

**After Honduras:  
Constitutions and the International Promotion of Democracy**

Antonio Franceschet and Pablo Policzer  
University of Calgary

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## Introduction

From the outset, the 2009 Honduran constitutional crisis—in which a sitting President was removed from power and the country by military force—was a matter of international concern and controversy. The nearly uniform condemnation of this coup by outside actors, as an affront to democracy as a universal value, brings to mind Immanuel Kant's words from 1795: "The growing prevalence of a (narrower or wider) community among the peoples of the earth has now reached a point at which the violation of right at any *one* place on the earth is felt in *all* places" (Kant 2006, 66-109). The wide interest and, in many cases, enthusiasm for the French Revolution across Europe suggested to Kant that, when it comes to issues of what he called "public right," an "unwritten code of constitutional and international right" is an essential supplement to both domestic and interstate legal rules (Kant 2006, 66-109). But could such a code supplant or override the *actual* constitutional rules of specific states or, indeed, international law?

The Honduran constitutional crisis of 2009 is scarcely comparable to France in 1789—but the global enthusiasm and concern for "public right" are present in both cases. Moreover, the ethical questions raised about how to apply the putatively universal values of an international community while recognizing the importance and value of particular states' constitutions are general and persistent. For classical liberals like Kant, state constitutions are legally and morally significant phenomena that can be ignored by outside actors only in exceptional circumstances (see Fabry 2009, 20). This view is worth recalling in light of the Honduran crisis. With it we might recover something lost in the global enthusiasm for public right in the face of constitutional crises, particularly those that, as happened in Honduras, result in violence and human rights abuses. Actual constitutions have value not simply because or when they conform to global norms of constitutionalism. In fact, the inverse is true: such norms are a recognition of the value of actual constitutions even when these constitutions are themselves flawed, violated or fail to effectively produce a condition of public right or democratic politics. Indeed, abstract norms of constitutionalism can only be applied politically and legally by actual peoples and authorities within particular institutional settings; the role of outside actors and institutions in upholding and defending such norms is important, but their judgments and actions do not and cannot effectively substitute for what might be originally lacking or problematic in the target country's real constitution. The actions of outsiders potentially become ethically and legally problematic, particularly if they engage in coercive or punitive measures.

The problems raised by the Honduran case have been largely viewed as a failure of Hondurans to live together democratically. For many, the failing can be attributed to one of the two parties to the constitutional dispute. The reaction by influential outside actors and organizations, particularly the Organization of American States (OAS), was to judge fairly unequivocally the actions of particular parties in the crisis—those who deposed the President—as unconstitutional; moreover, it was to apply punitive measures against a Honduran state led by the *de facto* government. Certainly these judgments and actions are a reaction to a failure on the part of Hondurans to live together under law—but they ignored or downplayed the extent to which the imperfections of the actual Honduran Constitution, rather than simply deliberate illegality, were a key condition of the crisis. Moreover, the reaction of OAS states assumed that global norms of constitutionalism are authoritative substitutes for an effective constitutional order *within* particular states. In doing so, outside actors attempted to

enforce their judgement of what *should* be considered constitutional in Honduras, and in a way that dealt with the symptoms rather than the cause of the underlying legal-political problem.

The Honduran case raises a problem, then, in the way the OAS has instituted and acted upon its democracy promotion mandate. The OAS has made democracy a requirement of membership of the preeminent club of sovereign states in the Americas. However, since establishing the 2001 Inter-American Democratic Charter (IADC), which prohibits an “unconstitutional alteration or interruption” of any state’s democratic order, the organization has glossed over the fact that many constitutions in the region contain undemocratic provisions. As Dexter Boniface notes, the OAS has focused primarily on developing mechanisms to oppose coups as the most significant regional threat to democracy. But constitutional crises have been treated “as second-order threats, to be handled largely on a case-by-case basis—contingent on how gravely they threaten the democratic order” (Boniface 2007, 40-62). He adds, “This highlights an important and little-discussed limitation of OAS doctrine, namely that it addresses interruptions and alterations of democracy but not the quality of democracy itself. Thus, a constitutional framework with patently undemocratic features, such as Chile’s (from 1980 until the recent reforms), would be immune from criticism as long as the constitutional framework was upheld” (Boniface 2007, 40-62). Honduras was not as fortunate as Chile in that it did not reform its constitution, and suffered political instability leading to last year’s coup. However, it was because of the coup, rather than the limitations of its Constitution, that Honduras was not only criticized but suspended by the OAS.

We argue that the Honduran crisis shows that constitutions need to shift to the centre of OAS debate and practice as regards democracy promotion: their contradictions and undemocratic aspects need to be addressed and not ignored. Although it is understandable that the first phase of OAS democracy promotion—undertaken as authoritarian regimes in the region waned—focused on preventing coups and the violent usurpation of democracy, the next phase ought to focus on ensuring that actual constitutions are aligned with, and supportive of democracy (see Policzer 2010). The Honduran crisis has called into question two prevailing assumptions: that constitutions are by definition democratic and that all threats to democracy are *ipso facto* unconstitutional. We suggest that the first assumption conflates contemporary democratic political and normative aspirations with the more complex and diverse undemocratic constitutional practices and perspectives that have existed historically, and which continue to exert an influence. A more honest and useful approach, intellectually and politically, is to acknowledge that many Latin American constitutions (and the constitutional thinking underpinning them), contain undemocratic features. Only once these are reformed and challenged by peoples within these states, and through democratic procedures, is it possible to make the second assumption, that forcible threats to a democratic order are automatically unconstitutional. However, there is an important role to be played by pro-democratic outsiders, both individual states like Canada and collective agents like the OAS. The current OAS practice of paying attention to constitutions on a case-by-case basis coinciding with serious crises such as coups is clearly insufficient (cf. Boniface 2007, 40-62). A better approach would be for international actors such as the OAS to promote not simply democracy but democratic constitutional reforms across the region in ways that prevent crises and military involvement in politics, rather than reacting to constitutional crises after the fact.

