



The role of regional organizations in the protection of constitutionalism

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Contents

Acknowledgements.....	6
Abbreviations	7
Executive summary.....	8
Key recommendations	11
1. Introduction	13
2. Law, policy and practice in the African Union	18
3. Law, policy and practice in the European Union	27
4. Law, policy and practice in the Organization of American States	34
5. Conclusion	40
6. Recommendations.....	43
References	55
About the author.....	60
About International IDEA.....	61
More International IDEA Discussion Papers	62

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Abbreviations

ASEAN	Association of Southeast Asian Nations
APRM	African Peer Review Mechanism
AU	African Union
CELAC	Community of Latin American and Caribbean States
CSCP	Continental Structural Conflict Prevention Framework
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EU	European Union
LAS	League of Arab States
MERCOSUR	Southern Common Market
OAS	Organization of American States
OAU	Organization of African Unity
PIF	Pacific Islands Forum
PSC	Peace and Security Council (African Union)
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UCG	Unconstitutional change of government
UN	United Nations
UNASUR	Union of South American Nations

Executive summary

This Discussion Paper compares how three regional organizations—the African Union (AU), the European Union (EU) and the Organization of American States (OAS)—protect constitutionalism in their member states. It focuses on the types of measures to protect constitutionalism in cases of fundamental threats to and violations of the constitutional order, rather than on the mechanisms to promote constitutional governance. This study argues that regional organizations should move beyond policies that target only the most blatant violations of the constitutional order, namely unconstitutional changes of government in the form of a classic coup d'état, and increase their focus on more nuanced interruptions of the constitutional order, such as constitutional crises engineered by leaders including the adoption of (un)constitutional measures to undermine the constitutional order or through a gradual process to erode the integrity of a constitutional regime. It analyses the law, policy and practice of these three organizations to outline policy-relevant conclusions, good practices and common limitations.

Regional organizations are increasingly involved in protecting constitutionalism at the national level. Several regional organizations have developed legal frameworks and policies to uphold fundamental constitutional values, including the rule of law, democracy and the protection of human rights. Such direct external enforcement can be traced to three different concerns. First, a regional organization may act to prevent or address a security crisis that has possible regional implications. For example, a military coup d'état can cause negative externalities, including humanitarian crises, and threaten the security of neighbouring states. Second, when negotiating a regional treaty states generally enshrine normative values or principles to serve as a foundation of their organization and guide their conduct in realizing its objectives. Often these normative principles overlap with broader values common to the different constitutional regimes of the member states. The involvement in national constitution enforcement can thus be viewed as efforts from a regional body to assist member states comply with their regional obligations and commitments. Third, a regional intervention may be the only available option for upholding constitutionalism in a member state, for example if the national constitutional order is overthrown or undermined to such extent that no other branch of government can hold the infringing power in check.

The key challenge is then to establish the precise conditions under which it is possible—or necessary—for a regional organization to protect the constitutional order in one of its member states. It would not be fitting for a regional organization to interfere in every violation of the constitutional order committed by a member state. An intervention would only seem appropriate if foundational values were violated in a sufficiently serious manner, for example if there were multiple or systematic infringements. While coups d'état are now less common, states are often still confronted with serious attacks on their constitutional order. For example, elected leaders engineer constitutional crises, by manipulating elections or presidential term limits, or unconstitutionally removing

or appointing elected officials or members of the judiciary. Such an erosion of the constitutional order is less obvious than a fundamental breach in the form of a military coup, but perhaps just as disruptive.

This study compares the law, policy and practice of three regional organizations—the African Union (AU), the European Union (EU) and the Organization of American States (OAS). It identifies good practices that can inform the development, implementation and improvement of legal instruments and policies to address fundamental threats to (or violations of) the core values of the member states and the regional organizations as a whole. It also explores mechanisms to help regional organizations safeguard respect for constitutionalism among their member states. Identifying best practices from these organizations, and especially the detailed policy-relevant recommendations, will benefit policymakers, academics and officials engaged with regional organizations all over the world.

Five key points emerge from this study:

1. *Creating normative frameworks.* All three regional organizations have successfully established normative frameworks with which to uphold constitutions. The analysis has shown a considerable overlap in the fundamental constitutional values and principles that are collectively enshrined in the relevant regional legal frameworks. These include the promotion of and respect for human rights, adherence to the rule of law, separation of powers, and a number of essential guarantees of democratic processes such as regular, free and fair elections and a competitive multiparty electoral system. Nevertheless, confusion persists concerning the concrete content and interpretation of these constitutional principles and values. This clearly impedes the identification and understanding of the standards or benchmarks of the values and principles, making it difficult to establish when a violation occurs, especially in more nuanced cases such as systematic infringements of the constitutional order by elected officials. Therefore, regional organizations would benefit from developing an assessment framework based on clear and widely applicable standards developed through an accepted regional understanding of constitutional standards drawn from the principal features of constitutionalism common to member states.
2. *Establishing a violation of the constitutional order.* On the basis of a more nuanced understanding of the content and interpretation of the constitutional values and principles enshrined in regional normative frameworks, regional organizations should more clearly define what constitutes a serious and structural threat to (or violation of) the constitutional order. Accordingly, regional organizations should become more closely involved in developing normative guidance on the conditions under which their intervention could be justified. Where broad legal frameworks are generally in place to allow intervention, the meaning of these conditions should be clarified. This will require taking due account of the complexity of violations of constitutionalism, specifically those committed by incumbent leaders. Regional organization involvement should remain restricted to the most serious cases. Developing a framework of what constitutes a violation based on clear standards will increase the coherence and predictability of regional organization action.

3. *Enforcing normative frameworks on constitutional governance.* If more clarity is provided about what type of situation triggers regional organization involvement, the relevant institutions will be able to act in a more timely and effective manner. They will be better equipped and informed about when to launch relevant mechanisms or procedures to address situations before they erupt into larger-scale constitutional crises. Acting more proactively, regional organizations should pursue a broad and comprehensive approach to develop appropriate solutions to serious breaches of fundamental values in a given member state. These assessments should then fulfil a number of criteria, including impartiality and objectivity, as well as respect for (and a detailed understanding of) national contexts and particularities. Above all, the organs entrusted with enforcing the normative frameworks on constitutional governance should ensure consistency in their policies and practice. This is a crucial element of ensuring the credibility, legitimacy and predictability of their interventions. To more effectively enforce regional normative frameworks, regional organizations should have the necessary access and capacity to assess member states' compliance with relevant constitutional principles, and to cooperate where appropriate with local, sub-regional and international actors.
4. *Developing proportionate sanctions.* If there is a serious threat or violation of the constitutional order, the potential sanctions should go beyond diplomatic pressure or suspension. The three organizations evaluated strongly emphasize these two options. While diplomatic engagement is very important for trying to remedy a situation in an inclusive way, and should be maintained during the whole process, this mechanism may be too 'soft' to achieve the desired outcome. Yet the severe option of suspension may also be unproductive, as it could jeopardize the relationship between the infringing state and the regional organization, which could in turn undermine possible constructive cooperation between the various actors. Therefore, sanctioning mechanisms should be developed that are proportionate to the type of infringement, which can be applied in a graduated manner depending on the nature of the threat or breach of the constitutional order. This will also provide more clarity and predictability with regard to the type of measures that could be imposed.
5. *Returning to constitutional order.* In line with the more nuanced approach to establish a threat or violation of the constitutional order, regional organizations should determine more carefully whether the root causes of the constitutional crisis have been addressed. Therefore, they might want to consider a more substantial test in declaring a return to constitutional order, since this in effect means endorsement as constitutional and conferral of legitimacy on the regime in question. From this perspective, regional organizations should put forward specific and targeted recommendations concerning the minimum features that need to be addressed before they decide whether there has been a return to constitutional order. The development of these recommendations and criteria will facilitate the monitoring and evaluation of the processes concerning a return to constitutional order. This process could then be tied to the gradual sanctioning mechanism: the regional organization can adjust its remedial action in accordance with progress made by the state to restore constitutional order.

Key recommendations

Creating normative frameworks

1. Clarify the meaning of the constitutional principles adopted in their normative frameworks to ensure there are clear standards to allow for a substantive assessment of member states' constitutional orders.
2. Remain, where possible, within the scope of existing frameworks and reinforce currently available mechanisms or procedures.
3. Ensure to the greatest extent possible the enforceability of the normative framework by adopting binding legal instruments and the developing consistent practice in the commitment to uphold constitutional values and principles.

Establishing a violation of the constitutional order

1. Increase regional organizations' engagement to deal with threats and violations of the constitutional order that originate from within the ruling regime.
2. Develop clear normative guidance on what constitutes a serious enough threat to (or violation of) the constitutional order of a member state to warrant the intervention of a regional organization. A framework should outline the precise procedural and substantive conditions that may trigger a response from the regional organization.

Enforcing normative frameworks on constitutional governance.

1. Engage in a broad and comprehensive approach to proactively address potentially serious threats to (or violations of) the fundamental values and principles of the constitutional regime of a member state.
2. Have adequate access to assess the level of compliance of a member state with the constitutional principles and values enshrined in the regional normative framework.
3. Organize an objective and impartial evaluation of a member state's compliance with the regional normative framework while duly respecting and taking into account its legal, political and institutional context.
4. Ensure consistency in the implementation of the normative framework to uphold constitutionalism at the national level and refrain from any biased application of standards.

5. Ensure the necessary capacity and resources, to monitor, evaluate and support member states' compliance with their regional obligations and commitments.
6. Cooperate, where appropriate, with civil society actors, states, sub-regional groupings and the wider international community to more effectively enforce the normative framework and to demonstrate collective commitment to the respect for (and protection of) fundamental values and principles.

Developing proportionate sanctions

1. Develop a comprehensive framework establishing different categories of sanctions that may be gradually applied in accordance with the gravity of the violation or threat to the constitutional order.
2. Ensure not to disproportionately harm the civilians of a non-complying member state.

Returning to constitutional order

1. When adopting a more comprehensive approach to assess a threat or violation of the constitutional order, consider whether the underlying reasons that led to the threat or violation have been resolved.
2. Develop precise, appropriate and context-specific conditions for establishing a return to constitutional order.
3. Develop mechanisms and procedures to gradually remove sanctions in accordance with progress made to restore constitutional order.

1. Introduction

Regional organizations are increasingly becoming involved in upholding constitutionalism at the national level. Several regional organizations have developed normative, legal and institutional frameworks in pursuit of this objective, as well as the policies and established practice to implement them. Against the backdrop of a violent history of coups d'état, the African Union (AU) has developed a normative framework to deal with challenges emerging from grave violations of the constitutional order in its member states. Similarly, in a context where many states suffered under long and cruel dictatorships, the Organization of American States (OAS) has elaborated a regulatory regime to undertake action when an unconstitutional alteration or interruption of a democratic order takes place in one of its members. In the same vein, the European Union (EU) established a legal framework that deals with threats or actual breaches of the fundamental constitutional values of the EU and its member states. However, a more detailed analysis of such efforts suggests that there is still significant scope to improve regional efforts to protect constitutionalism.¹

One of the specific challenges regional organisations are confronted with is to establish the precise conditions under which it is possible, or rather necessary, for them to become involved in upholding the constitutional order in one of their member states. While coups d'état are now less common, states are often still confronted with serious attacks on their constitutional order. For example, elected leaders sometimes engineer constitutional crises, either by adopting measures that undermine constitutionalism or through a gradual process to erode the integrity of a constitutional regime. Since an erosion of the constitutional order is less obvious than a fundamental breach such as a military coup, but perhaps just as disruptive, regional organizations need to be adequately equipped with the appropriate mechanisms to detect and deal with nuanced constitutional failures.

Regional organizations also struggle to determine when a state has 'returned' to constitutional order. If unconstitutional acts that represented a fundamental threat to or infringement of the constitutional order have led to a justified regional intervention, under what circumstances should the organization declare that the constitutional order is restored (and lift any sanctions imposed)? Regional organizations should share their experiences on these issues to help develop new policy proposals and normative guidance to correct any shortcomings.

This study revisits the 'Inter-Regional Democracy Dialogue on the Role of Regional Organizations in Promoting the Rule of Law and Constitutionalism' hosted by International IDEA and the Ministry of Foreign Affairs of the Netherlands on 14–

¹ This study uses a broad understanding of constitutionalism, constitutional order, constitutional governance and constitutional regime to denote an understanding of how constitutions are put into practice.

15 October 2013.² It analyses the legal frameworks and policies of three regional organizations (the AU, the EU and the OAS) that seek to protect constitutionalism in their member states. The study identifies gaps, inconsistencies and good practices, and provides detailed policy recommendations to help address these limitations.

The following section reflects on the appropriateness of regional organization involvement in the internal affairs of member states to guarantee respect for constitutional values. Then, the norms, policies and practices of the three regional organizations will be critically analysed and compared, paying particular attention to the mechanisms and procedures to ensure that constitutionalism is upheld, including possible gaps or inconsistencies between laws and policies. Finally, policy proposals based on this analysis will be outlined, and good practices and common problems will be highlighted.

This analysis will contribute to knowledge about the potential role of regional organizations in promoting constitutionalism when developing, improving or implementing relevant legal instruments and policies. The identification of best practices from these organizations, and especially the detailed policy recommendations, can benefit policymakers, academics and officials engaged with regional organizations. Insights into the mechanisms that regional organizations can use to address fundamental threats to or violations of core values also apply to processes of regional involvement elsewhere in the world.

