



NOTE POLITIQUE

The next stage of democracy promotion

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Abstract

The first stage of democracy promotion in the Americas involved developing a broad regional consensus on democracy as a core standard. With the exception of Cuba, that consensus is now in place and is embodied in the Organization of American States' Inter-American Democratic Charter. However, the 2009 military coup in Honduras revealed that the Charter has a serious weakness: it forbids unconstitutional interruptions or alterations of the democratic order, but ignores constitutional violations that may be committed by the armed forces. Indeed, some Latin American countries' constitutions still contain provisions that make the armed forces the ultimate guarantors of the constitutional order, which could trigger more democratic crises in the future. Considering that a key condition for Canada's entry to the Organization of American States (OAS) in 1990 was its contribution to the promotion of democracy, a core Canadian concern in the region, Ottawa could play a leading role in the next stage of democracy promotion: it could foster debate on how best to reformulate these undemocratic provisions to make the region's constitutions reflect the democratic principles embodied in the Charter.

Essentials

- The first stage of democracy promotion in the Americas sealed a consensus on the value of democracy over authoritarian rule, as enshrined in the Inter-American Democratic Charter.
- The 2009 Honduran military coup revealed a significant blind spot in the Charter: the armed forces' power to act as guarantors of the constitutional order to the detriment of democracy.
- The next stage of democracy promotion could focus on reforming the undemocratic aspects of many countries' constitutions, especially regarding the powers of the armed forces, to safeguard stability in the region.
- Since democracy promotion is at the centre of Canada's interests in the Americas, it could play a leading role in creating a forum to foster dialogue on making the region's constitutions more democratic.

Introduction

Democracy has gained a strong foothold in Latin America in recent decades, yet the 2009 coup in Honduras revealed that democratic safeguards are weaker than many had assumed. Canada contributed to the first stage of democracy promotion in the region, especially through the elaboration of the Inter-American Democratic Charter adopted in 2001, which established a consensus among the Organization of American States (OAS) member states that the Western Hemisphere should be democratic. Yet the Honduras crisis shows that some countries' constitutions still need to better reflect the principles embodied in the Charter, especially by shedding the anachronistic and undemocratic powers they grant to the armed forces. Canada can now contribute to the next stage of democracy promotion by moving beyond the Charter and helping make the region's constitutions more democratic.

The urgency of constitutional reform

When Canada joined the OAS in 1990, it pushed for the creation of the OAS Unit for the Promotion of Democracy and played a leading role in elaborating the main pillar of the region's democratic infrastructure: the Inter-American Democratic Charter. The Charter is not a binding treaty, but it expresses the commitment of the OAS member states to defend and promote democracy. Article 19 of the Charter stipulates that "an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation [as a member of the OAS]." In other words, an unconstitutional alteration or interruption of the democratic order can trigger the most powerful set of regional diplomatic and political mechanisms for protecting democracy in the Americas.

While the Charter does not define an "interruption" or "alteration," the broad outlines are relatively clear. The OAS can now legitimately exert diplomatic pressure on states that suffer not only interruptions

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of democracy such as military coups, but also alterations such as the arbitrary dismissal of the legislature or the judiciary. But is there similar clarity on what "unconstitutional" means? Would we necessarily know whether a given alteration or interruption of democracy was within the boundaries of the constitution? The 2009 military coup in Honduras made painfully clear that what is and what is not constitutional leaves much space for debate.

In brief, the dispute in Honduras was triggered by former President Manuel Zelaya's 2009 proposal to hold a referendum on convening a constituent assembly to change the country's constitution. This led to a constitutional crisis for the following reasons. First, the Honduran Constitution stipulates that it can only be modified by a two-thirds congressional majority, and also includes a number of articles that cannot be modified at all. One of the permanent articles establishes a one-term

limit for Honduran presidents, and Article 239 stipulates that even proposing to do away with this restriction immediately disqualifies anyone to hold the Presidency. Zelaya suggested that the constituent assembly would discuss the issue of term limits; his opponents argued that the plebiscite was a veiled attempt to obtain re-election. Second, the Honduran Constitution does not provide a mechanism to remove elected officials, such as an impeachment procedure. Third, its Article 272 gives the military the mandate to “defend the territorial integrity and sovereignty of the Republic, maintain peace, public order and the *rule of the Constitution...*” (translation, emphasis added)

The opposition parties held a majority in Congress and when Zelaya refused to call off the referendum, they demanded his

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resignation. They claimed they were upholding the Constitution, yet without the power to impeach the president, they could not resort to any constitutional mechanism to impose their will. In late May, the Honduran Supreme Court reinforced the opposition’s stance by ruling the proposed referendum unconstitutional. The Court did not order the armed forces to remove Zelaya, but on June 28 the military abducted him in the middle of the night in his pajamas and sent him into exile. The fact that the military’s actions exceeded the demands of the Court, some argue, is proof that Zelaya’s removal was an unconstitutional interruption and alteration of the democratic order, and thus a violation of the terms of the Charter.

Yet here lies the most troubling aspect of the Honduran crisis: by granting the armed forces the power to defend “the rule of the Constitution,” Article 272 makes the armed forces the ultimate political arbiter in times of constitutional crisis. The armed forces staged a coup against Zelaya in forcibly removing him, but this coup was consistent with the powers granted to them by the Constitution. In its subsequent June 28 ruling, the Honduran Supreme Court recognized that “the armed forces, as defenders of the Constitution, have acted in defence of the rule of law in carrying out legal orders against

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those who have publicly acted against the dispositions of the Constitution.”

