

## VIEWS AND OPINIONS OF HAITIAN ACADEMICS ON POST-JOVENEL MOÏSE GOVERNANCE

WE,

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Have been commissioned by Quisqueya University to produce this opinion in our capacity as academics.

It was requested to propose a reflection based on Constitutional Law and Political Science on the situation posed by President Jovenel Moïse's sudden death and the absence of constitutional rules relevant to his succession. The academic community thus intends to contribute to the solution of the present situation.

This opinion is aimed at contributing to the formulation of a Haitian solution to the crisis, while some actors in the international community openly set themselves up as kingmakers. This being said, we are aware that no solution will be formally constitutional, but at the outset it should be reaffirmed that the Haitian legal order did not disappear with the death of Mr. Moïse.

Our opinion is inspired by the spirit of the Haitian Constitution of 1987, general principles governing a democratic State; it takes also into account our country historical experience.

### I-THE ABSENCE OF NORMS RELEVANT TO Mr. JOVENEL MOÏSE'S SUCCESSION

The constitutional provisions in force are inapplicable to the situation arising from the disappearance of Mr. Moïse.

If it is considered that Mr. Moïse was no longer President since February 7, 2021 and he exercised *de facto* the presidential functions; then the constitutional provisions on the presidential vacancy cannot govern this situation.

Alternately, even if we accept -without endorsing it- the position that Mr. Moïse was to be President until February 7, 2022, then his death occurred during the fifth year of his mandate. In this case, Section 149 provides for the appointment of a provisional president by the National Assembly.

In both cases, the Constitution is silent. On the one hand, a *de facto* president cannot be replaced impromptu. On the other hand, it is presently impossible to convene the National Assembly. Therefore, in either case, no solution will be constitutional, but it is still necessary to assess the ones proposed or implemented.

## II. - ASSESSMENT OF THE SOLUTIONS PROPOSED OR IMPLEMENTED

### a. The Claude Joseph solution

Mr. Joseph proclaimed himself head of the Executive Branch and had, for a time, acted as such. BINUH and the United States of America supported him. His position was not based on legitimacy or legality. First, it is only if the President's vacancy occurs during the first three years – this is not the case here- of the President's mandate, that the Prime Minister becomes head of the Executive Branch until the next presidential elections. Secondly, Mr. Joseph as Prime Minister had already been replaced by the President before his death in an order published in the official Gazette, *Le Moniteur*, which had appointed his successor.

### b. The Lambert solution

Eight out of the ten remaining Senators nominated Senator Joseph Lambert as provisional President of the Republic. This resolution seemed to be inspired by Section 149 of the Constitution, which confers jurisdiction to the National Assembly. However, the ten senators still in office do not represent and cannot make any binding decision in the name of the Senate. They can even less claim to represent or replace the National Assembly on their own. Consequently, Mr. Lambert cannot rely on this resolution to pretend he is the provisional President.

### c. The Ariel Henry solution

Prior to his death, Mr. Moïse had appointed Mr. Ariel Henry to replace Claude Joseph as Prime Minister. He passed away before the new Prime Minister could be sworn in or form his cabinet. And now Mr. Henry has self-appointed himself as head of a government, which is not recognized by any political party or by the whole Haitian civil society.

First, we will apply to Mr. Henry the same reasoning developed for his predecessor. We are no longer within the three-year period in which the Prime Minister can be entrusted with the role of head of the Executive Branch. Any reference to Section 149 of the Constitution in this case is a sham.

Then, Mr. Henry takes over entire executive function for an indefinite period of time. It must be reminded here that the silence of the Constitution on how to fill the vacancy in the present situation does not nullify or destroy the entire constitutional order set up by the 1987 Constitution, which is still in force. It is clear from its text that, first, the Executive Branch is shared by the President and the Prime Minister, and also that some powers belong only to the President in his capacity as Head of State. Extending the Prime Minister's powers to those of the President of the Republic is illegal in form and illegitimate in substance. Consequently, the

present exceptional circumstances cannot justify for the Prime Minister to elevate himself to the dignity of Head of State and exercise its powers.

### **III. - REMINDER OF THE PRINCIPLES OF DEMOCRATIC GOVERNANCE**

Given the many attempts to resolve the crisis since 7 July 2021, and especially the efforts made by civil society to find a Haitian solution, we should infer there must be a minimum consensus on democratic governance to conduct the government affairs. Some fundamental principles should then be remembered to inform the search for a solution.

The first principle is respect for universal suffrage. The beneficiaries of this democratic anointing must be included in any search for a solution and in any transitional institutional mechanism. Clearly, account must be taken of the only people who still hold a piece of national sovereignty: the ten remaining Senators.

The second principle is that the exercise of executive power must be surrounded by legal and institutional control mechanisms to avoid omnipotence intoxication. Democratic ethics cannot be freed from the principles of responsibility and accountability.

The tinkering we are witnessing is deliberately and dangerously moving away from these principles. What remains of the popular representation is ignored and the government is settling in, preparing to manage, legislate and spend without any checks and balances. Moreover, the government's strategy of denying all oversight was even clearer when most recently when the State lawyers asked for the judges of the Administrative Court (Cour Supérieure des Comptes et du Contentieux Administratif) to be recused in the case regarding the legality of the order retiring a judge of the Supreme Court (Cour de Cassation). This shows the deliberate intention to neutralize the only government oversight body. A regime in which the Executive branch of government acts without oversight is a dictatorship.