Framing regional influences

Norms associated with liberal democracy, such as the separation of powers, the independence of the judiciary, transfer of political power through elections and the protection of human rights, have spread widely around the world, including at the regional level. However, that does not mean there is a universal or regional consensus on the specific meaning of these constitutional standards. Each region comprises a variety of constitutional orders, which complicates any kind of measurement against universal yardsticks. In some cases, regional norms and institutions have been developed to prohibit and address fundamental breaches of the constitutional order, including for example unconstitutional changes of government (UCG) such as military coups. Yet the mandate for intervention of regional organizations is less clear when incumbent governments manipulate legal frameworks or employ unconstitutional procedures to fundamentally undermine the constitutional order of their own state. If a member state's core constitutional values are eroded to such an extent that it becomes unacceptable (or at least undesirable) for the regional organization to remain unengaged, how does the institution determine that action is required, and on what grounds? Or should regional organizations refrain completely from protecting these constitutional values, and leave such matters for individual states to deal with? As this is a matter closely related to the principle of sovereignty, and especially in view of the context specificity of each nation and how constitutions reflect national identities, shouldn't states have the sole competence over constitutional issues? Or, can there indeed be an appropriate role for

2 For more information on the conference see International IDEA (2013). This study draws on discussions at the conference and on papers submitted by participants, many of which were published in *Rule of Law and Constitution Building: The Role of Regional Organizations* (International IDEA 2014). In particular, it draws on Choudhry and Bisarya (2014), Leininger (2014), Wachira (2014), Hedling (2014) and Olivari (2014).

regional organization to enforce the constitutional values of a state? These questions ultimately shape the arguments for or against the regional interventions.

Regional organizations are often established as mechanisms to ensure peace, stability and security. From this perspective, it would seem obvious for regional organizations to take action in situations where violations of constitutions and the conflict dynamics triggered by the violation could provoke a regional security crisis. For instance during a military coup d'état or a mercenary intervention to replace a legitimate government, the attack on the democratic order could spread to neighbouring states and lead to instability and conflict in the region. Since these scenarios could lead to humanitarian problems, limit socio-economic development and involve losses of peace dividends, regional organizations may wish to act in order to avoid these catastrophes even if doing so would violate the non-interference principle in a strict sense.

When concluding a regional treaty, states generally agree on a number of normative values or principles to serve as the foundation of their organization and guide their conduct in realizing the organization's objectives. Accordingly, regional involvement in national constitution enforcement can be viewed as helping member states comply with regional obligations and commitments they voluntarily agreed to. Given that the infringed fundamental values have been absorbed into the framework of states' international obligations, some form of regional enforcement under pre-established criteria and procedures could be warranted. Likewise, since the organization's membership criteria may require adherence to its core values, any disregard of these values can lead to a deferral of the rights and privileges of membership, or suspension.

Of course, it would not be fitting for a regional organization to interfere with every violation of the constitutional order committed by a member state. Rather, it seems only appropriate for it to intervene if its foundational values were violated in a sufficiently serious manner. This could entail either multiple or systematic infringements or even a threat of such critical nature that regional interference cannot remain absent. The regional involvement would then prevent the corrosion of its foundation. It would act to avoid the waning of trust among member states in their collective commitments, especially since the failure to act may jeopardize other objectives of the organization.

If a member state's national constitutional order is overthrown or undermined to such extent that no other branch of government can hold the infringing power in check, a regional organization may serve as a last resort for upholding the constitutional order where there are no other mechanisms for redress. The increased attention to respecting essential constitutional principles by member states can also help regional organizations understand and deal with the phenomenon of popular uprisings, which are often ignited by the ineffectiveness or failure of regular institutional processes to address constitutional crises. This may be the case when the power of the judiciary is entirely hollowed out impeding any real control over the executive or simply when the executive monopolizes all state power to the detriment of the other branches of government. Absent of any alternative to restore the constitutional order within the member state, a regional organization may be required to interfere on behalf of the silenced or disempowered branches of the state to ensure some form of constitutional order.

Nevertheless, the process of exerting such regional influence occurs in a very sensitive context. A context so intimately tied to the core foundations and nature of a state that a regional organization should be cautious when interfering in this situation. Therefore, it seems only appropriate and reasonable that any intervention of a regional organization in the constitutional operations of a state should take place with the greatest respect for and understanding of the local context, or risk seriously impairing the legitimacy and success of the regional policy. Compared with other external interferences, such as the United Nations, regional intervention may even be more advantageous as it generally benefits from greater in-depth local knowledge due to stronger political, cultural, economic and geographic linkages.

The next section examines the roles of the AU, EU and OAS in protecting constitutionalism. These organizations have been selected due to their active and advanced engagement in this field. For the past two decades, the AU has been the frontrunner in the development of a sophisticated norm against UCG. The EU, as part of efforts to become an area of freedom, security and justice without internal borders, has led the way in developing a regional community based on law and legal cooperation among its member states. Likewise, the OAS has championed constitutional democracy as an indispensable condition for stability, peace and development for the past three decades and has been committed to democracy since its establishment in 1948. Although these three organizations have different objectives, histories and ambitions regarding their institutional mandates, they share the aim of safeguarding the constitutional order of their member states, which provides scope for inter-regional learning.

Other regional organizations have also seriously committed to fostering a culture of constitutionalism in their respective member states. These include the Association of Southeast Asian Nations (ASEAN), the League of Arab States (LAS), the Pacific Islands Forum (PIF) and the South Asian Association for Regional Cooperation (SAARC). Other subregional organizations have broken new ground in strengthening and preserving the constitutional orders of their member states. These include the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) in Africa, and the Union of South American Nations (UNASUR), the Community of Latin American and Caribbean States (CELAC) and the Southern Common Market (MERCOSUR) in the Americas. While these organizations are beyond the scope of this study, the best practices and policy recommendations identified apply to other regions or subregions dealing with similar challenges.

The following three chapters examine the normative and institutional frameworks of the AU, EU and OAS, respectively, and outline the main provisions and institutional arrangements relating to their roles in dealing with constitutional issues in their member states. The focus will be on (a) the different normative values that are collectively enshrined in the relevant regional legal frameworks; (b) the modalities related to establishing a threshold of infringement of the constitutional order that necessitates the involvement of a regional organization; (c) the different mechanisms for enforcing the regional normative framework; (d) the sanctioning regime of a regional organization; and (e) the conditions for determining a return to constitutional order.

The analysis of the normative framework will refer to relevant policy and practice in each regional organization. After providing an overview of the legal and institutional

framework, any gaps, inconsistencies and good practices in the law and practice of the regional organizations will be discussed. The same structure will be applied to all three regional organizations in order to provide an appropriate frame of comparison, which will serve as the basis for the policy recommendations outlined in the final section.

2. Law, policy and practice in the African Union

The AU, as the organization dedicated to achieving an integrated and peaceful Africa, developed a normative framework to protect constitutionalism—particularly the constitutional transfer of power—in order to foster stability, security and democratic state-building. Shifting from a tradition of ‘non-interference’ under its predecessor, the Organization of African Unity (OAU), to a culture of ‘non-indifference’, the AU is in the process of taking a more proactive stance towards improving the governance structures of its member states. This has been demonstrated, for example, in the cases of the Central African Republic (2003), Togo (2005), Mauritania (2005), Comoros (2007), Guinea (2008), Madagascar (2009), Niger (2010), Mali (2012), Guinea-Bissau (2012) and Egypt (2014) in the context of coups, and in post-electoral conflicts in Kenya (2007) and Côte d’Ivoire (2010).

Normative framework

The AU’s normative framework to protect constitutionalism consists of various treaties, protocols, declarations and decisions, the most important of which is the African Charter on Democracy, Elections and Governance (Governance Charter) (AU 2007).³ The Governance Charter is a legally binding instrument that seeks to promote a culture of democracy, enhance adherence to the rule of law, and foster better political, economic and social governance. It establishes the main tenets of the framework that guides AU interventions to uphold constitutionalism in member states. Similar to the Lomé Declaration on the framework for OAU responses to UCG, the charter establishes a set of common principles and situations that may lead to AU intervention, and the possible measures and sanctions that may follow in response to a violation of the constitutional order (AU 2000a). The Governance Charter essentially institutionalizes (and strengthens) previous AU mechanisms and procedures (Glen 2012: 168). Article 3 of the Governance Charter lists the main principles that guide member states in fulfilling their obligations while implementing the charter. These include respect for human rights and democratic principles; the separation of powers; political pluralism; holding regular, transparent, free and fair elections; and promoting a representative system of government. The charter effectively elaborates on the principles enshrined in the founding treaty of the AU—the Constitutive Act—which mandates respect for

3 For the text of other important documents see African Union (1981; 1998; 2000b; 2002a; 2003). Key AU documents can be downloaded from the AU website, <<http://au.int/en/>>. For relevant non-binding instruments such as AU decisions, declarations and resolutions see AU (1999; 2000a; 2002c; 2009e; 2010b). Also of importance are the various PSC resolutions that put into practice the normative framework of the AU and a number of decisions and declarations from the African Commission on Human and Peoples’ Rights and the African Court of Human and Peoples’ rights, which interpret a number of constitutional values enshrined in the African Human Rights Framework. On the workings of the PSC see the AU website, <<http://au.int/en/organs/psc>>.

democratic principles, human rights, the rule of law and good governance (AU 2000b: article 4(m)). Beyond establishing these constitutional values, the charter emphasizes the importance the AU places on constitutionalism. This includes a commitment to the supremacy of the constitution in the political organization of the state (article 10), the requirement that access to (and the exercise of) power must be in accordance with the constitution (article 3) and the obligation for member states to take all appropriate measures to ensure constitutional rule (article 5).

Establishing a violation of the constitutional order

In addition to establishing a set of common principles, the Governance Charter provides non-exhaustive normative guidance to establish what constitutes a violation of the constitutional order, specifically in the case of an unconstitutional transfer of power. It complements the relevant provisions of the AU Constitutive Act, which establishes the norm on the prohibition of UCG (AU 2000b: articles 4(p), 30). While article 30 of the Constitutive Act forbids governments to come to power through unconstitutional means, it provides no guidance on the different types of unconstitutional transfers of power.⁴ The Governance Charter, however, defines a UCG as: (a) any putsch or coup d'état against a democratically elected government; (b) any intervention by mercenaries to replace a democratically elected government; (c) any replacement of a democratically elected government by armed dissidents or rebels; (d) any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or (e) any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government (AU 2007: article 23). The first four situations are replicated from the Lomé Declaration, whereas the fifth was introduced in the Governance Charter.

Importantly, in addition to the qualification of infringement of constitutionalism by unconstitutional access to power, the Governance Charter also provides for a description of a breach of the constitutional order in the exercise of power. Accordingly, the Peace and Security Council (PSC) of the AU is mandated to exercise its responsibilities to maintain the constitutional order in response to a situation where the democratic political institutional arrangements or the legitimate exercise of power is affected (AU 2007: article 24). In more general terms, article 23(2) of the Constitutive Act stipulates that the Assembly of Heads of State and Government (Assembly) can impose sanctions on any member state that fails to comply with AU decisions and policies, which is broad enough to include policies and decisions to protect the constitutional order. Similarly, article 46 of the Governance Charter stipulates that 'the Assembly and the Peace and Security Council shall determine the appropriate measures to be imposed on any State Party that violates this Charter'. It would appear that infringements of the constitutional order could also be referred to here.

4 However, in the Rules of Procedure of the Assembly of Heads of State and Government of the African Union (AU 2002b: Rule 37), reference is made to the Lomé Declaration to indicate what should be considered as an UCG.

Enforcement

The PSC—the principal decision-making body for the prevention, management and resolution of conflicts on the continent—is primarily entrusted with enforcing the normative framework. It is composed of 15 member states, which are elected on the basis of equitable regional representation and a number of substantive criteria, including a commitment to uphold the principles of the AU, a willingness and capacity to contribute to regional peace and security initiatives, and respect for constitutional governance, the rule of law and human rights (AU 2002a: article 5). The AU Commission, as the central coordinating structure, is mandated to ensure the implementation of the Governance Charter, which include making sure that effect is given to the different commitments relating to the constitutional order through support to the state parties and the development of benchmarks (AU 2007: article 44). Most of this coordination takes place under the African Governance Architecture, the overall political and institutional framework for promoting and strengthening democracy, good governance and human rights in Africa (AU 2010a).⁵

Violations of the Governance Charter, and the appropriate measures to be taken against violating state parties, are determined by the Assembly of Heads of State and Government (Assembly), the highest policy organ of the AU, and the PSC (AU 2007: article 46). Sanctions for UCG are also determined by the PSC; the Assembly has a complementary role in this regard (AU 2002a: article 7(g), 2007: article 25). These decisions are generally reached on a consensus basis, failing which a two-thirds majority vote of members voting is required (AU 2002a: article 8(13)). If the democratic political institutional arrangements or the legitimate exercise of power of a state party to the Governance Charter is affected, the PSC will uphold the constitutional order (AU 2007: article 24). Furthermore, the charter also envisages a judicial mechanism in dealing with UCG, in which perpetrators may be tried before the competent court of the AU (AU 2007: article 25(5)). In pursuit of this objective, the AU adopted a protocol to expand the jurisdiction of the African Court of Human and Peoples' Rights to include criminal jurisdiction, including UCG (AU 2014a: article 28(e)). However, the protocol has not yet entered into force.⁶

Sanctions

The sanctions for violating the AU normative framework on constitutionalism are varied in nature. After the occurrence of a UCG, the PSC can suspend a state from exercising its right to participate in the union's activities. This course of action will only proceed if all diplomatic initiatives to restore the constitutional order have failed (AU 2007: article 25(1)). The suspension, however, will not discharge the respective state from fulfilling its obligations to the union, particularly those relating to respect for human rights (AU 2007: article 25(2)). During the suspension, the AU will continue diplomatic engagement and take initiatives to restore democracy. Such initiatives have included the deployment of a High-Level Panel of former heads of state and government to find ways

⁵ This decision was subsequently endorsed by the AU Assembly (AU 2010e).

