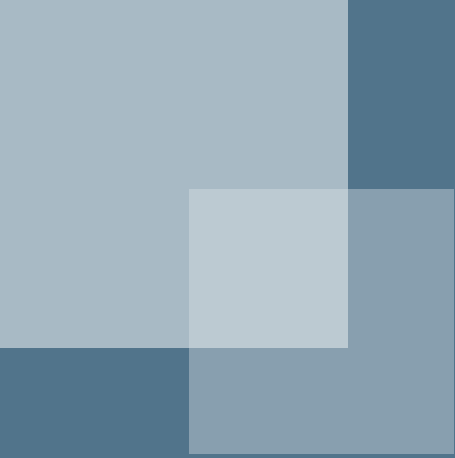




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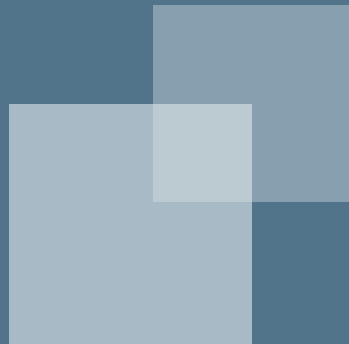
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International IDEA, Strömsborg, 103 34 Stockholm, Sweden
Phone +46-8-698 37 00, Fax: +46-8-20 24 22
E-mail: info@idea.int Web: www.idea.int



Chapter 8

Regional Organizations and Threats to Constitutional Democracy from Within: Self- Coups and Authoritarian Backsliding



Chapter 8

Sujit Choudhry and Sumit Bisarya



Regional Organizations and Threats to Constitutional Democracy from Within: Self-Coups and Authoritarian Backsliding

Introduction: defining threats to democracy from within

The problem of unconstitutional transfers of power has long been an issue on the agenda of regional organizations. Historically, the paradigmatic example of an unconstitutional transfer of power is the military coup d'état, in which the armed forces seize power and make no pretence of adherence to the constitutional procedures for changes in government. Over time, however, regional organizations have come to recognize that constitutional democracy can also be undermined *from within*, by democratically elected governments and presidents that capture the state and put an end to political competition and democratic rule. There are at least three main differences between a military coup d'état and internal threats to constitutional democracy.

- A military coup d'état seeks to seize power and overthrow a civilian government, whereas threats to constitutional democracy from within come from governments and presidents who have already obtained power through democratic and constitutional means, but do not wish to surrender it, through either an actual or expected electoral loss and/or presidential term limit.
- A military coup d'état cannot easily lay claim to an electoral mandate or democratic legitimacy to overthrow a civilian government, whereas governments and presidents that seek to remain in power can do so, and regularly do (although it is difficult to sustain this claim without a fresh electoral mandate).
- A military coup d'état acts entirely outside constitutional procedures and institutions, in blatant contravention of the existing constitutional

order, without any pretence of compliance with legality, whereas threats to democracy from within occur through both unconstitutional *and* formally constitutional means.

These three distinctions between the military coup d'état and threats to democracy from within have raised a series of difficult issues for regional organizations that have sought to adapt their existing legal and institutional frameworks for unconstitutional transfers of power to encompass these situations. This chapter draws a further distinction between two categories of attacks on constitutional democracy from within: *self-coups* and *authoritarian backsliding*:

- A *self-coup* (*autogolpe*) arises when democratically elected presidents remain in power unconstitutionally and escape the confines of term limits and/or electoral losses. While the means vary, there are a number of recurring themes. A president may declare a state of emergency that suspends many of the constitution's provisions, and may then amend parts of or rewrite entirely the constitution (especially its provisions on term limits) either by decree or by convening an extra-constitutional constituent assembly. Or he may simply act through brute political might and/or military force. In many instances, the self-coup results from the abuse of constitutional powers for unconstitutional ends. It is like a military coup d'état in that the president remains in power through unconstitutional means.
- *Authoritarian backsliding* arises when a democratically elected government or president has come to power without force or fraud, and then manipulates the state rules and institutions (through constitutional and statutory amendments) to overcome term limits and/or electoral losses. The means vary, and include the manipulation of electoral systems, political party regulation, and/or the modification or abrogation of presidential term limits. The prospect of backsliding under law creates real difficulties for regional organizations. The term authoritarian backsliding is used since the democratic regime under threat may itself have replaced a prior authoritarian regime, to which the constitutional order may be reverting.