The analysis that follows challenges the two assumptions noted above about constitutions and democracy. We also show why OAS doctrine and practice should take

constitutions more seriously and not just for instrumental reasons related to democracy promotion. In particular, we suggest that constitutions are not just a means to a preferred (democratic) end. More fundamentally, constitutions engender forms of human association that are morally and legally consequential; they establish obligations for all actors, internally and externally, to respect the legal bonds and bounds of the sovereign state. Respect for constitutions engenders specific responsibilities related to enforcing constitutions and to the use of coercion and sanctions.

We start with a brief overview of the main points of contention in the Honduran crisis. We argue that these suggest four fundamental problems, which have received relatively little attention in the debate over the Honduran coup, but which form the core of our analysis: First, what is being *constituted* by constitutions? In other words, what are states and why do they enjoy moral and legal status as independent entities in world politics? Second, what is the difference between a violation of the constitution and a crisis of the constitutional order? Third, who may defend and enforce a constitutional order and by what means? And what rights and duties do outside actors have in this regard? Fourth, when can punitive or coercive measures be used to promote either a particular constitutional order or broad norms of constitutionalism? In all these areas we suggest that actual constitutional rules on power limits, even ones that are ambiguous or imperfect, are important limitations not just on domestic politics, but on the actions and decisions on foreign powers and international institutions.

### *The Honduran crisis*

In brief, the dispute in Honduras was triggered by former President Manuel Zelaya's proposal to hold a referendum in 2009 on whether a constitutional ban on re-election should be reconsidered. This led to a constitutional crisis for three main reasons: First, the Honduran Constitution establishes a one-term limit for its presidents, meaning that Zelaya's proposal dealt with the potential alteration of a core constitutional norm. Second, the Honduran Constitution does not provide for a mechanism to remove elected officials, such as an impeachment procedure. And third, Article 272 of the Constitution assigns the military the power to "defend the territorial integrity and sovereignty of the Republic, maintain peace, public order *and the rule of the Constitution...*" (emphasis added).<sup>1</sup>

The opposition parties held a majority in Congress and when Zelaya refused to call off the referendum, they demanded his 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 removal of Zelaya, but on June 28 the armed forces abducted him in the middle of the night in his pyjamas and sent him into exile. The fact that the military's actions

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<sup>1</sup> "ARTICULO 272.- Las Fuerzas Armadas de Honduras, son una Institución Nacional de carácter permanente, esencialmente profesional, apolítica, obediente y no deliberante. Se constituyen para defender la integridad territorial y la soberanía de la República, mantener la paz, el orden público y el imperio de la Constitución, los principios de libre sufragio y la alternabilidad en el ejercicio de la Presidencia de la República": <http://pdba.georgetown.edu/Constitutions/Honduras/hond05.html> (accessed May 10, 2010).

exceeded the demands of the Court, some argue, is proof that Zelaya's removal was an unconstitutional interruption of the democratic order, and thus a violation of the terms of the IADC.

Yet the most troubling aspect of the Honduran crisis is that by giving the armed forces the power to defend "the rule of the Constitution", Article 272 makes the armed forces the ultimate political arbiter. 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 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 those who have publicly acted against the dispositions of the Constitution".

The international community, including the OAS, strongly opposed Zelaya's overthrow. The OAS rightly understood that the coup posed a serious challenge to the Inter-American Democratic Charter, which commits Member States to oppose "an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order". The OAS both demanded Zelaya's reinstatement, and at the same time facilitated diplomatic mediation efforts through Costa Rican President Oscar Arias, to try to broker a deal out of the crisis. When these efforts failed, it followed the terms of the Inter-American Democratic Charter (where the persistence of an unconstitutional violation or interruption of the democratic order "constitutes, while it persists, an insurmountable obstacle to its government's participation [as a member of the OAS]"), and suspended Honduras from the OAS.

The international community's reaction was premised on two notions: first, that Zelaya's ouster was unconstitutional, and thus a clear violation of the terms of the IADC; and second, that the crisis was rooted in the inability of Hondurans to work out their political disagreements through democratic constitutional means. The first assumption explains the OAS's forceful condemnation of the coup, and the second its efforts to mediate the crisis through President Arias. Besides pointing out that condemning the coup undermined the OAS's stance as a neutral arbiter and therefore its capacity to mediate the crisis, what bears mentioning is that the constitutional provisions that led to the crisis in the first place received too little attention. Some observers argued that the actions of the Congress, for example, or the Supreme Court, were not strictly based on provisions or powers in the Honduran Constitution (e.g. Cassel 2009).<sup>2</sup> Zelaya's opponents, especially, along with some observers argued that Zelaya's actions were themselves unconstitutional and that the Congress and the Supreme Court upheld the constitutional order (e.g. Méndez 2009). Our aim in this essay is not to wade into the debate over which party's actions were better or more poorly grounded in the Honduran Constitution. Instead, we argue that the Honduran crisis raises at least four deeper questions, which are critical to understanding why the crisis occurred and how similar crises might be avoided in the future, but which have remained largely unexamined in the literature and debate following the coup:

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<sup>2</sup> See also <http://blogs.ubc.ca/andemandemocracy/2009/06/29/constitutional-analysis-honduras/> (accessed May 15, 2010)

### *What do constitutions constitute?*

The first question addresses the most fundamental aspect about constitutions: what are they, and why are they significant? What do they constitute? We argue that constitutions embody two distinct but related values or principles:

- (1) *Self-determination*—the good of establishing a political association where groups of people come together and constitute themselves;
- (2) *Institutional limitation*—the good of establishing limits on political power through rules on how it is exercised within and for the association.