⁶ As of 1 April 2016, nine countries had signed the Protocol, but no countries had yet ratified the instrument. The Protocol shall only enter into force 30 days after the deposit of instruments of ratification by 15 member states.

to restore constitutional order and the rule of law, as in 2013 in Egypt after the ousting of the democratically elected president. Similarly, a High-Level Panel was established for the resolution of the 2011 constitutional crisis in Côte d'Ivoire (AU 2011).

In addition to suspension, the AU can impose other forms of sanctions on the perpetrators of the UCG, including punitive economic sanctions (AU 2007: article 25(7)). However, the normative framework provides no concrete examples regarding the nature of the sanctions. The Lomé Declaration and the Assembly's Rules of Procedure offer some indication of limited and targeted sanctions that can be imposed (AU 2002b: rule 37). These may include visa denials for the perpetrators of a UCG, restriction on government-to-government contacts and trade restrictions (AU 2000a, 2002b: rule 37). Furthermore, perpetrators of a UCG are barred from participating in elections held to restore the democratic order, and are excluded from assuming any position of responsibility in the political institutions of the state (AU 2007: article 25(4)). The AU has reiterated this and specifically urged states not to recognize the de facto authorities in the event of a UCG, and calls on the international community, including the UN, not to grant accreditation to such authorities (AU 2010b). Member states are also prohibited from harbouring or giving sanctuary to coup plotters (AU 2007: article 25(8)).

In order to strengthen the existing institutional and normative arrangements for preventing and combatting UCG in Africa, in 2009 the PSC developed the Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government (AU 2009a). The objective of this framework is to enhance the effectiveness of the AU's sanctions regime, including by establishing a sanctioning committee.

If there is an infringement of the constitutional order in the exercise of power, or if the democratic institutional arrangements of a member state are affected, the Governance Charter stipulates that the PSC shall act to preserve the constitutional order, which could include the use of sanctions (AU 2007: article 24). More broadly, article 23(2) of the Constitutive Act provides that a member state found to have violated AU policies and decisions, which may include those relating to constitutionalism, may be sanctioned through 'the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly'. However, it appears that the assembly has never invoked this article as a legal basis for sanctions. The charter also makes broad reference to the possibility of 'appropriate measures' to be imposed on state parties that violate the charter, which may include violations of provisions relating to the constitutional order (AU 2007: article 46).

Return to constitutional order

The PSC determines whether a member state has returned to constitutional order. The Governance Charter provides that 'once the situation that led to the suspension is resolved', the PSC will lift the imposed sanctions (AU 2007: article 26). The Lomé Declaration does not refer to any substantive grounds for declaring a return to constitutional order. However, the instrument does provide a time frame: it requires the perpetrators of a UCG to restore constitutional order within six months. In countries where the constitutional order was violated, the PSC will continue to monitor progress

in promoting democratic practices, good governance, the rule of law, and the protection of human rights and fundamental freedoms (AU 2002a: article 7(m)).

Limitations in law, policy and practice in the AU

Normative framework

Due to the varied nature of its different (binding and non-binding) instruments, the AU faces significant challenges in ensuring the robust enforcement of its norms, particularly those related to constitutionalism. The norm on the prohibition of UCG is incorporated in the Constitutive Act, which makes it applicable to and enforceable on all member states. However, this provision only refers to the transfer of power and does not consider serious infringements of the exercise of power. The Governance Charter includes broad mechanisms to protect the constitutional order, but is binding only on the states that have ratified it. While the Lomé Declaration has gained incredible normative value in the AU's agenda on constitutionalism, it is a non-binding mechanism and thus lacks the legal force for strict enforcement. The normative significance of the Lomé Declaration on the framework for an OAU response to UCG can be found in the PSC decisions that refer to the instrument and give effect to its content. The AU Assembly Decision on the prevention of UCG and strengthening the AU's capacity to manage such situations could provide a further legal basis concerning broader disciplinary action (AU 2010b). This legal basis follows from member states' obligation to comply with AU decisions and policies at the risk of sanctions, as provided for in article 23(2) of the Constitutive Act.

There also appears to be a gap in establishing the precise content and meaning of the normative principles in the AU framework. The African Court on Human and Peoples' Rights has started to develop jurisprudence related to broader democratic principles, and has contributed to the interpretation of constitutional values and principles enshrined in the regional framework, such as the 2013 case of *Tanganyika Law Society et al. v. Tanzania*,⁷ in which the court considered the right of citizens to participate in government.⁷ Similarly, the African Commission on Human and Peoples' Rights has adopted a number of resolutions and decisions relating to democratic principles, including a Resolution on Electoral Process and Participatory Governance (1996), the Dakar Declaration on the Right to a Fair Trial (1999), the Declaration on Principles on Freedom of Expression (2002), Resolution on Elections in Africa (2008). Other examples from this commission include *Jawara v. The Gambia* (2000), which addressed the freedom of expression and the right to information, and *Lawyers for Human Rights v. Swaziland* (2005), which concerned the right to fair trial and the independence of the judiciary. However, these cases on the interpretation and precision of different constitutional values remain limited, and find their legal basis principally in the AU's human rights framework. They do not include some of the more specifically governance-oriented principles enshrined in the Governance Charter, which remains vulnerable to variations in their interpretation and protection.

⁷ See *Tanganyika Law Society et al. v. United Republic of Tanzania*, App. Nos. 009/2011, 011/2011 (14 June 2013). It should be noted that as of 1 April 2016, only 30 of 54 member states had ratified the Protocol Relating to the Establishment of the African Court on Human and Peoples' Rights (1998) and accepted the court's jurisdiction.

Establishing a violation of the constitutional order

There are a number of limitations to establishing whether a violation of the constitutional order has occurred. Although the normative framework of the AU—the Lomé Declaration and the Governance Charter—outline a number of common constitutional principles for democratic government, these principles are not directly linked to robust enforcement mechanisms. Only UCG is directly tied to a well-established sanctions regime. Indeed, the norm on UCG forms the foundation of the AU’s agenda in upholding constitutionalism. The AU has been very successful in developing instruments to deal with UCG in the most classical sense of a coup d’état. Yet there is an important gap in the development of tools to deal with other types of threat or breach of a state’s constitutional order. Indeed, violations of the constitutional order that could prescribe an appropriate intervention by the AU go beyond unconstitutional transfers of political authority. Serious infringements of the constitutional order can also refer to malpractice in the accumulation or exercise of power. This could include scenarios in which constitutional principles such as the independence of the judiciary, checks and balances, the limitation of powers, the rule of law, and fundamental political rights and freedoms are continuously diluted in favour of a monopolization of power. Accordingly, a constitutional regime could be fundamentally undermined when important democratic institutions—such as the judiciary, electoral authorities, media or opposition political parties—are systematically and structurally suppressed (Perina 2012: 80).

A plethora of AU documents and decisions acknowledge a link between political crises and unconstitutional changes. However, only limited action has been taken to address these crises pre-emptively. This approach would appear particularly timely in light of the experience with popular uprisings, which are often the result of a population exasperated by a broader constitutional crisis, including a lack of respect for the separation of powers, checks and balances, and other institutional mechanisms such as presidential term limits, as seen in Burkina Faso (2014) and Burundi (2015). If these issues are not addressed promptly and appropriately, it is possible that the AU will increasingly need to deal with popular revolts. To some extent, it seems that the AU has foreseen the need for remedial action in these cases: the Governance Charter allows the PSC to act to maintain the constitutional order if a member state’s democratic political institutional arrangements or legitimate exercise of power is ‘affected’ (AU 2007: article 24). However, the standards, benchmarks or criteria of what ‘affected’ might mean, or when PSC involvement is called for, remain unclear.

Enforcement

The problem of defining a fundamental violation of the constitutional order has also led to inconsistencies in enforcing the normative framework, including with regard to the popular uprisings in northern Africa. The AU has discussed how to define popular uprisings and what type of framework is needed to address them, but has still not adopted an official policy framework. The High-Level Panel on Egypt recommended developing guidelines to determine the compatibility of popular uprisings with AU norms on UCG. Taking the experiences in northern Africa (and especially Egypt) into account, the panel suggested different criteria for such a guideline: ‘(a) the descent of the government into total authoritarianism to the point of forfeiting its legitimacy; (b)

the absence or total ineffectiveness of constitutional processes for effecting a change of government; (c) popularity of the uprisings in the sense of attracting a significant portion of the population and involving people from all walks of life and ideological persuasions; (d) the absence of involvement of the military in removing the government; (e) peacefulness of the popular protests' (AU 2014b: 31).

As it appears from these conditions, a very high threshold is suggested for determining a situation not to be a UCG but a popular uprising. What seems to be proposed by the High-Level Panel by making this distinction, is that a popular uprising could be tolerated and should not be sanctioned as a UCG. This reasoning was reflected in a provision in an earlier draft of the protocol amending the Protocol on the African Court, which stated that a UCG could be considered a crime, except when it constitutes a popular uprising (AU 2014c: article 28E3). This clause was not adopted in the final version of the protocol after the PSC and the Assembly could not agree on a definition of 'popular uprising'. This understanding of a popular uprising seems to suggest an approach informed by the need to respect the exercise of certain fundamental human rights such as the freedom of expression, freedom of assembly and the right to participate in government (Obse 2014: 835–36). Yet it is complex to establish standards to assess these criteria of a popular uprising—especially standards that refer to the level of military involvement, the peacefulness of the protests or the profile of the protesters. If members of the military get involved only on a limited scale, does this immediately transform a popular uprising into a UCG? If a protest involves some riots or looting because of opportunism, could the general public action still be considered peaceful enough to count as an acceptable popular revolution? And how widespread should the revolution be? If there is only a popular reaction in the capital, could this still count as a popular uprising?

To assess such matters consistently, credibly and transparently, it would seem necessary to establish a detailed framework to evaluate a constitutional crisis with a more nuanced set of standards and benchmarks. Elements (a) and (b) of the criteria set out by the High-Level Panel emphasized the importance of having a constitutional order with functioning constitutional processes. This would clearly require a nuanced assessment to determine whether there is a situation of total authoritarianism and a complete breakdown of constitutional processes to change government. However, such a detailed assessment framework is still missing under the current policy and practice. This has not only led to challenges in the context of popular uprisings, but also more generally in AU attempts to protect constitutionalism in its member states.

Steps have been taken to address the lack of an assessment framework. The AU is developing a Continental Structural Conflict Prevention Framework (CSCPF) to facilitate a coordinated approach to the structural prevention of conflict and the consolidation of peace and stability (AU 2015). The CSCPF confirms the PSC's determination to address the root causes of conflict. The PSC has identified certain situations as potent triggers of conflict, including the abuse of human rights, a refusal to accept electoral defeat, the manipulation of constitutions, corruption, the mismanagement and unequal distribution of resources, and a lack of socio-economic opportunities and unemployment (AU 2015). The CSCPF also foresees the development of a Country Structural Vulnerability Assessment and a Country Structural Vulnerability Mitigation Strategy. These two tools aim to facilitate the early identification of a country's structural vulnerability to conflict and to outline measures to address the structural challenges.

Concerns remain, however, whether the different tools will foresee in the development of a more nuanced set of standards and benchmarks to evaluate a constitutional crisis. Furthermore, such comprehensive assessments as envisaged by the AU would require adequate resources. Yet, it appears that the AU is still lacking full commitment from its member states to provide such means.

Sanctions

In pursuit of the strong condemnation of UCG, the AU has been effective in developing a sanctions regime that allows for an almost automatic suspension mechanism. The advantage of such a procedure is that it depoliticizes, to a certain extent, the highly sensitive nature of such decisions. By deliberately bracketing a number of politically sensitive concerns and upholding the fairly well-established principle of zero tolerance for coups, the AU has gradually increased the legitimacy of its actions. However, this sanction alone will often not suffice to persuade the infringing regime to make restitutions. Specific sanctions can be necessary to pressure an infringing regime to return to constitutional normalcy. Targeted sanctions considered in the past have included travel bans, diplomatic exclusion and freezing of foreign assets like in the cases of Mauritania (2008), Guinea (2009), Madagascar (2010) and Central African Republic (2013) (AU 2009b, 2009c, 2009d, 2008, 2010c, 2010d, 2013a). However, it appears that there is only limited guidance on how to devise sanctions that could be applied progressively to an infringing regime in a way that allows for necessary predictability and legal certainty. Mechanisms to assist in the monitoring and implementation of sanctions still need to be further developed, as was agreed in the Ezulwini Framework. In the case of Madagascar (2010), the PSC made explicit reference to the Ezulwini Framework as a guiding structure for applying the comprehensive set of sanctions (AU 2010d).

