, Jovenel Moïse was sworn in on 7 February 2017 as Haiti's 57<sup>th</sup> President. Thus, this process, initiated on October 25, 2015, was definitively completed on February 7, 2017.

## IV. Conclusion

### F. February 7, 2021, end of constitutional presidential mandate

42. There is absolutely no doubt that the mandate of President Jovenel Moïse, winner in the first round according to the CEP of the electoral process, initiated on October 25, 2015, will end on February 7, 2021, according to: (i) the provisions of Article 134 (2) of the Constitution; (ii) the principle of strict application of and respect for the Constitution; (iii) the legal precedent created by President Joseph Michel Martelly, who ended his term on 7 February 2016, having been sworn in on 14 May 2011; and (iv) the "*Political Agreement for institutional continuity at the end of the term of office of the President of the Republic in the absence of an elected President for the continuation of the electoral process begun in 2015*", which provisionally led Jocelerme Privert to power.

### G. Reminder of some historical precedents relating to compliance with the constitutional presidential timetable

43. It seems relevant to recall a few precedents relating to the respect of the five constitutional – not calendar – years of the presidential term during troubled times:
44. *i) Jean Bertrand Aristide (7 February 1991 - 7 February 1996)*. Having been sworn in on 7 February 1991 as the new President, winner of the 16 December 1990 elections, President Jean-Bertrand Aristide was the object of a *Coup d'État* by the military on 30 September 1991, forcing him to spend three years in exile. He returned to the country on 14 October 1994, held elections on 17 December 1995 and left power on 7 February 1996.
45. *ii) Jean Bertrand Aristide/Boniface Alexandre (7 February 2001 - 7 February 2006)*. Having been sworn in on 7 February 2001 for a second term, Jean-Bertrand Aristide was forced to step down from power on 29 February 2004. In accordance with the then Constitution, Mr. Boniface Alexandre, President of the Court of Cassation, was sworn in on 8 March 2004 to fill the vacancy. René Garcia Préval, winner of the presidential election of February 6, 2006, was sworn in on May 14, 2006.

46. *iii) Joseph Michel Martelly (14 May 2011- 7 February 2016)*. Having been sworn in on May 14, 2011, President Joseph Michel Martelly completed his term on February 7, 2016.
47. Regardless of whether the presidential elections were held in 2017 or 2018, the term of office of the President-elect is to end on 7 February 2021. The Constitution is clear that, regardless of the date on which the election is held, the term of office of the President-elect “*shall be deemed to have begun on 7 February of the year of the election,*” that is, 7 February 2016.
48. Elected at the second level through the “Political Agreement” of 6 February 2016, Mr. Jocelerme Privert, having spent one year in power (7 February 2016 - 7 February 2017), completed the electoral process and served an “extraordinary”, unconstitutional term.

**H. Need to anticipate the political-institutional crisis after 7 February 2021: absence of Parliament and end of the mandate of the Provisional Electoral Council responsible for finalizing the 2015 electoral processes.**

49. The protagonists, in particular President Jovenel Moïse, must be realistic and responsible, as the country is mired in a deep and unprecedented institutional and political crisis, over and above the current disastrous socio-economic situation: increasing poverty (4.5 million Haitians are food insecure) and unemployment, exponential reduction in purchasing power (about 110 gourdes for one US dollar), galloping insecurity, institutional collapse, etc.
50. There is no Parliament. The Provisional Electoral Council, whose mandate was to “Restart the 2015 electoral process, implement the recommendations of the Independent Electoral Assessment Commission and finalize and proclaim the results of the elections”, has come to an end, in accordance with the electoral law (article 240) and the order of 29 March 2016.
51. The President, the opposition and civil society must be clear-sighted and vigilant in proposing legitimate, innovative and constructive solutions and clear action plans on the transition formula to be adopted, choosing, for example, either the Court of Cassation to assume the Presidency, or a personality by informed consensus, capable of forging the foundations of a new beginning for the benefit of the daughters and sons of the Nation, or by jointly opting for one or more public law theories reflecting the circumstances, otherwise the disaster that is about to occur will be very hypothetical for the country at all levels.

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