The main distinguishing feature between a self-coup and authoritarian backsliding is that the latter is achieved through constitutional means, whereas the former is not. In many disputes, a central point of contention among parties to the conflict is whether capture from within has occurred through constitutional or unconstitutional means. This creates two main issues for regional organizations: (1) they may be called upon to adjudicate

matters of domestic constitutional controversy; and (2) they may be called upon to assess the rulings of domestic constitutional courts on these issues in reaching their own determinations. Authoritarian backsliding raises the additional problem that regional organizations must condemn measures that are entirely constitutional as a matter of domestic law on the substantive ground that they impede political competition.

These issues remain pressing today, and have become matters of international concern, especially for regional organizations. The proliferation of military coups in the second half of the 20th century¹ drove regional organizations, in particular in Latin America and Africa, to develop legal and institutional frameworks that, by protecting democratic and constitutional order, would contribute to these organizations' overall goals of regional unity and stability. Egypt² is the latest country to have its membership in a regional organization suspended for an unconstitutional change in government, joining the Central African Republic, Guinea, Guinea-Bissau, Madagascar, Mauritania, Niger, Côte d'Ivoire, Togo, Fiji, Paraguay and Honduras.

The next section examines how the Organization of American States (OAS) and African Union (AU) have developed their legal and institutional frameworks for unconstitutional transfers of power to extend beyond military coups d'état to encompass authoritarian backsliding and self-coups. Both regional frameworks envision possible suspension of participation in cases of unconstitutional transfer of power. Two recent cases—Honduras (2009) and Niger (2010)—are examined to analyse the challenges for regional organizations in responding to such events. Madagascar is used as a case study to examine when (and under what conditions) those suspensions are lifted. Preliminary lessons are drawn from these case studies, and policy recommendations are provided for regional organizations.

Regional mechanisms: from coups d'état to threats to constitutional democracy from within

The Organization of American States

The OAS is a regional intergovernmental organization of states in North and South America and the Caribbean that was established in 1948 by an international treaty, the OAS Charter.³ The key provision governing unconstitutional transfers of power is article 9 of the OAS Charter, which provides that:

[a] Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

Article 9 defines an unconstitutional transfer of power as the overthrow of a democratically elected government by force. In such an event, a state may be suspended from the right to participate in the OAS. The power to suspend is a last resort that can only be exercised if diplomacy to restore representative democracy has failed (article 9(a)). Suspension requires a two-thirds affirmative vote of member states (article 9(b)), and a suspension may be lifted by another two-thirds vote (article 9(f)).

Article 9 defines an unconstitutional transfer of power as a coup d'état or military invasion. It does not address threats to democracy from within in the form of a self-coup or authoritarian backsliding. Over time, the organization's understanding of unconstitutional transfers of power has evolved to partially address these issues. The key document is the Inter-American Democratic Charter (IADC), which was adopted in December 2001 by the OAS General Assembly, and which serves as an interpretation of the OAS Charter. Article 19 delineates two kinds of threats to democracy that warrant OAS action. First, there is the 'unconstitutional interruption of the democratic order of a member state'. This includes coups d'état and military invasions—already covered by article 9 of the OAS Charter. Second, there is the 'unconstitutional alteration of the constitutional regime that seriously impairs the democratic order of a member state'. This captures changes to the constitutional regime by democratically elected governments to restrict political competition and remain in power—as opposed to an unconstitutional transfer of power. But the changes to which it applies lie outside the normal process of constitutional amendment—for example, by executive decree, ordinary legislative vote or referendum where these are not recognized procedures for amendment. Thus it applies to self-coups, but does not extend to authoritarian backsliding, which is defined here as *constitutional* alterations of the democratic regime that seriously impair the democratic order of a member state. Article 21 of the IADC affirms the need for a two-thirds vote to suspend a member.

Likewise, article 22 affirms that a two-thirds vote is required to lift a suspension, but adds a new substantive precondition: that 'the situation that led to suspension has been resolved', without specifying what an appropriate resolution must entail. In cases of coups d'état, the language is broad enough



to include the transfer of power back to civilian rule. In such situations, an appropriate resolution could entail either restoring a duly elected president or government, or holding fresh elections. The extent of what is politically feasible in a given situation will depend on the context. In cases of self-coups, a resolution of the situation could entail the restoration of the constitutional status quo ante. An interesting question is whether an appropriate resolution could also entail the resignation of the president where the prior term limit had been exceeded, and/or holding fresh elections to give the government a new electoral mandate.

The African Union

The AU was created by an international treaty known as the Constitutive Act of the AU in 2000.⁴ In contrast to its predecessor,⁵ the Organization of African Unity (OAU), the AU has developed a legal and institutional framework aimed at promoting democratic and constitutional order. Article 30 of the Constitutive Act provides that ‘governments which shall *come to power* through unconstitutional means shall not be allowed to participate in the activities of the Union’ (emphasis added), which connotes that they must be suspended if this has occurred. At first glance, article 30 is quite narrow. It applies to *changes* in power that are unconstitutional—for example, military coups d’état. It does not apply to self-coups, because those are instances of democratically elected governments or presidents that have come to power constitutionally *remaining* in power through unconstitutional means. Likewise, it does not apply to authoritarian backsliding, because this is also a case of democratically elected governments or presidents seeking to remain in power through the manipulation of, but formal compliance with, constitutional procedures.