In addition, the sanction that prevents a coup plotter from participating in the process of returning the country to constitutional order has not been applied consistently. In Madagascar (2013), the AU successfully upheld its position, and barred those responsible for the constitutional crisis from running for leadership positions. However, in Egypt (2014) the AU failed to implement this sanction. Abdel Fatah el-Sisi, responsible for the UCG in Egypt in 2013, was allowed to run for elections and win—which damaged the AU's credibility. The PSC has the authority to assume its responsibilities to maintain the constitutional order of a state during a situation that may affect its democratic political institutional arrangements or legitimate exercise of power (AU 2007: article 24), but the range and modalities of these mechanisms or actions are unclear, which again suggests a lack of precision in the sanctions regime. Article 23(2) of the AU Constitutive Act provides for the possibility of political and economic sanctions for non-compliance with AU decisions and policies, which could serve as the legal basis for a range of enforcement measures, including those relating to policies on respect for the constitutional order. However, the vague nature of the provision has most likely contributed to its inapplicability. This appears especially so given the nearly non-existent practice in using this article as a legal basis for sanctions. Similarly, it is unclear what type of appropriate disciplinary measures may be imposed in case of violations of the Governance Charter (AU 2007: article 46; Elvy 2013: 103)

Return to constitutional order

Even more problematic is perhaps the fact that there is only limited normative guidance to determine under what conditions a country has succeeded in restoring constitutional order. This has generally led to a call from the PSC for a return to the constitutional status quo ante, which could mean ‘the reinstatement of the ousted authorities or for the application of the constitutional rules on succession of power’ (Vandeginste 2013: 12). However, in most cases this approach was not feasible. The alternative—and most commonly employed—mechanism to validate and endorse the return to constitutional order has been organizing elections to establish a new political regime, as in the cases of Central African Republic (2005), Togo (2005), Mauritania (2009), Guinea (2010), Niger (2011), Madagascar (2014) and Egypt (2014). While in recent practice elections appear to be the key condition for the AU to declare a return to constitutional order, this entails a number of risks, including the possible legitimization of the authorities who are responsible (or share responsibility) for the constitutional crisis (Vandeginste 2013). For instance, in Togo (2005) the election was won by Faure Gnassingbe, who manipulated the constitutional process related to the succession of power after the death of his father President Gnassingbe Eyadema; in the Central African Republic (2005) the original coup perpetrator François Bozize won the election; and in Egypt (2014) Abdel Fattah el-Sisi won after having ousted the incumbent President Mohammed Morsi. In all three situations, the AU recognized the new governmental regimes and lifted sanctions.

AU policy and practice has seemed to suggest a conceptual confusion between stability, electoral democracy and constitutional rule. A return to stability does not necessarily mean a return to constitutional order, since under a completely authoritarian system there can be peace but a serious void of constitutionalism. Similarly, holding free and fair elections does not guarantee the existence of a mature and well-established culture of constitutionalism. Considerable progress has been achieved in the professionalization of AU mechanisms to observe electoral processes on the continent and pass a substantial judgement on the quality of these elections. However, this snapshot assessment of only one aspect of a constitutional system fails to provide a more comprehensive evaluation of whether the constitutional regime is restored. It appears that the AU’s focus on the most serious violations of the constitutional order (in the form of UCG) created a very narrow objective in demanding their rectification only in the most direct sense, with the risk of legitimizing an otherwise defunct constitutional order.

3. Law, policy and practice in the European Union

The EU is a regional organization designed to ensure peace, unity and solidarity among its member states (EU 2007a, 2007b). It has developed into one of the most successful formal integration projects, united by a set of economic and political cooperation and convergence mechanisms, together with a set of core values. These fundamental values have their origin in the constitutional traditions common among all founding member states.

Normative framework

The EU normative framework to protect constitutionalism is based on various treaties, European Court of Justice (ECJ) case law, reports from different European institutions and agencies, and European Commission policy documents (EU 2000, 2007a, 2007b; European Commission 2003, 2014).⁸ Article 2 of the Treaty on European Union (TEU) encapsulates the organization's main normative values and founding principles, including 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Although the EU, notably the European Commission, focuses generally on the rule of law—which it views as the foundational principle of the union, as well as the essential guarantee of the protection of the other fundamental values on which the union is based—a broad definition of the rule of law is assumed to include the most essential constitutional values shared by all member states. This approach was adopted in a communication of the European Commission on a new EU framework to strengthen the rule of law, which serves as a guiding policy statement on how to address systemic threats to the rule of law in member states (European Commission: 2014).

The content and interpretation of the principle of the rule of law is based on the case law of the ECJ and the European Court of Human Rights (ECHR), as well as the opinions and reports produced by the Council of Europe, particularly its advisory body on constitutional matters, the European Commission for Democracy through Law (also known as the Venice Commission) (European Commission 2014: 4). The core principles that specify the meaning of the rule of law include legality, legal certainty, prohibition of arbitrary executive powers, independent and impartial courts, effective judicial review that includes respect for fundamental rights, and equality before law (European Commission 2014). The Annex to the communication provides an overview of the relevant principles and case law related to the rule of law, which revisits the definition proposed by the Venice Commission (Venice Commission 2011). The EU framework acknowledges an explicit link between the rule of law and respect for

8 For key European Union documents visit the EU website, <http://europa.eu/publications/index_en.htm>.

democracy and fundamental rights, which captures the core of a liberal constitutional order shared among its member states that it aims to promote and protect.

Respect for the fundamental values of the EU constitutes one of the conditions to apply for membership (EU 2007a: article 49). It forms part of the ‘Copenhagen criteria’, which outline a series of requirements an aspiring state must fulfil in order to be eligible to accede to the EU, including ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union’ (European Council 1993: 13).

Establishing a violation of the constitutional order

Article 7 of the TEU identifies two conditions that merit EU intervention in the internal matters of a member state: (a) the determination of a ‘clear risk of a serious breach’ by a member state of the fundamental values of the EU and (b) the determination of a ‘serious and persistent breach’ by a member state of the common values (EU 2007a: articles 2, 7). If a violation of the constitutional order overlaps with a breach of EU law, the ECJ can establish a specific violation of the EU legal framework based on the infringement procedures (EU 2007b: articles 258–9). The scope of article 7 moves beyond the infringement proceedings before the ECJ, which can only address a breach of a specific provision of EU law.

According to the Communication of the European Commission on Article 7 of the Treaty of the European Union, which sets out the precise content of the conditions needed to trigger article 7 of the TEU, the EU can also act ‘in the event of a breach in an area where the member states act autonomously’ (European Commission 2003: 5). Generally, the condition of a serious breach should exceed the threshold of individual cases of breaches ordinarily established by national courts, the ECJ or the EHCR. The risk or breach should go ‘beyond specific situations and concern a more systematic problem’ (European Commission 2003: 7). The EU Framework to Strengthen the Rule of Law (2014) was developed to address systematic threats to the rule of law before they develop into a clear risk of a serious breach. This framework denotes different situations that may provoke the rule of law protective mechanism, including a threat to the ‘political, institutional and/or legal order of a member state as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists’ (European Commission 2014: 7).

Enforcement

Different EU institutions have a complementary role in enforcing the normative framework. To address constitutional concerns that correspond to an infringement of EU law, the European Commission or a member state can initiate legal action, and the ECJ will act as the adjudicator (EU 2007b: articles 258–59). The concerned state has the opportunity to submit its observations on the case before the judicial proceedings (EU 2007b: articles 258–59). Under the article 7 procedure, the Council of the EU, subject to a qualified majority, can determine whether there is a threat of a

serious breach. However, it may do so only after obtaining the consent of the European Parliament, acting on the basis of a reasoned proposal of the commission, the European Parliament or one-third of the member states, and after having consulted with the state under scrutiny. Under the same procedure, the Council of the EU may address recommendations to the respective state. Certifying that a serious and persistent breach of the common values has occurred requires unanimity of the European Council (the highest policy organ of the EU) plus the consent of a two-thirds majority in the European Parliament, representing at least a majority of its members.

The member state in question will previously have been invited to submit its observations. The commission, as the guardian of the treaties, has the central role in the Rule of Law Framework. When assessing a systematic threat to the rule of law, it may seek advice from EU institutions and other organizations, including the Venice Commission, the EU Fundamental Rights Agency and judicial networks, while maintaining regular and close interaction with the European Parliament and the Council of the EU.

Sanctions

The sanctions regime differs substantively depending on which enforcement mechanism is employed. Under the infringement procedure, the ECJ can impose a financial sanction if it finds that the member state has not complied with its judgment (EU 2007b: article 260). The TEU's article 7 mechanisms permit addressing non-binding recommendations to a member state in the event of a clear risk of a breach of fundamental EU values. If a serious and persistent violation of the common principles is determined, the European Council may suspend some of a state's membership rights, including voting rights. In imposing sanctions under this regime, a precautionary approach must be adopted to ensure reflection on the possible consequences of such measures. At the same time, the suspension of certain rights may not lead to the derogation of any obligation of the concerned member state. The Commission Framework to Safeguard the Rule of Law does not explicitly provide for sanctioning measures; it is more concerned with proactive measures based on close cooperation and inclusive dialogue with the member state concerned. The commission will address targeted recommendations to the member state on how to solve the identified problems and indicate a time frame for doing so. In case of the unsatisfactory implementation of the specific recommendations, the commission can launch one of the mechanisms established in article 7 of the TEU (European Commission 2014: 8).

Return to constitutional order

The legal framework provides some normative references for establishing the return to constitutional order. If found by the ECJ to have infringed EU law while violating the constitutional order, the state will be required to 'take the necessary measures' to comply with the judgment of the court (EU 2007b: article 260). The commission is responsible for monitoring the compliance of the member state with the court's decision, and article 7 confers an active monitoring obligation onto the Council of the EU to verify whether the grounds which led to the activation of article 7 mechanisms continue to apply (EU 2007a: article 7(1)). In response to changes in this situation, the Council of the EU may decide to change or lift the imposed measures (EU 2007a: article 7(4)). The framework

on strengthening the rule of law accords the commission the primary role in deciding whether the situation constituting a systematic threat to the constitutional order has been satisfactorily resolved. This decision can be made either before issuing targeted recommendations or after, using the recommendations as benchmarks to assess whether the situation has been resolved (European Commission 2014: 8).

Limitations in law, policy and practice in the EU

Normative framework

While the EU's normative framework generally allows for some oversight and scrutiny of possible or actual breaches of the constitutional order of member states, it is still faced with a number of challenges. For example, there is a limited understanding of the normative values on which the EU is founded. The concrete meaning of the principles outlined in article 2 of the TEU have not been clearly developed in the treaty framework. To some extent, the EU can build on the expertise of the ECJ, the Venice Commission and the ECHR, for example, for normative guidance to determine the precise content of the principles laid down in the framework. However, it remains unclear whether this guidance is sufficient for the operationalization of an effective assessment of possible violations of EU fundamental values.

Establishing a violation of the constitutional order

The legislative history of the EU demonstrates to some extent the progressive nature of the organization's dedication to upholding common constitutional values, as illustrated by the development of modalities to establish a violation of the constitutional order. First, corrective action for serious and persistent violations of common constitutional values was incorporated into the legal framework, as amended by the Treaty of Amsterdam (1997). Subsequently, the framework was revised by the Treaty of Nice (2001) to provide that even a clear risk of a serious breach—not only actual infringements—could lead to sanctions. Although the EU has not been required to deal with the most egregious challenges to the constitutional order in the form of a military coup d'état or widespread human rights violations, it has been confronted with a number of serious attempts to undermine the constitutional order. By their nature, these have constituted more nuanced attacks on the integrity of the constitutional regime, which has made it harder to determine or prove the existence of a threat or breach of the constitutional order. Significant discretionary power is given to the Council of the EU and the European Council in determining a serious and persistent breach of the common values. Therefore, the Article 7 mechanisms are largely of a political nature. On the one hand, this allows for a comprehensive political approach, which paves the way for a broad scope of various diplomatic solutions (European Commission 2003: 7). On the other hand, the high threshold to activate the Article 7 mechanisms of the TEU generally prevents a timely and effective response, which has led to calls to more clearly define the conditions to initiate action under article 7.

The Commission Framework on the Rule of Law contributes to a more nuanced approach and may have an important role in filling this gap. Yet the Legal Service of the Council of the EU has expressed concerns regarding the legal basis of the rule of

law mechanisms proposed by the commission, arguing that ‘there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article’ (EU 2014b). This may raise concerns relating to the implementation of the mechanism.

Enforcement

The EU has encountered a number of rule-of-law-related crises, including the Roma crisis in France in 2010 and the constitutional crises in Hungary (2011) and Romania (2012). However, the article 7 mechanism was not used to address these situations or their broader underlying problems. For a number of issues, however, the European Commission launched infringement procedures on a more restricted legal basis. For instance in Hungary, the European Commission initiated three judicial procedures that addressed the independence of the central bank, the independence of the national data protection authority and the independence of the judiciary in a case related to the lowering of the retirement age for judges. Concerning the Roma crisis in France, the commission started a proceeding against measures to deport Roma (a minority group consisting mostly of Romanian and Bulgarian citizens) out of France.