### **IV. - PROPOSALS FOR A RETURN TO DEMOCRATIC GOVERNANCE**

#### **a) The intent of Section 149 of the Constitution**

It has been explained that it is impossible to apply article 149 of the Constitution as is. However, with a deeper analysis into its essence shows that the constitution writers' intent was to entrust the largest group of the people's representatives to appoint the provisional president until the next elections. Hence, what is needed is to set up a similar mechanism to bring together a set of personalities who represent the Nation in its diversity. To this end, it is proposed what is already in the constitution to bring together all the country's stakeholders.

We therefore propose the constitution of a body (Council of State, Council of the Transition) composed of the ten Senators still in office, and two representatives of each the following sectors, mentioned for the setting up of the provisional electoral councils:

- The Episcopal Conference,
- The Protestant Federation,
- The Voodoo Sector,
- The Peasant Sector,
- The Chamber of Commerce and Industry of Haiti (*because of its national coverage*),
- The Court of Cassation or the Federation of Bar Associations,
- The Human Rights Sector (*through the POHDH*),
- The University Sector (*through the CORPUHA*),
- The Press Sector (*through associations of journalists and media owners*).

The Council of State thus formed would then appoint the provisional President until the next elections, on the basis of the criteria listed in Section 135 of the Constitution.

b) A government accountable to the oversight body

In our history, we have known councils of State accompanying the Executive during moments of transition. The common feature of these various councils is that they did not have any real legislative or oversight powers.

Our proposal seeks to go further and is based on the democratic principle of a liable and checked government.

Therefore, the interim President will appoint a Prime Minister after consultation with the oversight body, in accordance with the qualifications listed in Section 157 of the Constitution.

The Prime Minister and his Government will be accountable to the oversight body, which may impose a vote of no confidence on them.

No decree or budget may be promulgated unless the oversight body whose members will have the power of amendment has approved it.

In summary, we advocate the granting to the oversight body of all the powers enjoyed by the Chambers.

## **V. - THE MINIMUM PROGRAM OF THE PROVISIONAL GOVERNMENT**

It is noted with interest the debates and proposals emanating from various sectors of civil society address issues that are fundamental to the transformation of our governance and the future of our Nation. It is healthy that they are not uniform and even appear contradictory. On issues related to the establishment of a new social contract, the democratic ideal is that these opinions clash and that their promoters seek to convince the only arbiter: the electorate. Therefore, we believe that it should not be up to a non-elected government, however well intentioned, to commit the country to societal reforms. The main task of a transitional government is to establish the legal, institutional and security conditions for a healthy competition, before the citizens, between the various opinions or the different projects that emerge.

The government, which should be light (twelve ministries maximum) and which duration should not exceed two years, could therefore focus on the following priority points.

a) Restore Public Safety

Gun control. Dismantling of armed gangs

b) Restore confidence in the democratic process

To this end, we take up the various analyses presented by academics and the Federation of the Bar Associations (*Fédération des Barreaux*) on the illegitimate nature of the current provisory electoral council (*Conseil Électoral Provisoire - CEP*), with regards to its composition, mission and activities. In our opinion, the relevant decrees and decrees should be repealed to pave the way for the establishment of a new credible CEP.

In the same vein, the electoral rolls will have to be updated truly reflect the electorate.

c) Fight against impunity

- Energize or revitalize the emblematic investigations (into the assassination of *Bâtonnier Dorval*, President *Moïse*, and the various massacres, in particular those of *La Saline*, *Delmas 32*, etc.),

- Energize or revitalize the investigations into the squandering of *Petro Caribe's* funds.

d) Respect the rule of law

Repeal the decrees:

· Violating the collective conscience (Criminal Code. Need for social debates on certain points: abortion, sexual orientation, for example),

· Violating fundamental individual rights (ANI, terrorism),

· Freeing the State from all oversight (public procurement, Court of Auditors).

e) Re-establish the Judiciary

- Re-establish the Superior Council of the Judiciary (CSPJ) and fill up the Supreme Court (*Cour de Cassation*). To repeal orders retiring certain judges of the Court in violation of the principle of security of tenure.

f) Set in motion the constitutional project

Initiate the process for the establishment of a Constituent Assembly in accordance with democratic standards. Consequently, dissolve the Commission responsible for drafting the new Constitution and cancel the process of a referendum that had not been the subject of any public debate.

- The democratic ideal underlying this proposal is that societal issues and the re-foundation of the State should be publicly debated and be the subject of the campaign to establish the

Constituent Assembly by universal suffrage. This is how the will of the 1987 constituent must be interpreted. Section 282.1, puts the constitutional question to the votes, because voters, in electing their representatives, do so theoretically bearing in mind the amendments proposed by the outgoing legislature. The newly elected members, with fresh democratic legitimacy, will then ratify or reject the proposed amendments. This is also in line with our constitutional tradition expressed in the Republican Constitutions of 1867, 1889, 1932, 1946, 1950 and 1957.

## **VI. - THE ROLE OF THE POLITICAL PARTIES**

We remember the unfortunate experience of the Collegiate Government of 1957, made up of leaders of political parties competing for the ensuing electoral contests. The resulting violence was logical and predictable. This experience should not be repeated. During the last experiment of filling the void in the the Executive Branch of the government (February 2004), this was avoided when Judge Boniface Alexandre was appointed head of the Executive.

We therefore strongly advocate for the political parties to commit themselves to the conclusion of the political agreement (political class and organized sectors of civil society) which, if our proposal is accepted, should lead to the appointment of the interim President and the constitution of the Government. They will remain the attentive watchdogs of this government. They will use this time to strengthen their electoral bases, promote their programs and prepare for the next general elections, which we hope will bring about a return to constitutional normality.

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