All states seek to maintain the constitutional principle of self-determination by maintaining a basically healthy identification of individuals and sub-state groups with the larger whole. Jürgen Habermas’s notion of “constitutional patriotism,” where individuals are loyal to the fundamental laws upon which their political association relies is an inclusive and democratic expression of the self-determination principle (Habermas 2006). All states have institutional rules on political power but there is significant variation here, in theory as much as there are different states with unique histories, collective choices, and politics. However, we can follow Wil Waluchow’s distinction between “minimal” and “rich” conceptions of institutional limitations in constitutions (Waluchow 2008). “In some minimal sense of the term, a ‘constitution’ consists of rules or norms creating, structuring and defining the limits of government power or authority....all states have constitutions and all states must have some acknowledged means of constituting and specifying the limits (or lack thereof) placed upon...government power” (Waluchow 2008). A rich conception holds that a constitution’s limiting rules constrain the exercise of political powers; any government that exceeds these limits acts without proper authority. The minimal/rich distinction allows for a more precise demarcation between the concept of a constitution and constitutionalism. All states *qua* states have a constitution; constitutionalism is a set of values about *how* states’ rules on power and authority ought to be entrenched. Constitutionalism rules out certain kinds of constitutions, and not all constitutions measure up to the demanding requirements of constitutionalism (i.e., government that is limited and checked, preferably by democratic and legalistic procedures and institutions).

For democracy’s sake, constitutionalism is the only attractive view of what constitutions ought to be. However, we believe that analysts and policy makers are better served by considering more seriously the more minimal conception of actual constitutions in the world. In other words, sound analysis and policy should be more clearly aware of the differences between the “is” and “ought” of constitutions. Taking the “is” of actual constitutions seriously does not require we relinquish or abandon the “ought” of the richer notions of constitutionalism as the goal of democracy promotion. To the contrary, it prevents us from assuming that liberal democratic states, in all their various forms, are constitutionally perfect (as the Honduras case clearly shows). In the abstract we can distinguish between a mere constitution and one infused with the values of constitutionalism: the latter is achieved only when there are entrenched limits governing authority’s powers (Waluchow 2008). But in real terms, there is a large continuum of actual constitutional practice with very thin and weak limits on authority on one end and a very rich, democratic vision of constitutionalism that no state has perfected entirely. Moreover, actual constitutions and the values of constitutionalism have evolved over time and remain a site of disagreement and contestation.

A normative bias in favour of democratic constitutionalism should not blind us to the variety of actual constitutions and other perspectives and intellectual traditions. Although the mainstream of political theory views the principle of “institutional limitation” to mean that constitutional government is distinct from dictatorship or absolutism, this is not necessarily the case. For much of the history of sovereign states, the notion of constitutional dictatorship is not theoretically or practically oxymoronic (see Rossiter 1963, ix, 322 p.; Watkins 1940, 324-80). Indeed, from Thomas Hobbes in the seventeenth century to Carl Schmitt in the twentieth, the realization of “self-determination” has been viewed as requiring virtually or absolutely unlimited government power and/or sovereignty. Hobbes as the proto-liberal and Schmitt as the anti-liberal converge on the notion that it is actually contradictory to limit constitutional powers if the goal is the establishment and effective preservation of the political association. Thus, there is a constitutional tradition that sees the need for, and no contradiction in, limits on the limits of government authority. In other words, the constitutional rules create an asymmetrical legal and political relationships; the sovereign decides the “state of exception,” to quote Schmitt, and all other relationships are institutionally limited by what the sovereign decides (Schmitt 2006).

Liberal democrats have largely—and rightly—contested the constitutional dictatorship thesis with an alternative vision: the effective realization and maintenance of the self-determination principle requires robust limitations on all governing authorities. In other words, a political association’s authentic self-determination requires institutionally entrenched limitations on the exercise of power. From Locke in the seventeenth century to the post-Cold War ideological consensus in favour of democratic constitutionalism, at least in the West, the idea that governing actors must live within and respect the institutional limits of the rule of law and individual rights has become a powerful and determining source of legitimacy. But it has not been determinative in shaping all of the world’s actual constitutions; and, as we discuss below, it has certainly not shaped enough of the actual constitutional rules of international society (see Archibugi 2008).

Looking at the relative stability, prosperity, and freedom enjoyed in Western states, liberal democrats have a strong case for the claim that absolute powers are unnecessary and, indeed, potentially corrosive to the realization of the self-determination principle. Nevertheless, even liberal democrats and thinkers have acknowledged that constitutions are not self-enforcing. Moreover, entrenched limitations on governing authority has not been viewed as an absolute good or something that must be maintained at all cost no matter the circumstances. Theoretically, for instance, Kant’s essentially liberal understanding of constitutionalism, with separate roles for executive, legislative, and judicial authorities, and with guaranteed rights, presupposes the necessity of an absolute sovereign. This sovereign, whose ultimate purpose is the public or general will, is the final source of determination on any conflicts of what the constitution requires (Kant 2006, 110-49). Kant’s quasi-Hobbesian absolutism is viewed by contemporary liberals as a dogmatic anachronism (Pogge 1988, 407-33). However, it points to a strain of constitutional anxiety not just within liberal democratic theory but in historic and contemporary practice. Ensuring that a sovereign authority holds a legal title and resources to effectively settle constitutional disputes and to counter threats to the foundations of the political order is a persistent concern. A rich conception of constitutionalism holds that constitutional disputes be settled democratically and peacefully rather than dictatorially and violently; but a minimal conception allows us to identify those

moments where even clearly liberal states, such as Canada and the US, have allowed extraordinary states of legal exception.