But the AU’s concern for constitutional democracy now extends to threats to democracy from within. The origins lie in the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, adopted in July 2000, which defines four kinds of unconstitutional changes of government:⁶

- military coup d’état against a democratically elected government;
- intervention by mercenaries to replace a democratically elected government;
- replacement of a democratically elected government by armed dissident groups and rebel groups; and

- the refusal of an incumbent government to relinquish power to the winning party after free, fair and regular elections.

The Lomé Declaration also provides a framework for possible responses from the OAU, including suspension, which are aimed at ‘a speedy return to constitutional order’. This implies, at a minimum, the restoration of the constitutional status quo ante. It could also connote the restoration of the deposed government or president, although that is not clear.

The first three instances of unconstitutional regime change in the Lomé Declaration expand upon the traditional focus on the military coup d’état to encompass two other kinds of violent threats to democratically elected governments that African democracies have faced: overthrow by mercenaries and armed rebels. The fourth instance is technically not an example of unconstitutional regime change, but rather unconstitutional regime *maintenance*. It is a self-coup, albeit a narrow one that arises only after there have been elections in which the governing party has lost. It does not extend to a situation in which a president or government pre-empts an electoral loss by delaying or suspending elections altogether or, more generally, by engaging in a variety of forms of unconstitutional conduct (e.g., declaring a state of emergency, convening an extra-constitutional constituent assembly, abrogating or amending the constitution) that put an end to political competition and democratic rule.

In 2007,⁷ the AU sought to further expand its framework for democracy through the African Charter on Democracy, Elections and Governance (ACDEG).⁸ Article 23 of the charter broadens the definition of an unconstitutional change of government to ‘illegal means of accessing *or maintaining power*’ (emphasis added), which clearly applies to threats to democracy from within. It also adds a fifth category of unconstitutional means of accessing or maintaining power to those identified in the Lomé Declaration: ‘any amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government’. This new category extends the AU’s framework for democracy to encompass authoritarian backsliding, because it applies to constitutional or statutory amendments that are formally legal, but which undermine government turnover. The interpretive question is whether it also includes self-coups, which have the same goal of undermining electoral turnover, but proceed through illegal means. Although article 23 does not expressly capture this category, it would be odd if it did not condemn this conduct, which is arguably more egregious and easier to identify (because it is achieved illegally) than authoritarian backsliding.

The AU may suspend a member and impose sanctions to enforce its framework for constitutional democracy. There are two key institutions that make these decisions: the Peace and Security Council (PSC)—a 15-member state body chosen by the AU Executive Council—and the AU Assembly. Chapter 8 of the ACDEG deals with unconstitutional changes in government. Article 24 provides that, when a situation arises, the PSC shall ‘exercise its responsibilities in order to maintain the constitutional order’. Article 25(1) in turn empowers the PSC to suspend a member state when there has been an unconstitutional change in government and diplomatic efforts to resolve disputes have failed and to impose sanctions (including punitive economic measures) on any member state that is proved to have supported or instigated unconstitutional regime change in another member state. The AU Assembly also seems to have the power to suspend or declare the suspension of a member state.

The ACDEG provides that the PSC can lift sanctions once the ‘situation that led to the suspension is resolved’⁹ without further defining what that might entail, parallel to the IADC. Importantly, and unlike the IADC, article 25(4) stipulates that ‘the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order ...’—a requirement that was put to the test in Madagascar (discussed below).

Case studies

The Organization of American States: Honduras

On 28 June 2009, the Honduran military seized the democratically elected president, Manuel Zelaya, and expelled him from the country. The OAS quickly suspended Honduras under article 21 of the IADC and called for President Zelaya’s reinstatement.¹⁰

On closer examination, however, the Honduran case is far from being as clear as the OAS resolution might suggest.¹¹ On 23 March 2009, Zelaya had issued a decree ordering the holding of a national plebiscite on 28 June on whether to hold a subsequent referendum in November 2009 (simultaneously with national elections) on the establishment of a National Constituent Assembly for the purposes of adopting a new constitution.¹² Although the decree did not specify the reasons for convening a constituent assembly and adopting a new constitution, and Zelaya stated on the record that convening a constituent assembly would not interfere with the election process,¹³ this was widely interpreted as a move to allow him to stay in power beyond his one-term limit set out in article 239 of the constitution.¹⁴