This course of action can lead to successful judicial remedies, but only when the infringement concerns constitutional principles that have a legal basis in EU law. The procedure fails to deal with violations of the fundamental values from article 2 in a broader sense. Therefore, a more sophisticated enforcement mechanism appears necessary to complement the judicial procedure. Indeed, the interventions of the EU so far have appeared to be of an ad hoc nature due to the limited suitability of the mechanisms to ensure an effective solution to a threat or violation of the constitutional order (European Commission 2014: 2). While the EU has been very effective in ensuring the compliance of states with its fundamental values in the pre-accession phase, it is now confronted with the so-called Copenhagen Dilemma. Accordingly, states applying for membership are held to criteria through strict monitoring and oversight mechanisms, whereas states that are already members are not assessed on the same basis to ensure their continued compliance with the EU’s fundamental values. This has led to discrepancies in the enforcement of the EU normative framework. A notable exception is the Co-operation and Verification Mechanism. In the cases of Romania and Bulgaria a monitoring procedure was established to address a number of concerns related to the rule of law during the pre- and post-accession phases. These issues included judicial reform to fight corruption and organized crime.

The European Commission’s new framework to deal with threats of systematic violations of the legal order, where the emphasis lies on increased oversight and scrutiny in the sphere of rule-of-law commitments, could therefore be seen as a positive evolution. Furthermore, in 2014 the Council of the EU committed to organizing an annual political dialogue among member states to promote and safeguard the rule of law in the framework of the treaties. According to the council, the inclusive dialogue will address the principles of objectivity, non-discrimination and equal treatment of member states, while adopting a non-partisan and evidence-based approach. This could be a useful complementary mechanism to the commission’s proposal in order to ensure the widest

political participation in the collective efforts of the EU to guarantee respect for the rule of law.

Sanctions

While the EU has developed a robust sanctions regime to address serious violations of the constitutional order outside its region, it has failed to elaborate an effective sanctioning system within its borders. Admittedly, there has been far less need for such a sanctioning system within the region. Nevertheless, this may damage the credibility of the EU in its interferences outside the region (Hellquist 2014: 35).

The internal sanctions regime for punishing violations of the core normative values shared by the different constitutional traditions of the EU member states appears to lack nuanced mechanisms and a coherent framework. There seems to be a gap between the soft power of political pressure and the drastic measure of suspending participation rights, including voting rights. Due to the seriousness of losing voting rights, this sanction appears to be reserved for only the most extreme situations. Thus many other grave violations risk not being properly addressed due to a lack of intermediate measures. The absence of a coherent framework has led to a questionable approach in addressing violations within the regional organization, as witnessed in the case of Austria (2000) and Hungary (2011). In the Austrian case, the EU member states unanimously imposed bilateral diplomatic sanctions on Austria in response to the formation of a coalition government by the extreme right-wing Freedom Party of Austria. The sanctions included reduced bilateral engagement to a technical level and the withholding of support for Austrian candidates in seeking positions in international organizations. Yet since the measures did not originate from the EU as a regional organization, Austria was still able to participate in EU activities.

The ECJ can impose financial sanctions through the infringement procedure, but only for specific violations of the constitutional order that are separately protected by EU law. A well-developed coercive sanctioning mechanism to anticipate and respond coherently to offences that form a significant threat to or violate the constitutional order due to their accumulation, rather than individual incidences, has yet to materialize.

Return to constitutional order

The EU legal framework has limited normative guidance on determining when a member state can be certified as returning to constitutional order. In practice, very detailed recommendations can be directed to an offending state. For example, the European Commission developed a list of measures for Romania to comply with in order to restore the rule of law. Similarly, during the Hungarian constitutional crisis, the EU Commission, European Parliament and the Venice Commission advised on a detailed list of recommendations the Hungarian Government should consider in order to restore constitutional order (Sedelmeier 2014: 116; European Parliament 2013; Venice Commission 2013). The Hungarian Government criticized the European Parliament recommendations as being ‘vague, un-implementable and . . . completely out of touch with the institutional, legal and political circumstances of the country’ (Hungarian Government 2013: 10). Without passing judgment on the validity of these critiques, the objection from the Hungarian Government raises legitimate concerns about the nature

of the recommendations and the criteria they should meet. The decisions of the ECJ can also contribute to a detailed remedy for specific infringements of the constitutional order as seen in the case of Hungary concerning the age discrimination of judges (ECJ 2012) and on the independence of data protection authorities (ECJ 2014). In the proceedings on the independence of the central bank of Hungary, the European Commission dropped the case after changes in Hungarian legislation.

4. Law, policy and practice in the Organization of American States

The OAS was established as the principal institution uniting the different states of the Americas around peace and development, while promoting and consolidating democracy with due respect for the principle of non-intervention (OAS 1948: article 2). The latter principle has gradually eroded in favour of the collective defence of democracy. The OAS has intervened in different contexts, including in Haiti (1991), Peru (1992), Guatemala (1993), Paraguay (1996), Venezuela (2002), Bolivia (2003), Ecuador (2005), Nicaragua (2005) and Honduras (2009).

Normative framework

The normative OAS framework for upholding constitutionalism is built around treaties, protocols, resolutions, declarations and decisions.⁹ The main legal provision related to protecting the constitutional order is found in article 9 of the Charter of the Organization of American States (OAS Charter), which provides that a member state will be suspended from its right to participate in OAS activities in the case of a forceful overthrow of the government. While article 9 addresses unconstitutional transfers of power, the Inter-American Democratic Charter (Democratic Charter) was adopted to protect and strengthen the constitutional order. The Democratic Charter builds on previous diplomatic instruments to consolidate democracy in OAS member states. It establishes an agenda to promote democracy along with a mechanism for its collective defence. The Democratic Charter therefore addresses constitutionalism in both the accession to power and in its exercise (OAS 2001: articles 2, 4, 7). To this end, article 3 of the charter outlines a number of principles and values that form the basis of the different constitutional regimes of OAS member states. These include respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, holding of periodic, free and fair elections, a pluralistic system of political parties and organizations, and the separation of powers (OAS 2001: article 3).

9 These include the Charter of the Organization of American States (1948), Inter-American Democratic Charter (2001), the Washington Protocol to the OAS Charter (1992), the Cartagena Protocol to the OAS Charter (1985), Resolution 1080 (1991), the Québec Declaration (2000), the Managua Declaration (1993), the Nassau Declaration (1992) and the Santiago Declaration (1959). The framework is also based on different decisions from the General Assembly and Permanent Council, decisions from the Inter-American Court of Human Rights, and decisions and reports from the Inter-American Commission on Human Rights. For key OAS documents visit the OAS website, <http://www.oas.org/en/information_center/default.asp>.

Establishing a violation of the constitutional order

According to article 9 of the OAS Charter, a violation of the constitutional order that would warrant OAS intervention would entail the forceful overthrow of the democratically constituted government of a member state. The Democratic Charter, however, foresees a gradual approach in establishing a violation of the constitutional order. Chapter IV of the charter identifies four scenarios that would entail OAS involvement; a more significant role is ascribed to the OAS in accordance with the increasing seriousness of the situations:

1. a threat to the democratic political institutional process or its legitimate exercise of power;
2. a situation that may affect the development of its democratic political institutional process or the legitimate exercise of power;
3. an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order; and
4. an unconstitutional interruption of the democratic order (OAS 2001: articles 17–21).

The Democratic Charter thus describes a more nuanced and hierarchical understanding of the various ways in which the constitutional order of a member state can be endangered.

Enforcement

The enforcement of the normative framework involves a number of authorities in the OAS with varying competences. In the event of a forceful overthrow of a government, the OAS Charter provides that the General Assembly, the principal policymaking organ, may decide on the suspension of the affected state by an affirmative vote of two-thirds of the member states during a special session (OAS 1948: article 9b). While the constitutional crisis persists, the OAS will continue to pursue diplomatic efforts to secure the restoration of representative democracy in the affected member state (OAS 1948: article 9d).

The Democratic Charter, following its hierarchical description of four situations relating to the destabilization of the constitutional order, attributes different roles to the respective bodies of the OAS mandated to either set or carry out the policy agenda. When the democratic political institutional process or the legitimate exercise of power is threatened (scenario 1), the secretary general or the Permanent Council (a body of representatives of OAS member states) may provide assistance to strengthen and preserve the democratic system (OAS 2001: article 17). If the development of the democratic political institutional process or legitimate exercise of power is affected (scenario 2), the Permanent Council may adopt decisions to preserve and strengthen the democratic system after collectively assessing the situation on the basis of field visits, a report from the secretary general or any other actions necessary (OAS 2001: article 18). This mechanism was reinforced through a General Assembly decision in 2005 (also known as the Florida Declaration), in which the secretary general was instructed to prepare

proposals for initiatives to deal with situations that might affect the development of the democratic institutional political process or the legitimate exercise of power in a timely, gradual and balanced manner (OAS 2005). However, a veto is possible in both mechanisms, since the OAS can only take action after obtaining the prior consent of the member state concerned.

In contrast, in the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order of any member state (scenario 3), the consent of the affected state is not needed; the secretary general or any other member state may call directly for a meeting of the Permanent Council to make a collective assessment and take appropriate decisions (OAS 2001: article 20). During the constitutional crisis, the Permanent Council may continue to engage in the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy. If these initiatives fail, or if the urgency of the matter so demands, a special session of the General Assembly will be convened, in which the Assembly can determine that there has been an unconstitutional interruption of the democratic order (scenario 4) and decide to suspend the affected state by an affirmative vote of two-thirds of the member states (OAS 2001: article 21). The OAS will continue its diplomatic engagement irrespective of the suspension of the member state. The last two scenarios are particularly important, since they underline the principle of the collective defence of the constitutional order of a state, in which any member state or the secretary general may request OAS intervention without the consent of the affected member state.

Sanctions

The sanctioning mechanisms of the OAS in case of a violation of the normative framework to preserve the constitutional order fall into two categories: (a) suspension of the member state from participating in the activities of the organization and (b) a series of sanctions that can be imposed in the framework of diplomatic initiatives to restore constitutional order. If the OAS decides to suspend a member state in case of a forceful overthrow of government (OAS 1948: article 9) or due to an unconstitutional interruption of the democratic order (OAS 2001: article 21), the suspension will take immediate effect, but will only apply to the rights (and not the obligations) of the member state, since the suspension aims to circumvent the privileges of the transgressing state and not the rights of its people. As part of the OAS diplomatic engagement to strengthen, preserve or restore the constitutional order, various sanctions can be applied. These may include economic sanctions such as freezing bank accounts or assets, and diplomatic sanctions such as breaking diplomatic relations and visa bans. The enforcement and sanctions regime clearly emphasizes comprehensive diplomacy aimed at restoring the democratic constitutional order (OAS 1948: article 9, 2001: articles 17–21).

Return to constitutional order

The OAS Charter does not explicitly define the conditions to determine the return to constitutional order. It only stipulates that the General Assembly can decide with a two-thirds approval of the member states to lift the suspension (OAS 1948: article 9). This seems to suggest that the restoration of constitutional order is implied in the removal of sanctions. The Democratic Charter establishes a more explicit condition: the situation that led to the suspension must have been resolved (OAS 2001: article 22).

Limitations in law, policy and practice in the OAS

Normative framework

The OAS normative framework clearly reflects the collective commitment of the Americas to maintain and strengthen the constitutional order, yet its binding nature is uncertain. While the OAS Charter draws its normative force from its treaty status, the Democratic Charter is only an authoritative soft law instrument. Even though the Democratic Charter has been endorsed by all member states, there are still concerns regarding the legal basis on which action can be taken and the subsequent forcefulness of the enforcement mechanisms. Whether the Democratic Charter serves as a sufficient legal basis for OAS reactions to more subtle manipulations of the constitutional order remains unclear. There are also doubts regarding the clarity of the various principles and values established in the normative framework, and the extent to which there are standards and benchmarks to assess their implementation. The OAS can rely somewhat on the progress made by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights and their contribution to the interpretation of some constitutional principles in reference to provisions included in the Inter-American Charter on Human Rights. For example, the commission elaborated on the principles of independence of the judiciary and the constitutional doctrine of the separation of powers (OAS 1993). However, it should be noted that not all OAS member states have accepted the jurisdiction of the Inter-American Court of Human Rights.

Establishing a violation of the constitutional order

There are challenges in the interpretation of the normative framework in regards to establishing a violation of the constitutional order. The OAS Charter provides for a scenario that makes it comparatively easy to establish a qualified violation of the constitutional order of a member state that justifies a regional intervention. This scenario requires the forceful overthrow of a democratically constituted government. However, this is an increasingly rare event in the region. There are numerous other circumstances that could constitute a serious violation of the constitutional order of a state and which now represent the greatest threat in the Americas. The Democratic Charter is effectively more nuanced and establishes gradual forms of a threat or actual breach of the constitutional order in a member state. Yet despite its more differentiated approach than that of the OAS Charter, it remains vague, especially with regard to unconstitutional interruptions or alterations of the democratic order.