In 1970, Canadian Prime Minister Pierre Trudeau invoked the War Measures Act to counter the apparent threat to the state posed by Quebec separatist kidnappers. Normal limits on state and police power and civil liberties were suspended. In the US after 9/11, the Patriot Act has led to even more drastic and unlimited state powers to counter terrorists. In both cases, the suspension of normal limitations is grounded *in* the actual constitutional prerogatives of the governments. In Canada, however, the War Measures Act was subsequently repealed through democratic or parliamentary debate, a demonstration of how actual constitutions can be reformed to eliminate clauses that become perceived as undemocratic. In the US, the courts have in some cases limited aspects of the executive's claimed powers under the Patriot Act in addition to its treatment of foreign individuals in the Guantanamo Bay facility. While Anglo-American constitutions do not typically contain exceptional powers for the military to uphold the constitutional order, as in Latin America historically, they do have imperfections and tensions that chafe against the institutional limitations which liberal democrats dearly value. Not unlike Kant's liberal philosophy, then, liberal democratic states have often relied on a modified and more limited version of Hobbesian sovereignty for exceptional cases of existential crisis and institutional paralysis.<sup>3</sup>

Self-determination and institutional limitation have had important yet different implications in international relations. The first principle is consistent with sovereign equality and non-intervention in international legal practice. International society is comprised of groups of people who constitute themselves as such and, ideally, recognize each other's constitution as a basis for independence and freedom from external intrusion, interference, and coercion. Until the twentieth century, however, the imperfect, thin constitutionality of the society of states permitted and facilitated colonialism or sovereign inequality. In classical international law, the overriding focus on states as independent and autonomous moral-legal persons has typically meant that the actual institutional limitations are entirely domestic matters. The exceptions to this were peoples viewed as too uncivilized to be self-determining in a modern sense and had to be governed by those with "superior" constitutions. As Robert H. Jackson has shown, the constitution of international society was amended in a democratic direction, however, with decolonization, when subject peoples became suddenly *entitled* to self-rule regardless of the arrogant and racist attitudes of Westerners (Jackson 1990, x, 225). Nonetheless, until more recently this entitlement has meant that the particular institutional limits of sovereign states are not legitimately subject to international criticism or coercion. There is clear evidence, however, that the constitution of international society is evolving and that state sovereignty does not imply an absolute immunity for state actions within their own territory and in relation to its own citizens. However, while international society is no longer indifferent or neutral with regard to human rights abuses or struggles directly related to violated or flawed institutional limitations, outside actors do not—as we discuss below—have

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<sup>3</sup> The classic example of a liberal constitution's emergency powers that permitted a coup and later a dictatorship is Article 48 of the Weimar Constitution (see Watkins 1940, 324-80): "If public order and security are seriously disturbed or endangered within the Federation, the President ... may take all necessary steps for their restoration, intervening, if need be, with the aid of the armed forces" (<http://web.jjay.cuny.edu/~jobrien/reference/ob13.html>, accessed May 5, 2010). These sweeping powers were used by Hitler after the Reichstag fire to gain complete control of the state.

the authority to judge or dictate what kind of constitutional system a self-constituting group ought to have. This would clearly violate the first principle of constitutions we outlined above.

### *The distinction between a violation and a crisis*

The second question raised by the Honduran case is the problem of distinguishing between a violation of the constitution and a crisis over the constitutional order itself. It is often easier to identify the violation of broad and abstract principles of constitutionalism than it is to make authoritative judgements about the violation of an actual constitution. It is because constitutional rules are not self-enforcing that agents are responsible for observing, upholding, and, if needed, enforcing (discussed further below) a state's constitution. All states, democratic or not, are ultimately coercive orders. Strictly speaking, actions that challenge or undermine the legal bonds that constitute the political association and/or its institutional limitations may be hindered, punished, or otherwise forced into compliance by those authorized under the challenged constitution. Such is the logic of constitutions even if one does not accept the legitimacy of a particular constitution or of the people putatively authorized to defend it.

Politically, however, the distinction between enforcing against constitutional violations and engaging in arbitrary acts of force in a larger constitutional crisis or breakdown is extremely problematic. Generally speaking, constitutional enforcement is effective in democratic contexts because the various relevant actors—from individual citizens, to branches of government and the armed forces—have internalized a respect for constitutional limits. Moreover, if there is a genuine conflict over what the institutional limits require, the branch most competent to interpret the law—the highest courts—will carefully put forward a justified ruling to settle the matter; losers will accept the result as final (at least until the next round of the democratic conversation). However, the two constitutional principles outlined in the previous section may be put in genuine crisis where democratic politics and constitutional procedures are ineffective, and where the possibility of meaningful enforcement against violations is hampered. First, the population may be so divided over political issues that the principle of a self-constituting group is at stake. Second, the different branches or powers of state not only disagree about the institutional limits; they have not internalized the democratic limits, or they refuse to accept as final the ruling of what is supposed to be the supreme judicial interpretation of the dispute. In a constitutional crisis, as in the case of Honduras, the state is so profoundly divided that “enforcement” and “violation” become truly opaque. In especially severe instances, it leads to civil war and, more metaphorically, to a return to the “state of nature.”

While a constitutional crisis is conceivable in any state, democracies are generally thought to be better equipped for dealing with them. This is because the possibility of significant disagreement is viewed as an inherent, legitimate and inevitable part of any state's constitutional life; the idea is that disputes will be managed peacefully and lawfully. But precisely for fear of crisis or disruption to the political order many constitutions include a provision for military oversight or authority to prevent or ensure no disruptions. Regrettably, Honduras's constitution includes such a clause and, with no impeachment clause or other way to hinder the President from “violating” the ban on a ballot to extend his term, the military bypassed any democratic or pacific means of “enforcing” the constitution. It is honesty rather than ethical relativism to say that, in some cases, a constitutional order proves utterly ineffective in helping outside actors to distinguish legally the good and bad guys, the enforcers

from the violators. Hence, we need more reflection on the politics and ethics of constitutional enforcement and democracy promotion in such messy conditions.

*How should a constitutional order be defended?*

The third major problem raised by the Honduran crisis is enforcement: Who should defend a constitutional order, and by what means? What rights and duties do outside actors, including international organizations, have in this regard? The answers to these questions depend on the distinctions discussed earlier: between a violation and a crisis, on the one hand, and between a minimal conception of actual constitutions and a richer conception of constitutionalism, on the other.

A rich or “thick” conception of constitutionalism may provide a basis from which to assess violations to the constitutional order. If the separation of powers is central to the principle of institutional limitation that forms the basis of constitutionalism, for example, then a violation to the separation of powers is a clear violation to the constitutional order (e.g. Cameron 2003, 101-16; O'Donnell 2001, 2004, 32-46). On the face of it, the same condition might also hold under a minimal conception of constitutionalism. Any established set of formal rules—including a constitution—includes terms of enforcement. These require stipulating *ex-ante* what constitutes a violation of the rules, and how a violation will be handled: by whom and according to what measures. This kind of institutional clarity is the basis of the rule of law, and for why clearly established laws are central to the functioning of liberal democracy. Everyone should know the standards to which they are being held.