Presidential term limits are often the first casualty of authoritarian backsliding, and in many jurisdictions have been extended or abolished entirely through constitutional amendments. In an analysis of constitutions with fixed executive terms since 1875, one study found that—in situations where it was a possibility (i.e., they had not died in office or been voted out before the maximum term limit)—25 per cent of cases of fixed-term executives broke those limits, and in these cases a large majority (86 per cent) amended or reviewed the constitution.¹⁵ In recognition of this threat, the presidential term limit in article 239 is subject to two layers of constitutional protection. First, article 373 of the constitution of Honduras provides that amending the constitution requires a two-thirds majority of Congress, and stipulates that article 373 (and other articles relating to term limits and the succession of power) are non-amendable. Further, article 239 provides that anyone who violates, or advocates amending, this provision shall immediately cease to hold office.

In the face of this constitutional framework, Zelaya's decree raised serious constitutional concerns and prompted a complicated set of legal proceedings. On 8 May, the Prosecutor's Office filed an action in the Administrative-Contentious Court seeking to (1) bring an injunction against the proposed plebiscite and (2) declare the presidential decree illegal and unconstitutional.¹⁶ On 27 May that court ordered a suspension to preparations for the 28 June plebiscite, pending resolution of the associated legal and constitutional issues.¹⁷ While the court was considering the action filed by the public prosecutor, Zelaya changed the wording of the presidential decree from 'consultation' to 'poll'. However, the court issued a clarification two days after its initial decision that included all decrees aimed at the same objective within the scope of the injunction. It subsequently issued a series of orders demanding that Zelaya comply with its ruling, and ordering the military not to distribute ballot papers for the plebiscite.

Notwithstanding these court rulings, Zelaya continued to press forward with his plans for the plebiscite. When the military refused to distribute ballot papers in accordance with the court order, Zelaya fired the head of the Joint Chiefs of Staff, General Romeo Vasquez. The Supreme Court immediately declared the removal unlawful and reinstated Vasquez. Zelaya rallied supporters and led them personally on a march to the military base where the ballot papers were being held in order to distribute them around the country, proclaiming at the gates of the compound 'Sunday's referendum will not be stopped'.¹⁸ He also asserted his authority to order the military to distribute the ballot papers in his capacity as commander-in-chief of the armed forces.



The Supreme Court then issued an order for Zelaya's arrest on 26 June, leading to his seizure by the military on 28 June and expulsion to Costa Rica. While the seizure was authorized by the court order, the expulsion from the country was the sole decision of the military. Congress subsequently sought to legitimize Zelaya's expulsion retroactively through the acceptance of a purported letter of resignation (which Zelaya denied he had written), and through a resolution that held Zelaya responsible for 'repeated violations against the constitution'. President of the Congress Roberto Micheletti was named president for the remainder of Zelaya's term (until January 2010), under the constitutional rules governing the line of succession when the presidency is vacant.

The OAS determined that the removal of President Zelaya was an unconstitutional transfer of power.¹⁹ There are indeed serious questions about the constitutionality of the actions taken to remove him from office. While it is true that the military never took power, and the line of succession under the constitution was followed, the question is whether Congress had the constitutional power to remove Zelaya. The constitution does not authorize Congress to impeach or dismiss the president. While article 239 provides that anyone advocating an amendment to presidential term limits 'immediately ceases to hold office', Zelaya's decrees calling for referendums on constitutional change did not expressly advocate directly for amending term limits. Even if article 239 was cited, it is far from clear that it applies. A case can be made that the removal of a president from office requires a legal proceeding (perhaps before a court), with appropriate due process, to determine whether a violation of article 239 has occurred.²⁰

The OAS clearly and swiftly decided that the transfer of power from Zelaya to Micheletti was unconstitutional, and acted accordingly. On 1 July, the OAS General Assembly passed a resolution condemning events in Honduras as a coup d'état. The resolution reaffirmed Zelaya as the president of Honduras and demanded his immediate return, and declared that no government emerging from the 'unconstitutional interruption' would be recognized.²¹ Thereafter, the General Assembly passed a follow-up resolution, the 'suspension of the right of Honduras to participate in the Organization of American States', in which it stated that 'diplomatic initiatives taken under Article 20 of the Inter-American Democratic Charter aimed at restoring democracy and the rule of law as well as reinstating' Zelaya had 'been unsuccessful', and thus suspended Honduras' participation in the OAS.²²

Despite increased international attempts to mediate a solution, elections went ahead in Honduras under a state of emergency on 29 November, in

which Porfirio Lobo—who had lost the 2005 elections to Zelaya—was elected president. Lobo entered into negotiations mediated by Colombia and Venezuela to bring Zelaya back to Honduras, and Zelaya finally returned on 28 May 2010. Almost immediately afterwards, the OAS voted to lift the suspension of Honduras.²³