For some interruptions of the democratic order, it is indisputably clear which situations could fall into this category. These could include military coups or situations where the constitution is suspended or the judicial or legislative branches are indefinitely dissolved. However, it is harder to define scenarios that qualify as an 'unconstitutional alteration that seriously impairs the democratic order'. It would seem reasonable that the failure to hold periodic and transparent elections or the unconstitutional removal or appointment of elected officials or members of the judiciary could be considered a serious enough infraction (Ayala Corao and Nikken Bellshaw-Hógg, 2006: 25–26). Cumulative changes that gradually but systematically erode the democratic constitutional order are less clear, such as unwarranted interference in the deliberations of the judicial branch or electoral bodies, ignoring or defying court decisions or legislation, or the use of

public office to attack the opposition or the press (Perina 2012: 80). These scenarios constitute more controversial forms of alteration, as it becomes more complicated for the OAS to collectively agree and take action (Perina 2012). This lack of guidance, including procedural and substantive conditions to determine when the gravity of the constitutional offense has reached the threshold warranting regional intervention, are likely to have negative effects on the coherence and effectiveness of OAS action.

Enforcement

The OAS provides for some notable enforcement mechanisms that can truly help protect the constitutional order in a member state. The graduated approach in dealing with the various ways the constitutional order may be undermined serves as a useful framework that allows a commensurate role for the regional organization depending on the seriousness of the threat to the constitutional order. However, the main limitation of the enforcement mechanisms is that they are largely dependent on the willingness of the affected state to cooperate with the OAS. Where there are signs of constitutional deterioration, the OAS can only monitor threats to the constitutional order if the concerned state has given prior consent. Since the adoption of instruments to address threats to the constitutional order, in particular Resolution 1080 (1991) and the Democratic Charter (2001), the OAS has already responded to a variety of challenges in different member states. These include coups and attempted coups in Haiti (1991), Paraguay (1996, 1996), Venezuela (2002) and Honduras (2009)—for the latter two, the governments requested OAS assistance before the coups. In Peru (1992) and Guatemala (1993) the OAS addressed processes of constitutional erosion brought about by incumbent leaders, while in Bolivia (2003, 2005) and Ecuador (1997, 2000) the OAS was called upon to deal with political crises incurred after popular protests.

In situations where the incumbent leaders are threatened by unconstitutional attacks, the request for the OAS to intervene can indeed lead to a timely and decisive response. The problem is when sitting leaders are responsible for the gradual erosion of the constitutional system. It would then seem unlikely that the governments and leaders in question would consent to the interference by the OAS. Of course, for the most serious violations of the constitutional order, not only coups, the OAS may intervene without permission from the respective member state. However, postponing OAS involvement until it reaches an acute level may impede the effectiveness of the response. Intervening reactively to the rectification of the constitutional crisis is likely to be more challenging and resource intensive for the OAS than engaging early on with the relevant actors through preventive diplomacy to avoid a manifest constitutional interruption.

Sanctions

The different situations outlined in the Democratic Charter relating to the strengthening and preservation of democratic institutions similarly lack a strictly defined sanctions regime, which may result in unpredictability and uncertainty. The suspension mechanism clearly stipulates its scope—the withdrawal of the participation rights of a member state but not the state's obligations towards the organization (OAS 2001: article 21). Yet while the normative framework clearly emphasizes diplomatic initiatives to strengthen, preserve or restore the democratic constitutional order, they offer no indication of what type of measure could be adopted or imposed, except for a reference

to the use of good offices.

Although sanctions have been imposed in the past, both economic and political, no guidance is offered on how these may be established, on what grounds, or in accordance with which criteria or standards. For instance in Haiti (1991), the OAS called for measures including the diplomatic isolation of the perpetrators of the coup, as well as the freezing of assets and the imposition of a trade embargo. In Honduras, the state was suspended from OAS activities after the detention and subsequent forced exile of the president (OAS 2009a, 2009b). In dealing with the Honduras matter, the OAS remained vague about what kind of additional measures should be taken. It encouraged ‘the member states and international organizations to review their relations with the Republic of Honduras during the period of the diplomatic initiatives for the restoration of democracy and the rule of law in the Republic of Honduras and the reinstatement of President José Manuel Zelaya Rosales’, without indicating what that should mean (OAS 2009b). Nevertheless, many states followed suit and broke off relations with Honduras. This type of voluntary sanctions regime lacks unity, coordination and decisiveness in committing to the protection of the constitutional order of member states, which jeopardizes its effectiveness.

Return to constitutional order

The OAS has not used consistent conditions to determine when a state has returned to constitutional order. Some constitutional crises led to a call for the constitutional *status quo ante* by reinstating the deposed president (Haiti 1992, Honduras 2009). In other situations, the OAS demanded the re-establishment of the democratic institutional order (Peru 1992, Guatemala 1993). During other infringements of the constitutional order, the resumption of normal procedures for the constitutional succession of power (Ecuador 2005), followed by the organization of elections (Bolivia 2005) led to OAS acceptance of a return to constitutional normalcy.

The handling of the crisis in Honduras reveals an inconsistent application of OAS norms. The root causes of the crisis included a conflict between the judicial, legislative and executive branches of government. It broadly concerned an attempt by the President Zelaya to adopt a new constitution, allegedly to remove presidential term limits, which the Supreme Court declared unconstitutional. President Zelaya defied the court’s decision and proceeded with his attempt to change the constitution, which led the Supreme Court to order his arrest. The military subsequently sent the president into exile, and a decision from Congress followed to remove him from power. The OAS demanded the immediate and unconditional reinstatement of President Zelaya after the coup d’état and instructed the secretary general to undertake diplomatic initiatives to restore democracy and the rule of law. However, the OAS failed to define what constituted a restoration of democracy and rule of law. The OAS approach appeared to focus mostly on remedial action to reinstate the ousted president, rather than dealing with the larger constitutional crisis that led to the unconstitutional removal of the head of state. Clearly, this crisis was more complex than that the OAS made it appear to be. By categorizing the situation as a coup d’état and focusing mostly on the unconstitutional removal of the sitting president—and less on the other unconstitutional developments that preceded the coup—the OAS appears to have overlooked the more nuanced challenges associated with threats to the constitutional order from within.

5. Conclusion

In the context of an increased prominence of regional organizations in the protection of constitutionalism, this study has advocated a more nuanced role for such bodies in addressing fundamental threats to or violations of the constitutional order of their member states. As constitutional crises related to the erosion of the constitutional order are today more prevalent than traditional coups, regional organizations aiming to guarantee a culture of constitutionalism will need to enhance their efforts to deal with serious threats to the constitutional order from within.

However, a more nuanced and comprehensive approach should not imply an overly ambitious role for regional organizations. The study has demonstrated that the AU, the EU and the OAS provide ample scope for the robust enforcement of the constitutional values common to their member states that overlap with the collective values enshrined in the regional normative frameworks. Different mechanisms have been developed to protect constitutionalism at the member-state level in cases of serious violations of the constitutional order. Increasingly, provision is made in the legal and institutional frameworks to allow regional organizations to address more nuanced infringements of the constitutional order, including the manipulation of elections or the unconstitutional removal or appointment of elected officials or members of the judiciary.

The broader frameworks to address a serious and systematic erosion of the constitutional order are already in place. It is now up to the regional organizations to continue developing and implementing appropriate protective mechanisms in a way that offers more clarity, transparency and predictability. This will include (a) providing adequate guidance on the concrete content and interpretation of the values and principles captured in the normative framework; (b) clearly establishing the conditions under which a regional organization may intervene; (c) ensuring enforcement in a timely, effective and consistent manner; (d) developing categories of proportionate sanctions that could be applied gradually; and (e) conducting a comprehensive assessment of the underlying causes of a constitutional crisis before determining whether a state has returned to constitutional order.

Tables 5.1 and 5.2 provide an overview of the main issues discussed in the previous three chapters. Table 5.1 reviews the legal provisions of the normative frameworks of the three regional organizations, while Table 5.2 illustrates the principal challenges of protecting the constitutional order of their member states.

Table 5.1. Law of regional organizations in protecting constitutionalism

	African Union (AU)	European Union (EU)	Organization of American States (OAS)
Normative framework (main instruments)	<ul style="list-style-type: none"> – AU Constitutive Act – African Charter on Democracy, Elections and Governance – Lomé Declaration on the framework for an OAU response to UCG 	<ul style="list-style-type: none"> – Treaty on European Union – Treaty on the Functioning of the EU – case law of ECJ and the EHCR 	<ul style="list-style-type: none"> – OAS Charter – Inter-American Democratic Charter
Establishing a violation of the constitutional order (conditions for regional involvement)	<ol style="list-style-type: none"> 1. UCG: <ol style="list-style-type: none"> i. any putsch or coup d'état against a democratically elected government; ii. any intervention by mercenaries to replace a democratically elected government; iii. any replacement of a democratically elected government by armed dissidents or rebels; iv. any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or v. any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government 2. a situation where the democratic political institutional arrangements or the legitimate exercise of power is affected. 	<ol style="list-style-type: none"> 1. violation of the constitutional order which overlaps with a breach of EU law; 2. clear risk of a serious breach of the fundamental values of the EU; or 3. serious and persistent breach of the fundamental values of the EU 	<ol style="list-style-type: none"> 1. forceful overthrow of the democratically constituted government; 2. threat to the democratic political institutional process or its legitimate exercise of power; 3. situation that may affect the development of its democratic political institutional process or the legitimate exercise of power; 4. unconstitutional alteration of the constitutional regime that seriously impairs the democratic order; or 5. unconstitutional interruption of the democratic order.
Enforcement (main institutions)	Assembly of Heads of State and Government, PSC, AU Commission	European Council, Council of the European Union, European Parliament, European Commission, ECJ	General Assembly, Permanent Council, Secretary General
Sanctions (mechanisms)	<ul style="list-style-type: none"> – diplomatic initiatives – economic punitive sanctions – suspension from participation in the activities of the AU – prevention from participating in new government 	<ul style="list-style-type: none"> – financial sanctions in infringement proceedings; – diplomatic initiatives; and – suspension of certain rights, including voting rights. 	<ul style="list-style-type: none"> – diplomatic initiatives; and – suspension of participation rights.
Return to constitutional order (conditions)	– once situation that led to suspension is resolved	– changes in the situation which led to measures being imposed	– situation that led to the suspension must have been resolved

Table 5.2. Limitations in law, policy and practice

	African Union (AU)	European Union (EU)	Organization of American States (OAS)
Normative framework	<ul style="list-style-type: none"> – inadequate normative guidance on understanding and interpreting relevant constitutional principles; and – limited enforceability of normative framework (non-binding instruments). 	<ul style="list-style-type: none"> – inadequate normative guidance on understanding and interpreting relevant constitutional principles. 	<ul style="list-style-type: none"> – inadequate normative guidance on understanding and interpreting relevant constitutional principles; and – limited enforceability of normative framework (non-binding instruments).
Establishing a violation of the constitutional order	<ul style="list-style-type: none"> – inadequate normative guidance; – too much focus on unconstitutional transfer of power; and – limited focus on unconstitutional exercise of power. 	<ul style="list-style-type: none"> – inadequate normative guidance. 	<ul style="list-style-type: none"> – inadequate normative guidance.
Enforcement	<ul style="list-style-type: none"> – limited capacity to address root causes of constitutional crises. 	<ul style="list-style-type: none"> – ad hoc nature of interventions; – infringement procedure too limited in scope to address broader constitutional issues; and – inconsistency in applying membership criteria to acceding states and member states. 	<ul style="list-style-type: none"> – access to assess (non) compliance.
Sanctions	<ul style="list-style-type: none"> – inadequate guidance on sanctioning mechanisms; and – inconsistencies in applying sanctions. 	<ul style="list-style-type: none"> – inadequate guidance on sanctioning mechanisms; and – lack of precision. 	<ul style="list-style-type: none"> – inadequate guidance on sanctioning mechanisms; and – lack of precision.
Return to constitutional order	<ul style="list-style-type: none"> – limited substantive assessment of return to constitutional order. 	<ul style="list-style-type: none"> – limited normative guidance. 	<ul style="list-style-type: none"> – limited substantive assessment of return to constitutional order.

6. Recommendations

The AU, the EU and the OAS are three examples of regional organizations involved in protecting constitutionalism. As the analysis has shown, there are some important differences in their legal frameworks and practices, but also an important set of commonalities. Most fundamentally, all three organizations have put in place enforcement mechanisms to protect a set of similar core values. The three regional organizations and their role in protecting constitutionalism have been assessed using the same analytical framework. For each dimension of the framework, the respective norms and institutions have been identified, followed by a critical analysis of the limitations as well as good practices of each organization. In the following section, based on the findings of the previous sections, the same analytical framework will be employed to outline a number of detailed policy recommendations to tackle the main challenges faced by these organizations in upholding the constitutions of their member states. From a comparative perspective, different policy recommendations will be identified that are relevant to all three organizations, but which could also be applicable to other regional organizations. Where relevant, specific recommendations will be made for a particular regional organization to complement the general policy recommendations.