If the standards are clear and there is consensus about whether a violation has occurred, the main problem becomes ensuring that the terms of the constitution are enforced, according to the stipulated rules and norms. The international community, and especially the OAS, reacted to the Honduran crisis largely from the premise that there had been a violation of a clear constitutional order, and that the violation was rooted in Honduran leaders' inability to work out their political differences through constitutional channels. Given this premise, the main task for the OAS became to apply diplomatic and other pressure for the constitutional order to be upheld, and for the parties to work out a negotiated compromise.

However, as suggested above, the distinction between a violation and a crisis may not be so clear cut in practice. In reference to the self-determination principle of constitutionalism, for example, a group may come to dispute even the rich conception of constitutionalism, on the basis that it wants to constitute itself outside the established state. A discussion of the ethics of constitutional separation is outside the boundaries of this essay, but the evidence suggests that these cases are very rarely resolved through constitutional channels over which there is widespread consensus (Fabry 2009, 20, 2010, 272). “Us versus them” disputes over self-determination are very difficult to separate from procedural disputes over institutional limitations and regulations.

Even with attempts at prior clarification, disputes about whether rules or standards have been violated may turn into conflicts over self-determination, if a group comes to feel that its interests are better served outside the constitutional order than by continuing its membership inside it. Moreover, an abstract commitment to democratic constitutionalism can

elide possible tensions between the self-determination and institutional limitation principles. Indeed, some notions of democracy rub against constitutional limitations, viewed as impediments to the authentic self-determination of the “true” people or a sub-state population. Canada’s Clarity Act, for example, was enacted by Parliament as a way to prevent a potential constitutional crisis by clarifying the terms under which a legitimate sovereignty referendum should be held, thereby identifying when a violation to these terms would occur. However, many Quebecers view the Clarity Act and a Supreme Court ruling on the legality of secession as having little to no authentic legal-moral standing in the face of any actual vote by the Quebec population to quit the federation. They reason that a group of nine, mostly English Canadian judges and a Parliament also dominated by non-Quebeckers cannot override a democratic act of self-constitution. Even more important for this paper, however, is the tension across Latin America between populist, so-called Bolivarian democracy, best exemplified in Chavez’s Venezuela, and the more liberal and representative democracy favoured by the US and social elites in the region (with many other states caught between or uncomfortable with these ideological poles). Indeed, Honduras cleaved almost exactly along this wider regional divide and its actual constitution became a site of political conflict over the meaning of democratic constitutionalism rather than an objective and determining doctrine to settle the crisis.

The distinction between violation and crisis can also be blurry in cases of minimal institutional limitation, pertaining strictly to the established constitutional rules and norms. Established rules and norms may *prima facie* permit greater clarity: they are usually written, and easily visible. However, even clearly written rules can be contradictory, confusing, or they can be the product of solutions to past conflicts, with little bearing on present ones. Constitutions are usually imperfect documents, with ambiguities and contradictions, and they often reflect compromises over complex conflicts, which have been worked out over generations. They may stipulate terms of enforcement, but as the Honduran crisis shows, these may be unclear, contradictory, or undemocratic. In other words, constitutions may not only be ambiguous about the terms of enforcement, but their rules may actually exacerbate the blurring of the boundaries between a violation and a crisis.

As indicated earlier, an especially problematic aspect of the Honduran crisis was rooted in the constitutional powers granted to the armed forces. Ideally, democratic constitutions should be enforced democratically, through the institutions established to uphold people’s ultimate sovereignty over the powers of the state. For example, while even liberal constitutions provide executives with emergency powers in times of crisis (such as wartime), these are usually granted through and overseen by the legislature. Using emergency powers, including those requiring the armed forces, through such democratic channels is consistent with democratic constitutionalism (whether minimal or rich). But some constitutions permit undemocratic enforcement. Especially pernicious in this regard is the role of the armed forces in many Latin American constitutions, including Honduras’: the fact that they are mandated to guarantee the constitutional order.

The undemocratic and contradictory provisions found in the Honduran Constitution are replicated elsewhere in Latin America (see Policzer 2003, 75-86). For instance, Article 142 of the Brazilian Constitution stipulates that the armed forces are “under the supreme authority of the President of the 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". (Article 90 of the Chilean Constitution used to contain similar language, but this was removed as part of a series of constitutional reforms in 2005.<sup>4</sup>)

Many of the powers granted to the armed forces in Latin American constitutions are certainly undemocratic, but they have clear historical roots: in the special privileges granted to the armed forces as part of the Bourbon reforms during the 18<sup>th</sup> century, which aimed to strengthen imperial control over the colonies, and in the central role played by many military leaders in consolidating state power after Independence in the 19<sup>th</sup> century (see Loveman 1993). The past reliance on the military in Latin America is consistent with the Hobbesian conception of unlimited sovereignty: leaders gave the military extraordinary powers during a time when they were establishing and projecting a fragile state and government. Making the armed forces the guarantors of the constitutional order made sense when the constitutional order was weak, and when its viability was not guaranteed.

Unlike the 18<sup>th</sup> or 19<sup>th</sup> centuries, however, Latin American states' constitutional order today is more viable and not under threat. It follows that keeping the military as the guarantors of the constitutional order is an unnecessary anachronism, which also contradicts the contemporary norms of civilian control and democracy. While richer notions of constitutionalism may take it as a given that civilian control is or should be established, many constitutions have unfortunately not kept pace, and still reflect the powers granted to the armed forces in the past. We cannot assume that these powers do not matter, or that the category of guarantors of the constitutional order is a meaningless, empty phrase. Constitutions reflect past solutions to past conflicts, but they constrain present behaviour. It is telling that in 2005 Chileans removed the terminology referring to the military's role as constitutional guarantors from their own constitution, because they well understood the consequences of giving the armed forces this kind of power. The Honduran crisis shows that other countries' constitutions will also need to be reformed in order to remove the armed forces' anachronistic and undemocratic power to enforce the constitutional order.