The Honduras case raises interesting questions. If the forced exit of Zelaya from office represented an unconstitutional transfer of power, could his actions amount to an attempt to engage in ‘an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order of a member state’—i.e., a self-coup—by pushing forward his plans for a plebiscite on constitutional provisions rendering one-term president limits unconstitutional, in the face of a court injunction against the holding of the referendum? Or would this only have occurred if the plebiscite had been held, if it had approved a referendum, and if plans for a referendum had been launched? Or if an actual amendment to the term limit was proposed? Further, the original OAS resolution called for Zelaya’s reinstatement as a condition of ending Honduras’ suspension. Zelaya was not reinstated, yet the suspension was terminated. Was this perhaps an implied recognition that Zelaya had engaged in constitutionally questionable conduct to amend the constitutional provisions on term limits (which itself arguably breached the IADC), and that simply restoring to him to power would not be an appropriate resolution of that threat to constitutional democracy? These questions will be addressed after discussing a case of somewhat parallel circumstances in Niger.

The African Union: Niger

Mamadou Tandja was elected president of Niger in 1999, and re-elected in 2004. Approaching the end of his second term in 2009, and confronted by article 36 of the 1999 constitution of Niger, which imposed a limit of two five-year terms for the presidency, Tandja called a referendum to pave the way for a new constitution that would abolish presidential term limits. In a manner parallel to the constitution of Honduras, article 136 of Niger’s constitution prohibits the amendment of article 136, which is specifically excluded from the permissible subjects on which a president may call a referendum. The Constitutional Court accordingly found that the proposed referendum would be unconstitutional,²⁴ to which Tandja responded by dissolving the parliament and the Constitutional Court. The referendum was held on 5 August 2009 and, despite significant protests, approved Tandja’s proposal to adopt a new constitution.²⁵ Tandja proceeded to amend the constitution and win re-election, but his victory was short-lived. On 18 February 2010 the



military ousted him from office, suspended the constitution and stated that it wished to turn the country into ‘an example of democracy and of good governance’.²⁶

Before the AU crafted a response to developments in Niger, and before the military coup, the Economic Community of West African States (ECOWAS) was swift to condemn President Tandja’s efforts to circumvent the constitution and abolish term limits. At an extraordinary summit on 17 October 2009, ECOWAS condemned Tandja’s actions and invoked preliminary measures under its own relevant governance framework, namely the Supplementary Protocol on Democracy and Good Governance,²⁷ which provides in article 45 for sanctions in cases in which ‘democracy is abruptly brought to an end’. Notably, this triggering language is broad enough to encompass threats to democracy from within, including self-coups and authoritarian backsliding. The summit urged Niger to suspend legislative elections indefinitely and to enter into political dialogue with major political parties to resolve the impasse. Moreover, the summit determined that if President Tandja failed to comply with its decision, this would lead to the automatic and immediate imposition of all other sanctions envisaged in article 45, including suspension, and the case would be referred to the AU with the recommendation that it should adopt similar action.²⁸

The AU PSC, meeting two weeks after the ECOWAS Summit, endorsed the ECOWAS decision but did not take any actions under article 30 of the AU Constitutive Act. Moreover, the AU refrained from explicit condemnation of Tandja’s actions and chose instead to launch a mediation process.²⁹ The AU reaction to Tandja’s overthrow, by contrast, was swift and clear. The day after the coup, the PSC condemned the overthrow of the government, stating that ‘the relevant AU instruments systematically condemn any unconstitutional change of Government’ and demanding ‘the speedy return to constitutional order’ until which Niger was suspended from AU activities.³⁰ Here, the PSC defined the ‘return to constitutional order’ as ‘the internal situation [which] stood before the referendum of 4 August 2009’—that is, before the referendum on the abolition of term limits. In fact, Tandja did not return to power, and Niger held presidential elections in 2011 under a newly promulgated constitution, which imposes a limit of two five-year terms, like the 1999 constitution (article 47). After the elections, the PSC lifted Niger’s suspension.