Normative framework

While the three regional organizations have successfully put in place a framework to uphold constitutions, some difficulties remain with regard to interpretation and enforceability. The analysis identified considerable overlap in their fundamental constitutional values and principles, including the promotion of and respect for human rights, adherence to the rule of law, separation of powers and a number of essential guarantees of democratic processes such as regular, free and fair elections and a competitive multiparty electoral system. Nevertheless, confusion persists with regard to the concrete content and interpretation of these values. This clearly has repercussions for the identification and the understanding of what the standards or benchmarks of the values are, which makes it difficult to establish when a violation occurs, especially in more nuanced cases such as systematic infringements of the constitutional order by elected officials through democratic or undemocratic means.

In light of the complexity of these violations, it is therefore necessary to develop a clear framework for assessing these values. The EU has benefitted from the interpretation of the ECJ and ECHR and a number of other organs (in particular the Venice Commission) of different normative principles to develop guidelines for evaluation. The regional court system in Africa at the continental level is advancing, but still has great progress ahead. In line with the current mandate of the African Court of Human and Peoples' Rights, thus far the focus has only been on human and peoples' rights. Consequently, the broader principles related to the constitutional order as envisaged by the regionally adopted instruments, such as the separation of powers, exercise of power in accordance

with the rule of law, and respect for essential democratic principles, still need further clarification. Similarly, in the OAS, the Inter-American Human Rights system—including the Inter-American Court of Human Rights and particularly the Inter-American Commission of Human Rights—has developed interesting interpretations of a number of issues relating to democratic principles such as the separation of powers and the right to stand for elections. However, these interpretations have been limited to a human rights-based approach in specific cases, and have not addressed other regionally adopted constitutional values and principles. Yet fundamental rights are often only one element of broader constitutionalism concerns (Closa et al. 2014: 12).

Regional organizations would benefit from an assessment framework based on clear and widely applicable standards that are developed according to an accepted regional understanding of constitutional standards drawn from the principal features of constitutionalism common to the different states. The framework should be based on a broad, inclusive and comprehensive study of practices and understandings of the different member states to clarify these standards. This approach would prevent the existence or perception of double standards applied to different member states. The clarification of these values does not need to be exhaustive or far-reaching. Instead, it should concentrate on the most essential constitutional standards. This task could be assigned to a specific mechanism or committee mandated to identify the constitutional values shared by all member states. The body could then develop normative guidance for interpreting the principles and values, and offer advice on the best constitutional practices. Establishing the precise content of the minimum standards will have important consequences for developing benchmarks and criteria with which to evaluate threats or violations of these core principles and values.

Recommendation 1: Regional organizations should clarify the meaning of the constitutional principles adopted in their normative frameworks to ensure there are clear standards to allow for a substantive assessment of member states' constitutional orders.

Although the different regulatory frameworks (particularly the treaty frameworks) remain rather vague with regard to precise scope and interpretation of the principles the regional organizations are mandated to uphold, the three organizations studied have undertaken deliberate action to develop procedures and mechanisms to preserve the constitutional order in their member states. The question is whether the current legal basis is adequate to ensure an appropriate protection of the constitutional values, or whether new instruments are needed.

The analysis suggests that the legal frameworks of these regional organizations generally provide sufficient space to assess and uphold the constitutional order in cases of a potential or real breach, and leave enough room to develop new mechanisms that could contribute to these processes. Examples include the European Commission Framework to Strengthen the Rule of Law, which was established within the existing treaty framework, and the ongoing development of the AU Continental Structural Conflict Prevention Framework. Treaty amendments are not needed to improve the mechanisms and procedures to strengthen and uphold the constitutional order in the member states—especially since specific instruments have already been developed to promote

and protect the constitutional order, like the African Charter on Democracy, Elections and Good Governance and the Inter-American Charter on Democracy. Indeed, the AU Assembly and PSC have asserted their preference for better operationalizing existing instruments rather than developing new ones (AU 2010b, 2013b).

The use of existing mechanisms (or at least remaining within the existing framework) avoids the challenges of establishing new organs or instruments, including the slow nature of these processes and the high and problematic risk that infringing countries will delay or block a treaty amendment process or simply opt out—thus undermining the effectiveness of any amendment or new instrument (Closa et al. 2014: 7).

However, in some circumstances it can be advantageous to amend the existing legal framework. For example, to increase the legitimacy of regional interventions through a significant strengthening of the oversight mechanisms (Closa et al. 2014: 8). Amendment could also alleviate fears that overly ambitious individuals or institutions would hijack constitutional processes.

But even so, as long as the normative framework provides for scope to act, the process should not be overly burdened. In regional contexts beyond the ones under scrutiny here, it may be that a framework relating to constitutional values and their strengthening or ultimate enforcement still needs substantive development. This scenario is obviously different from the situations in Africa, Europe and America where overarching mechanisms are in place, and scope is provided to develop this framework further from within.

Recommendation 2: Regional organizations, where possible, should remain within the scope of existing legal frameworks and reinforce currently available mechanisms or procedures.

The success of a normative framework may depend in large part on its enforceability. While the EU benefits from its highly formalized integration—making the treaty norms but also the *acquis communautaire* (the cumulative body of binding EU law) applicable and enforceable on all its member states, including through the national and regional judicial system—the AU and the OAS are unable to enforce certain aspects of their normative frameworks due to the non-binding nature of some of the main instruments. Until recently, the relevant normative framework in Africa consisted mainly of soft law instruments, except for the prohibition of UCG, which is enshrined in the Constitutive Act of the AU. This changed dramatically in 2012 with the entry into force of the Governance Charter, which is legally binding. Yet, as of April 2016, less than half of the member states had ratified it. Ratification by all member states would ensure the widest possible application of constitutional governance standards in the region.

Similarly, the Inter-American Democratic Charter is strictly a soft law instrument. However, it could be argued that the OAS Democratic Charter is binding, ‘since it is considered as an authoritative interpretation of the OAS Charter, according to article 31 para. 3a of the Vienna Convention on the Law of Treaties’ (Saranti 2011: 695). The view that the Democratic Charter is completely enforceable clearly improves the

prospects of the OAS in ensuring adherence to constitutionalism. Enforceable legal frameworks will compel states to demonstrate a strong commitment to the norms and principles enshrined in them, and to develop consistent practice to this effect.

Recommendation 3: Regional organizations should, to the greatest extent possible, ensure the enforceability of the normative framework by adopting binding legal instruments and developing consistent practice in the commitment to uphold constitutional values and principles.

Establishing a violation of the constitutional order

The three regional organizations analysed have all established criteria for violations of the constitutional order that may warrant regional interference. However, a different conceptual focus appears to emerge. While the AU has been highly articulate and innovative in developing a norm against UCG, less attention has been paid to possible erosions of the constitutional order. To this end, the AU's focus has largely been of a procedural nature, relating to the transfer of power rather than a more substantive evaluation of the (un)constitutional exercise of power. The analysis has demonstrated the critical consequences of this approach.

EU involvement has mainly been of an ad hoc nature, which to some extent has hampered the consistency of its approach. However, it has gradually gained a more comprehensive understanding of circumstances under which fundamental EU values can be affected at the national level; it now appears to be better equipped to deal with such scenarios. For example, it increasingly emphasizes the importance of early detection of systematic or structural threats to the constitutional order, and aims to address these before they erupt into serious and persistent violations. The AU also underscored this approach in the Ezulwini Framework. Moreover, in earlier drafts of the Lomé Framework, the AU even included more substantive protection mechanisms such as AU involvement in manipulation of constitutional processes including tampering with constitutional term limits, electoral fraud, or systematic and persistent violations of the common values and principles of democratic governance (OAU 2000).

While these provisions were not included in the legal instruments, the principle was captured in the Lomé Framework, which stipulates that 'experience has shown that unconstitutional changes are sometimes the culmination of a political and institutional crisis linked to non-adherence to the . . . common values and democratic principles'. From this perspective it appears that there is a clear 'need for Member States to uphold the rule of law and abide by their own Constitutions, especially with regard to constitutional reforms, bearing in mind that failure to respect these provisions could lead to situations of tension which, in turn, could trigger political crisis' (AU 2010b). Accordingly, the AU declared that it was essential to adopt a 'comprehensive approach to the issue of UCG based on zero tolerance for coups d'état but also for violations of democratic standards, the persistence and reoccurrence of which could result in unconstitutional changes' (AU 2010b).

The OAS shares a similar view of the relationship between a failure to adhere to the rule

of law and the risk of violence and limited development. It has underscored this approach in the hierarchical intervention ladder of Chapter IV of the Democratic Charter, which allows the OAS to assess any potential threat to the democratic political institutional process or the legitimate exercise of power before it leads to manifest interruptions of the democratic order. As crises related to electoral fraud and the erosion of the constitutional order are currently more prevalent and destabilizing in the different regions, regional organizations aiming to contribute to ensuring a democratic and constitutional order should enhance their efforts to deal with threats to constitutionalism from within.

Recommendation 4: Regional organizations should increase their engagements to deal with threats and violations of the constitutional order that originate from within the ruling regime.

Based on a more nuanced understanding of the content and interpretation of the constitutional values and principles enshrined in regional normative frameworks, regional organizations should develop a more refined understanding of what constitutes a serious and structural threat to (or violation of) the constitutional order. Accordingly, regional organizations should become more closely involved in developing normative guidance on what conditions could justify the intervention of a regional organization. While broad legal frameworks are generally in place to allow intervention, the meaning of these conditions should be clarified. This will require taking due account of the complexity of violations of the constitutional order committed by incumbent leaders. In the EU, work in this direction has already begun through the Communication of the European Commission to Strengthen the Rule of Law, by establishing a more explicit framework for what might trigger EU action.

In the OAS, despite its useful gradual approach in establishing a threat or actual breach of the constitutional order in a member state, the framework remains vague. In particular, the meaning of an unconstitutional interruption or alteration of the democratic order needs to be elaborated more substantively. The same applies to the AU. Although violations relating to UCG are fairly well established, article 23(5) of the Governance Charter, which defines the unconstitutional change of power as amendments to the legal framework that contravene the principles of democratic change of government, remains ambiguous. Although an earlier draft of the AU Governance Charter included a reference to the manipulation of term limits, it is not clear whether this is covered in the final version, or whether it includes electoral malpractice through the manipulation of the legal instruments constituting the electoral framework to accede to or stay in power. The conditions for the AU PSC to get involved to ensure the maintenance of the constitutional order are also unclear. It remains uncertain what sort of challenge to the constitutional order would prompt the PSC to assume its responsibilities.

Regional organizations should clarify the conditions under which they will intervene to protect the constitutional order of their member states. This does not have to imply an overly ambitious role for regional organizations. Instead, such involvement should remain restricted, as indicated above, to the most serious cases. However, the spectrum of serious violations of the constitutional order should be broadened to include significant infringements of the constitutional order from within. The development of a framework of what constitutes a violation based on clear standards will also increase the coherence

and predictability of actions undertaken by the regional organization, without overly relying on the ad hoc political will of state-led policy organs, which may be guided by other political agendas or ambitions.

Recommendation 5: Regional organizations should develop clear normative guidance on what constitutes a serious enough threat to (or violation of) the constitutional order of a member state to warrant the intervention of a regional organization. A framework should outline the precise procedural and substantive conditions that may trigger a response from the regional organization.

Enforcement

Closely linked to the establishment of a more nuanced understanding of fundamental threats or violations of the constitutional order is the facilitated enforcement by the respective organs of regional organizations. If more clarity is provided about what type of situation falls under the purview of the triggering mechanisms, the institutions will be able to act in a more timely and effective manner. Regional organizations will be better equipped and informed about when to launch a mechanism or procedure to address situations before they erupt in larger-scale constitutional crises. A trend towards this proactive approach has appeared in the American experience: the OAS General Assembly instructed the secretary general to develop timely, gradual and balanced solutions to address situations in which the democratic order was affected (OAS 2005).

Likewise, a clear example of this trend can be found in the EU with the development of the Framework to Strengthen the Rule of Law, which is triggered by a systematic threat to essential rule of law principles. Similarly, the AU has affirmed that, on the basis of 'early warning indicators, steps should be taken to prepare guidelines for preventive deployment of AU presence before the breakdown of law and order' (AU 2009a). This pre-emptive alert and response approach was included earlier in the establishment of a Continental Early Warning System, which is a mechanism for collecting information on potential conflicts and with a mandate to formulate policy recommendations on the best course of action to address threats to peace and security in Africa (AU 2002a: article 12).

The AU is also developing a Continental Structural Conflict Prevention Framework that assesses a country's structural vulnerability to conflict and identifies programmes to mitigate these vulnerabilities (AU 2015). It is crucial that these mechanisms incorporate a nuanced set of standards and benchmarks to specifically evaluate a constitutional crisis. This approach is of particular importance in dealing with popular uprisings, which increasingly have as a root cause public dissatisfaction with the failure of an incumbent regime to respect important constitutional principles, such as the limitation of powers including presidential term limits or the independence of the judiciary. The relevance of this approach extends equally to the Americas, where the OAS had been faced with similar popular revolts in Ecuador (2005) and Bolivia (2005). From this perspective it is vital that regional organizations pursue a broad and comprehensive approach in 'addressing any potential risks of serious breaching of fundamental values

in a given member state at an early stage and immediately . . . engage in a structured political dialogue with the relevant member state' (European Parliament: 2013). This inclusive approach is also key to building a constructive relationship between the regional organization and a wide variety of stakeholders in order to mobilize support, build trust and avert the misrepresentation of the regional organization's objectives in assisting a country in the delicate exercise of overcoming challenges relating to its constitutional regime.