Making the armed forces constitutional guarantors is not only an undemocratic anachronism, but it also risks blurring the boundaries between a violation and a crisis. The armed forces are not deliberative bodies, like the other branches of government. They protect the constitution through the use of force. Their actions by definition risk turning an issue of violation and enforcement into a more serious crisis, over the terms of the constitutional order itself: over what Schmitt recognized as the central "us versus them" kind of conflict. This is why the notion of 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 international level, organizations such as the OAS would be well served by keeping these distinctions in mind. Traditionally, international actors have acted on the principle of non-intervention to enforce a state's constitutional order, a responsibility befalling domestic actors only. In the 20<sup>th</sup> century, however, international actors have become increasingly willing to intervene in questions of self-determination (the first principle of

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<sup>4</sup> See <http://pdba.georgetown.edu/Constitutions/Chile/chile89.html#mozTocId40498>, and <http://pdba.georgetown.edu/Constitutions/Chile/chile05.html#mozTocId310228>.

constitutionalism),<sup>5</sup> and are now becoming increasingly willing to intervene in questions of institutional limitation (the second principle of constitutionalism). The Inter-American Democratic Charter provides the OAS with a template to act as a sort of enforcer over questions of institutional limitation. While the trend is moving in the direction of increasing international intervention in affairs previously considered the sole responsibility of domestic actors—and while some of this is welcome, especially when faced with cases of massive atrocities or violations—we suggest reasons to be cautious.

Notwithstanding increasing international oversight even in questions of institutional limitation, the ultimate responsibility for constitutional enforcement, in our state-based system, still belongs to domestic and not to international actors. This is so for at least three reasons. First, even if sovereignty is no longer sacrosanct and absolute, the default presumption in international law is that authorized members of a state have a prior responsibility and right to uphold the domestic constitutional order. Thus, for instance, the International Commission on State Sovereignty and Intervention (ICISS) made it clear that the “responsibility to protect” the basic rights of individuals falls primarily on the independent state and it is only when a state is clearly unwilling or unable to do this that the international community takes on a role as protector, thus exercising a “secondary sovereignty” (ICISS 2001). Along the same lines, the 1998 Rome Statute for the International Criminal Court created an independent judicial enforcement entity, with a prosecutor that can initiate investigations without the consent of states (Schabus 2001). But this supranational amendment to international legal order coexists with the Statute’s principle of “complementarity,” which means that the ICC only has jurisdiction when states are clearly unwilling or unable to investigate and prosecute crimes within their territory or committed by their nationals. With both humanitarian protection and individual criminal liability, then, international law authorizes only the hindering and punishing of *actions* that may harm the constitutional rights of individuals or groups, but not upholding a state’s constitutional order *per se*. Indeed, unless there is a more sudden and deliberate ascent to a federal form of world political organization, with its own democratic constitution, the prior weight of locally authorized constitutional enforcers must be recognized as such. Intervention is warranted only in exceptional cases where the consequences of constitutional violations or a crisis are held to be threats to international peace and security (as determined by the UN Security Council under its Charter-based powers), or ethically speaking, when an intolerably high threshold of human rights abuse is imminent, ongoing or likely to recur. Indeed, partly to achieve wider state support (the procedural hurdle for the international constitution, such as it is), the Responsibility to Protect doctrine and the ICC Statute each permit intervention and punishment only when the scale of abuse or crimes appears to be massive, widespread and systematic.

Second, absent a narrower role as protector or punisher for specific actions related to human rights abuses, outsiders’ efforts to enforce a constitutional order risk being arbitrary and one-sided. If the target state’s self-determining “contract” has come apart, efforts to enforce a “true” reading of constitutionality in a crisis situation risk being viewed as simply efforts to back “them” against “us” in a dispute. While attempting to be neutral in the face of massive human rights abuses is to effectively side against the victim, and to acquiesce to the

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<sup>5</sup> See Jackson (1990, x, 225).

strength of the machete wielder, the same cannot be said when it comes to most constitutional crises (unless of course they devolve into full scale civil wars with crimes against humanity and genocide).<sup>6</sup> In a constitutional crisis, efforts by outside powers or institutions to “enforce” what it or they feel is “right,” constitutionally speaking, may not be “wrong” for a variety of political and possibly moral reasons. Such actions may help to stabilize a messy situation, create order and peace, provide humanitarian relief, and so on. But they may be just as “wrong” for failure to accomplish these goals, as the US and others learned in Iraq recently. But without the consent of a constitutionally authorized, legitimate domestic agent, it is an *intervention* (justified or not) rather than constitutional enforcement that describes the situation.

Third, then, if we truly value constitutionalism, we ought to reject the role of outside agents in enforcing constitutions if they do not have a legal title to do so in the particular domestic constitutional orders of states. Indeed, as Powell and Buchanan note, unless actual states revise their constitutions to permit some kind of role for international or supranational institutions to enforce the law in a state (as is the case to a degree with Europe), there is no authority for a robust role domestic law enforcement role for outside actors (Powell and Buchanan 2009, 249-67).<sup>7</sup>

In Honduras, the OAS pressured the domestic actors to resolve their dispute, even while it took sides. There is of course nothing wrong with providing good offices for such disputes to be resolved, or with taking a strong stance in favour of democracy. Nevertheless, it would have helped to keep in mind that the case was less clearly a violation of the Constitution—and hence of the terms of the IADC—than a crisis produced by the terms of the Constitution itself, and magnified by IADC’s assumption that constitutions provide a clear standard by which to determine whether the democratic order has been violated or altered. The OAS’s role as enforcer, even of the terms of IADC, rested on weaker foundations than its leadership assumed.