The case of Niger raises interesting questions that parallel those arising from the Honduras case. Were President Tandja’s actions in seeking to extend term limits a form of self-coup? Did such actions breach article 23 of the ACDEG,

which condemns ‘illegal means of accessing or maintaining power’, which it defines as including ‘any amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government’? This provision certainly encompasses self-coups. Would a constitutional amendment abolishing term limits per se, while nonetheless retaining fixed terms and regular elections, amount to a breach of this provision? Should the AU have followed the lead of ECOWAS and acted more aggressively to condemn the abolition of term limits, and how should the decision of the Niger Constitutional Court have shaped its analysis? Had the AU done so, would it also have prevented the bloody military coup? Without the military coup, would Tandja’s self-coup have remained unaddressed? Did the AU’s decision to demand a return to the situation prior to the referendum—as opposed to prior to the coup—imply a condemnation not only of the coup d’état, but also of the attempt to unconstitutionally amend the provision on term limits as a breach of AU norms? If so, should the AU also have conditioned the lifting of the suspension on measures to address the ‘collateral damage’ caused by Tandja’s power grab (the dissolution of the Constitutional Court and parliament)? Would the return of the constitutional status quo ante address the underlying conflict triggers exacerbated by Tandja’s referendum?

The African Union: Madagascar

AU documents provide different direction, with varying degrees of specificity, on the conditions that would justify lifting a suspension in cases of an unconstitutional transfer of power. For example, the Lomé Declaration refers to ‘a speedy return to constitutional order’, which suggests a return to the constitutional status quo ante, and potentially the restoration to power of the deposed leader or government. By contrast, the ACDEG states that the ‘situation that led to the suspension is resolved’ before a suspension can be lifted, which implies a range of possible responses that encompasses a return to the constitutional status quo ante, but conceivably extends beyond it. What would ‘resolve’ the situation is left undefined and open-ended. In addition, the charter does rule out one kind of response: an election in which the perpetrators of the unconstitutional change of government participate.

The following analyses how the AU has applied this legal framework in practice, and the issues that have arisen. The AU has dealt with unconstitutional transfers of power in the Central African Republic, Guinea, Guinea-Bissau, Madagascar, Mauritania, Niger, São Tomé and Príncipe, Togo, and Egypt.³¹ Only in São Tomé and Príncipe was the deposed president returned to power.



This evidence strongly suggests that in the context of a coup d'état a complete return to the status quo ante is likely to be unrealistic in many cases. While in the Central African Republic, Mauritania and Niger the PSC initially called for the reinstatement of the deposed president, the AU's broad formulation under the ACDEG encompasses the reinstatement of the constitutional order and the deposed leader him/herself, as well as other resolutions. In all of the cases above (except for São Tomé and Príncipe) this 'resolution' took the form of elections. In the Central African Republic, Mauritania and Togo, coup-makers were elected, and the lifting of the AU suspension in effect provided international legitimacy for the new regime. The charter recognized this contradiction in article 25(4) by conditioning the lifting of a suspension on the non-participation of coup-makers in elections to restore democratic rule.

Article 25(4) was put to a severe test in Madagascar.³² The deposed president, Marc Ravalomanana, and the coup leader, Andry Rajoelina, were intent on running in elections. The AU suspended Madagascar's participation following the 2009 coup,³³ and insisted that sanctions would remain in place until elections were held in which neither the deposed president nor the coup-maker were candidates. Following intense mediation by the Southern African Development Community, Ravalomanana and Rajoelina agreed not to stand in the next presidential elections, and made announcements in December 2012 and January 2013 to this effect. However, Ravalomanana's wife proceeded to declare her candidacy for president, which Rajoelina deemed to be a breach of his agreement with Ravalomanana, and led him to declare that he would also be a candidate. It fell to the newly reformed Special Electoral Court to remove both names from the list based on technical shortfalls in their eligibility.³⁴

The AU has maintained Madagascar's suspension throughout the four years of constitutional crisis, and lifted this on 27 January 2014 following the installing of a democratically-elected leader. It is likely that the strong stance taken by the AU regarding eligibility to run in post-coup elections under its new charter influenced the situation in Madagascar. Even if that stance did not affect the Electoral Court's decision, it may have induced Rajoelina to accept the court's decision. Indeed, soon after his acceptance of the judicial ruling, the targeted sanctions against him and some senior colleagues in government were lifted.³⁵

Analysis and recommendations

The analysis and recommendations are as follows:

- ***Expanding the categories of threats to constitutional democracies:*** The frameworks of the AU and OAS relating to unconstitutional transfers of power, as well as the reaction of ECOWAS in the case of Niger, show that over time regional organizations have broadened their understanding of unconstitutional transfers of power to include threats to democracy from within. This is a welcome development from the point of view of maintaining constitutional order. Regional organizations seeking to play a role in ensuring democratic and constitutional order should continue to focus on threats to democracy from within, as well as more obvious extra-legal threats such as military coups. However, threats to democracy from within are complex, and require a suitably nuanced approach from regional organizations. Democratic capture can come in two different forms: self-coups, in which a head of state prevents a democratic change of government by usurping power unconstitutionally, and authoritarian backsliding, where the government or president engages in the steady closure of democratic pathways by manipulating the constitution and laws to eliminate political competition and democratic rule through constitutional means. Regional instruments should be carefully drafted to clearly apply to both kinds of threats to democracy from within. At present, both the OAS and the AU instruments have important gaps in their coverage.
- ***Multiple parties threatening constitutional democracy:*** In Honduras and Niger, the triggering event for regional activity was a military coup d'état. However, both coups were preceded and precipitated by conduct by democratically elected authorities that was clearly (Niger) or arguably (Honduras) unconstitutional, and which threatened constitutional democracy (self-coups). The fact that more than one party may have engaged in conduct threatening constitutional democracy raises difficult issues for regional organizations. Censuring the coup d'état and demanding the restoration of civilian rule and the pre-existing constitution is relatively straightforward, because it is easy to identify and uncontroversial to condemn. By contrast, it may be more politically challenging to condemn self-coups, because presidents can lay claim to a democratic mandate for their actions. Moreover, as explained below, some self-coups raise difficult questions of constitutional interpretation that regional organizations may wish to steer clear of. But the actual or attempted self-coups in both countries ran afoul of the norms set out in regional instruments. A failure to condemn self-



coups, while condemning a closely related coup d'état, when both are part of a broader political struggle, would raise concerns regarding the impartiality and credibility of regional organizations and suggest that they were taking sides in a domestic political dispute. Moreover, the failure to recognize a self-coup for what it is makes it difficult to craft the conditions for an appropriate resolution of the situation and the lifting of a suspension. Restoring the constitutional status quo ante to what it was the moment before the coup would, by implication, legitimize the self-coup. In this context, the AU's decision to require a return to the situation in Niger before the referendum on term limits, and the OAS' decision to lift Honduras' suspension without requiring Zelaya to be restored to power, imply that both organizations understood that the presidents in both countries had themselves threatened democracy from within. Regional organizations should come to grips with the full complexity of a domestic constitutional situation before applying regional instruments to condemn and suspend member states.

- ***Interpretive disagreements require careful expert analysis and deference:*** In domestic constitutional systems, clear violations of the constitution are rare. There are usually two sides to every major constitutional dispute, with good arguments available for each. When regional instruments that seek to protect constitutional democracy incorporate domestic *unconstitutionality* by reference, this draws regional institutions into questions of domestic constitutional interpretation. There will be few interpretive disputes arising from the forcible overthrow of a democratically elected government in a coup d'état, because of the expressly extra-constitutional nature of such acts. However, as the Zelaya example indicates, in a self-coup plausible constitutional arguments can be made to both defend and attack the decision in question. Regional organizations need to devote careful attention to structuring a process that independently and objectively analyses domestic constitutional issues when determining whether there has been an unconstitutional attempt to stem political competition and democratic governance. This will require expertise, in the form of national constitutional experts, equipped with sufficient resources and time to engage in detailed constitutional analysis (and, if necessary, fact-finding). Because of the pervasiveness of these interpretive difficulties, regional organizations should avoid becoming embroiled in national constitutional disputes and consider limiting their interventions to the most obvious forms of unconstitutional conduct.
- ***Authoritarian backsliding:*** The most difficult issue for regional organizations will arise in cases of authoritarian backsliding, because

the impugned decision is entirely constitutional in a formal legal sense. It is therefore difficult to arrive at a conclusion that a constitutional or statutory amendment is a threat to constitutional democracy. One strategy for approaching this task would be for regional organizations to make a substantive judgement that draws on an understanding of the basic or essential elements of constitutional democracy with which all governments must comply. This is extremely challenging. The constitutional arrangements for constitutional democracies are quite varied in how they operationalize the idea of government commitment to democracy, the rule of law and human rights. Accordingly, the list of essential constitutional fundamentals will be relatively limited and easy to identify, drawing on the principal international sources of hard and soft law. Requirements, for example, for regular, periodic legislative elections and direct or indirect election of the executive, and universal suffrage, are part of a relatively short list of hard law international norms that emerge from this exercise. A variation on this strategy would be to emulate the practice of the Venice Commission, which routinely infers from the practice of European democracies a set of common standards for constitutional democracy, which it has developed into a form of international best practices that constitute an emerging body of soft law. One candidate for inclusion is the requirement for presidential term limits, but, even here, there is not uniform agreement that such limits are democratic, because they prevent the polity from having a free choice at the polls.³⁶

- ***Complementarity and national constitutional courts and supreme courts:*** Another commonality between the cases of Honduras and Niger is that in both the incumbent president chose to ignore Constitutional Court and Supreme Court rulings that their plans to change the constitution were unconstitutional. Regional organizations should frame their assessments of self-coups in part by reference to national court decisions. Adopting or adapting the principle of complementarity found in the International Criminal Court Statute may provide clearer guidance to help regional organizations determine when a violation of the national constitution has occurred.³⁷ A domestic court ruling that a proposed constitutional or legal change is unconstitutional and would have the effect of impairing democratic competition could presumptively count as strong evidence for a regional organization considering the issue. Structuring a partnership between domestic courts and regional organizations must also justify regional oversight as a form of intervention designed to buttress domestic constitutional oversight.