Recommendation 6: Regional organizations should engage in a broad and comprehensive approach to proactively address potentially serious threats to (or violations of) the fundamental values and principles of the constitutional regime of a member state.

Regional bodies will need to regularly assess the compliance of member states with their respective normative frameworks. An important challenge in these proceedings may arise in relation to the access to the concerned state. This means the question whether the regional organization will have adequate access to relevant information and actors to conduct a proper investigation into any potential or real infringement of the constitutional order. African states have taken a leading role in ongoing assessments of governance by establishing the African Peer Review Mechanism (APRM). The APRM is a mechanism for the mutual assessment of countries' governance structures that may serve as a vehicle to improve democratic and constitutional governance. The APRM even provides for a special review that can be launched when early warning signs suggest an impending political, social or economic crisis in a member country. Such a review can be called for by the APRM Heads of State and Government Implementation Committee (APR Forum) in a spirit of assistance and in solidarity with the government concerned. Although the APRM was created outside the purview of the AU, the Assembly of Heads of State and Government of the AU decided to incorporate it into the structures of the AU (AU 2014d).

Participation in the APRM procedure is voluntary, which to an important extent can undermine its effectiveness. The same restriction might apply to the Council of the EU's proposal in 2014 to organize an annual political dialogue on the rule of law. In the OAS, the involvement and assessment performed by its organs also remains largely voluntary. In cases when the democratic political institutional process or the legitimate exercise of power is threatened, the OAS can only intervene after having obtained prior consent from the affected state. This poses a significant challenge when the elected leaders are the ones responsible for the constitutional crisis. In view of these concerns, states might wish to consider extending an open invitation to the respective organs mandated to perform such assessments, for example by adopting a decision or resolution by the highest policy organs of the regional organization in support of such transparency. This is essential to facilitate and foster an open and constructive dialogue between the regional body and the affected member state, including the different branches of government and other relevant stakeholders. The procedure may benefit from the development of non-exhaustive guidelines to determine the kind of cooperation that can be expected of a member state with the regional organization.

Recommendation 7: Regional organizations should have adequate access to assess the level of compliance of a member state with the constitutional principles and values enshrined in the regional normative framework.

Although the need for the approval of the concerned state in the process of assessing its adherence to shared norms and values confirms the political delicacy of this exercise, the interests of the citizens—not national or even regional power plays—should lie at the heart of the regional organization. However, these assessments must then respect a number of criteria or follow a code of conduct. First, the conditions for regional assessment should include an appreciation of national constitutional complexities and particularities. As the intervention of a regional organization would take place in a setting that is closely associated with notions of sovereignty and national identity, it is crucial that such processes fully respect the national contexts and demonstrate a detailed understanding of local realities. The absence of such procedural guarantees could otherwise seriously impair the legitimacy and effectiveness of the regional engagement.

Second, assurances of objectivity and impartiality should be provided. For instance, parliamentary bodies such as the Pan-African Parliament or the European Parliament could be involved. Among other things this could strengthen the legitimacy of the initiative. But the risk remains that the parliamentary intervention could be perceived as politically biased. While in the OAS a call has been issued to keep such evaluations performed by the political bodies of the organization—Permanent Council and General Assembly—a strong case can be made for leaving the assessment to an independent body within the organization. The ultimate decision-making power, however, would remain with the political body. In this way, the different bodies can complement each other's work. According to this approach, regional parliamentary bodies can assist in the assessment phase. However, the leadership for conducting the assessment would remain with the independent body, allowing it to function uninhibited by pressure from different political bodies and states. The regional parliamentary body can later play a more significant role in decision-making, and this in a more informed way after having been involved in the assessment process. Suggestions have been made in the OAS to establish a special rapporteur or ombudsman to deal with these matters. This mechanism was suggested by the Friends of the Inter-American Democratic Charter, and later endorsed by US Secretary of State Hillary Clinton and the Canadian Government (Santistevan de Noriega 2012).

Similarly, in the AU context there have been suggestions to appoint a special rapporteur who would inform the PSC about progress made in the democratization process (AU 2010c). In Africa, a specific role could also be envisaged for the Panel of the Wise, a body composed of distinguished Africans with a mandate to advise and support the AU in all matters relating to the promotion and maintenance of peace, security and stability in Africa (AU 2002a: article 11). This panel could use its mediation and negotiation skills to assist in the prevention and management of a constitutional crisis, through early warning, fact-finding missions, preliminary mediation and consultative offices.

Third, these assessments should take place in accordance with predetermined procedures, and allow member states to challenge the assessment in an appropriate forum. For example during its constitutional crisis, the Hungarian Government criticized the

absence of such procedures (Hungarian Government 2013: 10). Finally, the impartiality of such a body mandated to evaluate the situation should be emphasized, especially considering the complexity of deciding issues where one party may assert its democratic legitimacy (for example if it is the elected leadership).

Recommendation 8: Regional organizations should organize an objective and impartial evaluation of a member state's compliance with the regional normative framework while duly respecting and taking into account its legal, political and institutional context.

Above all, the organs entrusted with enforcing the normative frameworks on constitutional governance should ensure consistency in their policies and practice. As identified in the analysis of the different regional bodies, the implementation of the normative framework has at times led to incoherent or contradictory practice. This should be avoided at all costs in order to ensure the credibility, legitimacy and predictability of the regional interventions. Consistency in implementing the normative frameworks covers all dimensions of the intervention, including the establishment of a real or potential violation, consistency in diplomatic engagement to address a real or potential breach, and in imposing sanctions and establishing a return to constitutional order.

Consistency in the regional approach will greatly benefit from a clearer definition of the fundamental principles and what constitutes a violation or potential violation of them. A more consistent regional approach would also benefit from a closer monitoring of potential threats to the constitutional order. In the EU, there is a clear demand for consistency in comparing a country's law and practice against the standards laid down in the Copenhagen Declaration before and after accession to the EU using the same assessment framework. The AU has inconsistently applied sanctions, which has allowed perpetrators of coups to run in subsequent elections even though this is expressly prohibited in the normative framework. To this extent it is of great importance 'to respect of the principle of equality between all member states', to reject 'the application of double standards in the treatment of member states' and to ensure that 'similar situations or legal frameworks and provisions should be assessed in the same way' (European Parliament 2013: 28).

Recommendation 9: Regional organizations should ensure consistency in the implementation of their normative frameworks to uphold constitutionalism at the national level and refrain from any biased application of standards.

If a regional organization is to engage in a more proactive approach to detect potential threats or violations that may seriously undermine its fundamental values, it must have the necessary expertise and knowledge to evaluate the actual or potential infringement in order to be better placed to identify the necessary remedies and monitor and assess the level of compliance with these remedies. This will require adequate resources and capacity.

Recommendation 10: Regional organizations should ensure the necessary capacity and resources to monitor, evaluate and support member states' compliance with their regional obligations and commitments.

Regional organizations should coordinate their approach with other actors and organizations when engaging with a particular member state to ensure consistency and foster effectiveness. This should include the close involvement of civil society organizations to assist in monitoring compliance with the regional framework and implementing recommendations. When implementing sanctions, regional organizations can benefit from the cooperation and assistance of other states, sub-regional groupings and the wider international community, including the UN. For example, the AU could more closely cooperate with subregional organizations such as ECOWAS and SADC, while the OAS could collaborate more closely with UNASUR and CELAC to demonstrate a collective commitment to the protection of fundamental values and principles.

Recommendation 11: Regional organizations should cooperate where appropriate with civil society actors, states, subregional groupings and the wider international community to more effectively enforce the normative framework and to demonstrate collective commitment to the respect for (and protection of) fundamental values and principles.

Sanctions

If there is a serious threat or actual violation of the constitutional order, the available sanctions should include a middle ground between diplomatic pressure and suspension. While diplomatic engagement is very important to try to remedy a situation inclusively, and should be maintained throughout the process, it may lack the potency to reach the desired outcomes. Yet suspension may also be counterproductive, as it could sever the relationship between the infringing state and the regional organization, which could additionally lead to polarization within the region and undermine constructive cooperation between different actors. Sanctioning mechanisms should therefore be developed that are graduated and proportionate to the different types of infringement of the constitutional order. Although regional organizations must have some flexibility to respond appropriately to each individual situation, they should develop clear categories of sanctioning mechanisms to be imposed in a graduated and predictable manner (AU 2009a: 10).

Recommendation 12: Regional organizations should develop a comprehensive framework establishing different categories of sanctions that may be gradually applied in accordance with the gravity of the violation or threat to the constitutional order.

All three organizations have made it very clear that any sanctions are directed at the concerned state or members of the offending regime, and not at civilians. Therefore the sanctioned state may not abrogate its responsibilities to the regional organization, including membership fees or obligations related to human rights (OAS 2001: article 22). This can be highlighted as a general good practice. The AU has stipulated in the Lomé Declaration that '[c]areful attention should be exercised to ensure that the ordinary citizens of the concerned country do not suffer disproportionately on account of the enforcement of sanctions'. A similar consideration has been enshrined in the EU framework. Article 7 of the Treaty of Lisbon (2009) provides that '[t]he Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons'.

This is an important principle, because it underlines the commitment and responsibilities of the regional organization towards the citizens of the region, rather than only underscoring the relationship between states and regional organizations. To this effect, regional organizations should duly take into account the consequences of the different sanctions imposed on the state, especially economic sanctions such as the cancellation of trade agreements or access to loans. Regional organizations should attempt to protect civilians as much as possible, and concentrate on the real culprits—the leadership or insurgents. Similarly, breaking diplomatic ties or visa bans should be realistically targeted at the responsible officials rather than the general population.

Recommendation 13: Regional organizations should make sure not to disproportionately harm the civilians of a non-complying member state.

Return to constitutional order

All three regional organizations have only limited guidance on determining a return to constitutional order; the legal frameworks provide few normative conditions. This lack of clarity has in the past led to inconsistencies in validating a return to constitutional order. While all three organizations are committed to the values of democracy, rule of law and human rights, their assessments of a return to constitutional order might have been too narrow on some occasions. The risk remains that a regime may restore its power constitutionally, but fail to exercise it according to constitutional provisions. Therefore, regional organizations might want to consider a more substantial test before declaring that there has been a return to constitutional order—especially since this in effect means endorsing a constitutional regime and conferring a certain legitimacy on it. Often a mere procedural approach risks overlooking the root causes of a constitutional crisis. Therefore, in line with the more nuanced approach to establishing a threat or violation of the constitutional order, regional organizations should more carefully determine whether the essential problems that led to the constitutional crisis have been addressed.

Recommendation 14: Regional organizations, in adopting a more comprehensive approach to assessing a threat or violation of the constitutional order, should consider whether the underlying reasons that led to the threat or violation have been resolved.

Thus regional organizations could put forward specific and targeted recommendations concerning the minimum factors that need to be addressed before they pronounce a return to constitutional order. The EU set a good example in the case of Hungary: it developed a long series of specific steps to take in order to restore constitutional order. The ECJ contributed significantly in this case by providing guidance and remedies for specific infringements. Equally, the EU Framework to Strengthen the Rule of Law provides that the EU Commission may address specific recommendations to the member state concerned. In line with the increased attention to addressing the root causes of conflict, including the manipulation of constitutions and the abuse of human rights, the AU is also taking steps to develop remedial action in a more systematic and holistic way. For example, the Continental Structural Conflict Prevention Framework would include the timely identification of coherent, concrete and realistic measures based on a context-specific analysis to address a state's vulnerabilities, including those related to core constitutional values (AU 2013).¹⁰ Such a structural and systematic approach would lead to a more appropriate response to the challenges associated with determining a return to constitutional order.

Recommendation 15: Regional organizations should develop precise, appropriate and context-specific conditions for establishing a return of constitutional order.

The development of these recommendations and criteria will facilitate the monitoring and evaluation of the processes concerning the return to constitutional order. These processes can then be tied to the gradual sanctioning mechanism: the organization can loosen its sanctions in accordance with the member state's efforts to restore respect for constitutional values. In cases with a more nuanced erosion of the constitutional order, the reversal of such actions, policies or laws can often take longer. Therefore, the regional organization can adjust its remedial approach in accordance with the pace of progress in this area.

Recommendation 16: Regional organizations should develop mechanisms and procedures to gradually remove sanctions in accordance with progress made to restore constitutional order.

¹⁰ See Draft Continental Structural Conflict Prevention Framework (2013) and specifically the principles that are intended to inform the CSCPF preventive actions, activities and programmes.

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This Discussion Paper compares how three regional organizations—the African Union, the European Union and the Organization of American States—protect constitutionalism in their member states. It focuses on the types of measures to protect constitutionalism in cases of fundamental threats to and violations of the constitutional order, rather than on the mechanisms to promote constitutional governance.

It argues that regional organizations should move beyond policies that target only the most blatant violations of the constitutional order, namely unconstitutional changes of government in the form of a classic coup d'état, and increase their focus on more nuanced interruptions of the constitutional order, such as constitutional crises engineered by leaders including the adoption of (un)constitutional measures to undermine the constitutional order or through a gradual process to erode the integrity of a constitutional regime.