### *Coercion versus persuasion*

When can punitive or coercive measures be used to promote either a particular constitutional order or broad norms of constitutionalism? Nothing in the preceding discussion is meant to suggest that coercion can never be used, either at the domestic or international level, to enforce constitutions or norms of constitutionalism. The rule of law requires potentially coercive enforcement, through the police and/or the military in some cases. (This much has been understood and accepted at least since Hobbes.) Moreover, in a time of crisis it may also be necessary to call upon the armed forces or upon extraordinary coercive powers to defend the state and the constitutional order. We recognize and do not deny that any constitution needs to provide for this possibility. Rather, our argument is that to avoid the danger of constitutional coups let alone dictatorship—whereby the coercive institutions take over the state through constitutional means—coercive enforcement needs to be carried out through democratic constitutional channels. This kind of enforcement is grounded on two principles: a) that civilians retain full control over the armed forces; and b) that executives’ power be limited and

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<sup>6</sup> In this case, however, the international enforcement of human rights is siding with a victim of human rights abuse rather than with a particular political faction in a constitutional crisis.

controlled by the other branches, e.g. through temporary grants of emergency powers, regular oversight of coercive power, etc. If the legislative branch grants the executive temporary emergency powers in a time of crisis (such as a war or an insurrection), and if judicial oversight is maintained over how this power is granted and exercised, in principle nothing in the exercise of these powers contravenes liberal democratic constitutionalism. If executives surreptitiously exercise coercive powers outside legislative and/or judicial oversight, they act outside liberal democratic constitutional norms (e.g. Ackerman 1991, v.).

Moving beyond the enforcement of an existing constitutional order, it is also possible to change an undemocratic constitutional order, such as exists in many Latin American countries. Again, such a change should be done democratically: for example through constitutional assemblies, popular consultation, or other such mechanisms of constitutional reform. The main tools for bringing such changes about ultimately rest on persuasion and not coercion – whereby different sectors bargain and deliberate over the terms of a new constitution, instead of forcibly imposing one.

We have already noted that international actors typically lack proper authority to enforce a particular state's constitution. Presuming that extremely serious human rights abuses are not an issue, or that a target state is not a threat to international peace and security, as determined by the UN Security Council (which took this extraordinary step of linking Haiti's 1994 coup to broader regional peace), persuasion rather than coercion ought be the default response to the problem of constitutional violations and/or crises. The international response to Honduras's problems was a mixture of coercive and persuasive measures. The coercive means were questionable not just in terms of effectiveness but legality and legitimacy; the persuasive measures were unquestionably legitimate and had the potential to mediate the crisis (but ultimately failed). This statement requires brief elaboration.

We are not suggesting that the coup or actions taken against Zelaya were legitimate, or that the efforts by the OAS to defend democracy in a member state were illegitimate or illegal full stop. Our position is more nuanced. The OAS is a club of states, where each member voluntarily accepts the terms of membership: no coups or undemocratic regime changes are permitted. Failure to comply with these terms clearly means a possible suspension. However, the quick suspension of Honduras was a hasty judgment of—as we have suggested above—a far more complex constitutional crisis than OAS member states were willing to admit. It was intended as a punitive measure to delegitimize undemocratic actions by the Honduran military and *de facto* regime. However, unless removing the specific constitutional provisions that gave plausible legal backing to the coup-leaders and Congressional supporters had been a condition of OAS membership, it is scarcely fair to suspend Honduras on that basis and after the fact. In other words, if the flawed constitution was not an issue beforehand, and was a major factor or cause of the crisis, the OAS's punitive measures were based on a retrospective rather than prospective version of legality—clearly a backwards step for those who value the rule of law and constitutionalism. As William E. Scheuerman writes, the rule of law means that laws enacted can only legitimately regulate future conduct; agents cannot be held liable for something that was legally permissible under the rules at the time (Scheuerman 1999, 4-25).<sup>8</sup>

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<sup>8</sup> Indeed, the victorious Allied powers disregarded the norm of prospectivity with the concept of “crimes against humanity” they used to prosecute Nazis at Nuremberg. But these were particularly egregious offences against an ostensible common morality, rather than a constitutional crisis; and the Nuremberg experiments

Beyond this suspension, however, powerful OAS member states like the US and international institutions like the IMF engaged in punitive economic measures or sanctions. While these seemed to reinforce the spirit of the OAS decision to suspend, they could be construed as unilateral and arbitrary political decisions. Indeed, the various interested parties in the region could assert their right to coerce in any fashion they wanted. Hence, uncomfortably for the US, strident Zelaya supporters like Chavez's Venezuela and Ortega's Nicaragua threatened military intervention in Honduras.<sup>9</sup> This raised further questions about whether, if that should have occurred, Colombia and the US would be forced into a counter-intervention to stop Bolivarian military adventurism from further destabilizing Honduras and the region. In such a case, the constitutionality of the OAS would be called into question, as there would be little in the way of either a regional self-constituting community or institutional limitation on power among its states. In sum, despite universal international condemnation of the coup, outside actors did not have the unequivocally clear legal title to coerce a *constitutional* coup (which, as we noted, is not an oxymoron).<sup>10</sup>

Knowing that punitive measures alone would not resolve the crisis, the OAS also quickly backed persuasive measures to broker a deal. Having made a strident judgment about what who was right and wrong in Honduras, outside actors no doubt compromised their neutrality in mediation. Nonetheless, the protocol that Costa Rican President Arias eventually negotiated with both factions in Honduras effectively recognized the ethical and legal murkiness of the country's internal problems. For, much like the ignored Honduran Supreme Court and internationally castigated Congress had ruled, the protocol required that Zelaya abandon any notion of a plebiscite as a condition of returning to power. The coup backers would have to relinquish their claims to executive authority that they took with force. Of course, the intransigent parties, particularly the coup leaders, ran down the clock and bet rightly that outsider actors like the US would recognize the newly elected president without a return of Zelaya. In the end, the circumstances may have made either coercive or persuasive means (and their combination) ineffective. However, lack of success through persuasion did not make this route inferior to punitive measures. Given the circumstances of a constitutional crisis (and the

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are now viewed as partly tainted by power considerations, i.e., "victor's justice" (Bass 2000). Allen Buchanan analyzes Nuremberg and the NATO bombing of Serbia for the sake of human rights as instances of "illegal legal reform" in international law (Buchanan 2001, 673-705). His argument is that such exceptional forms of reform-minded international illegality are justified in rare circumstances, and only when there is an explicit intent to amend (and live by) the fundamental rules of an ethical political order. This also points to a basic weakness of the international constitutional order, i.e., the lack of a peaceful amending order under current conditions.