- ***Remedies and the underlying conflict:*** As our case studies and a brief survey of other cases show, unconstitutional transfers of power are often rooted in underlying political conflicts that cannot simply be reset by, and may stand as roadblocks to, a return to constitutional normality. Consider the self-coup, in which the questions surrounding what constitutes a ‘resolution of the situation which led to the suspension’ may at first blush seem more straightforward than in a coup d’état. As no transfer of power has taken place, a suspension could in principle be lifted once the offending measure (in the cases of Honduras and Niger, the proposed referendums) is cancelled or reversed. There is no need for the maker of the self-coup to relinquish power, unlike for the military or rebel army coup, if the government or president has been duly elected and holds office under the terms of the prior constitution. Rather, all that is required is that they govern according to the existing constitution. Where a return to the status quo ante restores a presidential term limit, fresh elections for a new president may be necessary. However, in self-coups, other problems will certainly exist. The underlying political conflict that may have led to the self-coup, and the conflict dynamics unleashed by it, cannot easily be reset; thus regional organizations should look to include a menu of possible policy instruments—including power-sharing arrangements, constitutional review and transitional elections—in addition to seeking to simply reverse problematic measure(s).
- ***Graduated sanctions and engagement:*** In many cases, the sanction of suspension is neither desirable nor productive. It may be undesirable, as the effect will be to exacerbate conflicts and tensions within the regional organizations, creating a schism between allies and opponents of the offending state. It may also be unproductive in fostering the disengagement of the offending regime from the regional organization. Gradual sanctions leading up to suspension should be included in the menu of options for regional organization action, to allow for contemporaneous engagement and assistance (including supporting reforms, facilitating political dialogue and monitoring elections).

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Notes

- ¹ Marshall 2005. Annex 2B provides a comprehensive listing of all coups, successful and unsuccessful, during a 58-year period.
- ² The African Union suspended Egypt following the overthrow of President Mohamed Morsi, on 3 July 2013. See AU PSC 2013a.
- ³ OAS 1951.
- ⁴ AU 2000.
- ⁵ See Umozurike (1979) for an analysis of the implementation of the OAU non-interference policy in the context of human rights violations.
- ⁶ OAU 2000.
- ⁷ The charter came into force in February 2012 following the required 15th ratification (by Cameroon).
- ⁸ AU 2007.
- ⁹ AU 2007, article 26.
- ¹⁰ OAS 2009a.
- ¹¹ Much of the description of events leading to the coup is taken from Feldman et al. 2011.
- ¹² While the question of whether Zelaya was calling for a referendum or a poll has important legal and constitutional implications, it is not germane to our discussion here.
- ¹³ Feldman et al. 2011, p. 11.

- ¹⁴ Ibid.
- ¹⁵ Ginsburg, Melton and Elkins 2011.
- ¹⁶ Feldman et al. 2011, p. 24.
- ¹⁷ Ibid., p. 26.
- ¹⁸ CNN 2009.
- ¹⁹ His removal from the country was not only illegal (the court order calling for his detention specified that it was in order that he might answer to the court) but also unconstitutional, as it violated the constitutional prohibition on extradition, but that is not the concern of the IADC's unconstitutional transfer of power clause.
- ²⁰ The report to the Commission on Truth and Reconciliation finds 'no clear answer' to whether Zelaya was in violation of article 239. Feldman et al. 2011.
- ²¹ OAS 2009a.
- ²² OAS 2009b.
- ²³ OAS 2011.
- ²⁴ Constitutional Court of Niger 2009.
- ²⁵ BBC News 2009.
- ²⁶ BBC News 2010.
- ²⁷ See <<http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf>>.
- ²⁸ ECOWAS 2009.
- ²⁹ AU PSC 2009b.
- ³⁰ AU PSC 2010, para. 4.
- ³¹ Vandeginste 2013.
- ³² Omorogbe 2011.
- ³³ AU PSC 2009a.
- ³⁴ AU PSC 2013b.
- ³⁵ Ibid.
- ³⁶ For a summary of arguments for and against the evasion of term limits, see Ginsburg, Melton and Elkins 2011.
- ³⁷ ICC 2002, preamble, paragraph 10 and article 17. For an explanation of the principle of complementarity, see Schabas 2001.