Some may argue that the very notion of a “constitutional coup” is an oxymoron, because a coup is by definition a blow against the constitutional order. But this view assumes that constitutions provide an unambiguous standard by which to determine violations of the constitutional order. This is not always the case. Giving the armed forces the power to uphold the Constitution is risky in this regard, because unlike the other branches of government, they are not constituted to deliberate on the constitutionality of their actions. The armed forces protect the Constitution through the use of force. In other words, a constitutional coup is not an oxymoron, but a very real possibility if the armed forces are made the ultimate guarantors of the constitutional order.

At the regional level, OAS members are grappling with an Inter-American Democratic Charter that assumes that the evaluation of what is and isn’t

constitutional will make violations to the democratic order relatively clear. The only significant problem remaining would be the difficulty to mobilize the political will to exert diplomatic and other pressures on the violators. Yet the Honduran coup revealed the fallacy of this assumption because there was no clear violation of established standards, but rather a crisis over the standard of constitutionalism among different parties legitimately and plausibly claiming to defend the Constitution. Contrary to what the OAS assumed, there was no clear standard by which to determine whether a violation had occurred.

The undemocratic and contradictory provisions found in the Honduran Constitution are replicated elsewhere in Latin America. For instance, Article 142 of the Brazilian Constitution stipulates that the armed forces are “under the supreme authority of the President of the

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Republic,” while it is also part of their mission to “guarantee the constitutional powers.” In a similar manner, the Colombian constitution also establishes the principle of civilian control over the armed forces, while its Article 217 specifies that the armed forces’ core purpose includes defending the “constitutional order.” It is worth noting that Article 90 of the Chilean Constitution used to contain similar language that was removed at the time of constitutional reforms in 2005.

To avoid a crisis or a stalemate at the OAS when such constitutional provisions conflict, some analysts argue that the Charter should go beyond constitutions and turn to broad principles of constitutionalism for guidance. If principles such as popular consultation and the separation of powers are respected, it would be considered legitimate for a country to interrupt the democratic order constitutionally, for example by granting executives temporary emergency powers in times of crisis. Yet the problem with this view is that foundational documents such as constitutions are just that: foundational. They cannot be ignored. To be sure, there is a tension between legal

texts and principles, and debate over their precise relationship is at the core of any robust democratic regime. But this does not justify ignoring constitutions to determine violations only on principles.

At the other extreme, some observers suggest considering the text only, or the original intention of its authors, regardless of the broad principles involved. This view, which is common in debates over the role of the Supreme Court in the United States, for example, suggests that foundational documents are sacrosanct and unalterable. This view has some adherents, but it fails to recognize that constitutions also need to adapt and evolve in order to reflect the changes in principles, values and needs of their contemporary societies.

These opposing approaches are based on different views of the role of constitutions, but they are similarly uncompromising. A more balanced approach is to see constitutions as foundational documents, but which can and should also change to reflect the times and evolving principles. Reconciling texts and principles in this way

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Canada's role in the next stage of democracy promotion

Canada played a critical role in elaborating the Inter-American Democratic Charter and contributed to the advent of a new democratic norm for the region. The democratic principles embodied in the Charter represented a sea change after decades of authoritarianism. For all its flaws, it embodies the new regional commitment to the protection and promotion of democracy.

The Honduran crisis revealed that the next stage of democracy promotion will, among other things, require a more focused effort to reform many countries' constitutions. In particular, undemocratic provisions would need to be reformulated, particularly those pertaining to the pow-

ers of the military. The extensive constitutional powers granted to the armed forces in some countries are a relic of the times when they routinely meddled in politics, and when they were a bulwark against institutional weakness or breakdown, but they are anachronistic in an age of democracy and civilian rule.

Some will argue that constitutional reform should not be attempted because it is too difficult to accomplish. Reforming constitutions is certainly difficult, but not impossible. Over the past generation countries such as Bolivia, Colombia and Venezuela have undertaken profound constitutional reforms, overhauling their country's main institutions. More modest changes can also be implemented as shown by Chile's 2005 reforms, which removed the provisions making the armed forces the guarantors of the constitutional order.

Canada can play a role in the next stage of democracy promotion to promote stability in the region. It cannot forcibly mandate constitutional change, but it can create a forum to facilitate dialogue over how the region's constitutions may better reflect the principles of democracy embodied in the Charter. Participants could include a wide range of experts and stakeholders, including citizens' groups, academics, non-governmental organizations and political representatives. The region will benefit from a dialogue over

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the relationship among constitutions, principles of constitutionalism and democracy. It will particularly benefit from a discussion over how to do away with undemocratic powers that many constitutions still permit—for example, those granted to the military. Canada can share best practices and offer guidance based on its own history of rather different but highly relevant constitutional debate and reform, and on its experience in balancing constitutional texts with broader democratic principles.

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democracy as a core standard. Cuba aside, all countries in the region are now democracies, and have expressed this consensus in the Inter-American Democratic Charter. But the Honduran crisis revealed that the Charter is weakened by the fact that many

countries' constitutions still contain undemocratic provisions, especially regarding the armed forces. Canada can contribute to the next stage of democracy promotion in the region by looking beyond the Charter, to bring the issue of constitutional reform

from the periphery to the centre of the OAS agenda.

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The opinions expressed in this paper are those of the author and do not necessarily reflect the views of FOCAL, its board or staff.

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This policy brief reports on a project financed by Canada's International Development Research Centre (www.idrc.ca).



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