<sup>9</sup> As Chávez is reported to have said, "We will bring them down, we will bring them down, I tell you." He added: "I have put the armed forces of Venezuela on alert." "World Leaders Condemn Zelaya Overthrow," *France24.com*. July 1, 2009. <http://www.france24.com/en/20090628-honduras-leaders-reactions-president-zelaya-army-troops-constitutional-referendum>+ (accessed May 26, 2010).

<sup>10</sup> It is particularly curious that the Honduran Supreme Court, which ruled against Zelaya and opined in favour of the *de facto* government, was routinely dismissed by pro-democratic outside actors and academics. It suggests that something is constitutional when it accords with your preferred values or outcomes, rather than how an authorized judicial body decides. That the OAS's reading of what is constitutionally required in Honduras trumps that state's own Supreme Court potentially undermines the self-determination of all states.

lack of any clearly massive attack on human rights warranting intervention), persuasion likely suited this complex situation.

Persuasion also makes sense as a broader, proactive diplomatic strategy for the complex constitutional order of the region and beyond. We suggest that a better strategy than taking a case-by-case reactive stance against violent interruptions to democracy is to create a regional diplomatic process of constitutional reform. The OAS's first step of making democracy a condition of membership should be succeeded by a second step of creating a means through which peoples amend their constitutions democratically to forestall crises. The precise form of this process is beyond the scope of this paper. States may have reasons to resist the idea, related to their often jealous regard for sovereignty. But there is much to be gained from a regional dialogue on constitutions and constitutionalism in which peoples learn from and are persuaded by arguments based on each other's experiences. In the end, if a country decides it has its own reasons for a constitutional provision, say, a so-called "right to bear arms" or for minority language rights, it may serve as an example to others of what to avoid or institute. However, at a minimum, the most urgent task of constitutional learning would relate to removing any extant prerogatives for the military or other coercive authorities to intervene in the political realm.

### *Conclusion*

In brief, we have argued that the Honduras crisis in 2009 suggests the following: a) liberal democracy and constitutionalism complement and even require each other; b) constitutionalism requires addressing and not ignoring the constitutions themselves (though not necessarily holding them up as inviolable and written in stone); c) the international promotion of democracy has so far focused more on democracy and not on constitutions; and d) democracy promotion in the future should focus on the still undemocratic aspects of so many constitutions. We conclude by addressing a number of possible objections to our basic claims:

One possible counter-argument is that the problem in Honduras was not that international organizations like the OAS did too much, as we have suggested—it was that they did too little. Canada and the US, some have argued, were antipathetic toward Zelaya, and failed to follow the lead of OAS (and especially of Secretary General Insulza) in condemning the coup and the *de facto* government. What started as a forceful response by the OAS was ultimately undermined by some of its members (including Canada and the US). A better response would have been to hold the line against the *de facto* government, and in favour of restoring Zelaya.

While it is true that Canada and the US at some point defected from the initially forceful OAS position, this argument completely glosses over the tensions and contradictions at the core of the case, outlined in our paper. We are not arguing against democracy, against the international promotion of it, or even against Zelaya. We are also not taking sides in the dispute over which side's actions—whether Zelaya's or the *de facto* government's—was or was not constitutional. Instead, our paper argues that given the contradictions and undemocratic aspects of the Honduran Constitution, the basis for determining what was and was not constitutional, and hence what counted as a constitutional interruption of the democratic order—was weaker than most assumed. The Honduran crisis was just that—a crisis—and not a clear-cut case of a violation of a constitutional order. This reveals the need to rethink the terms

for the promotion of democracy, both at the domestic and international levels, and in particular the need to refocus effort from the quality of democratic regimes to the quality of the constitutions.

Another possible objection to our argument is that proposing to reform a country's let alone a region's constitutions contravenes a core principle of constitutionalism, namely respect for people's constituent power. If people have the right to self-determination, under what basis can international actors urge constitutional reform? This is a valid issue, to which our response is that we are not proposing a new set of standards or constitutions to be imposed coercively. Instead we are proposing the creation of a new set of forums to discuss the undeniably undemocratic aspects in many countries' constitutions. Discussions about how to make constitutions more democratic might result in a wide variety of constitutions, suited to fit each country's needs and principles. We are not envisioning a single constitutional model to be imposed on different countries, regardless of circumstance. On the other hand, we would hope that reasoned deliberation would convince people of the need to remove egregiously undemocratic anachronisms, such as the extraordinary powers granted to the armed forces in many countries' constitutions, which the Honduran crisis has laid bare. While we hope this would be the logical result of reasoned deliberation, we cannot of course be sure that people will choose this. Such is democracy. At least, however, choosing to give the armed forces extraordinary powers should be the product of reasoned deliberation, instead of being a holdover from a long-past undemocratic age that has not been subjected to debate and scrutiny. The Honduran crisis has shown that these powers are not inconsequential, and need to at least be discussed.

The last possible objection to our argument is that constitutional reform is a political can of worms, which may destabilize countries, and should therefore not be done. We have several responses to this objection. As Canadians, we are not naive about the dangers of engaging in complex constitutional reform. But to restate: we are not proposing reform per se, but rather the creation of forums to discuss the possibility of reform, in light of the Honduran crisis and what it reveals about the undemocratic and problematic aspects of many countries' constitutions. Moreover, the constitutional can of worms has already been opened: by setting up standards regarding democracy, and by including the criterion of "constitutional" in the IADC. Sorting out the tensions and contradictions raised by this can of worms will make things less rather than more complicated.

We do not know what the discussions over the region's constitutions will produce. We do know that the Honduran crisis in 2009 has made it clear that the time to engage in such a discussion is upon us.

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