

## BERICHT / REPORT

## Assistance to Constitutional Courts in Fragile Contexts: The Case of Mali, 2017–2022

By *Johannes Socher\**

### A. Introduction

The year 2021 witnessed a global “coup pandemic”, with the highest number of successful overthrows of government in the past twenty years.<sup>1</sup> Many of them – in Chad, Guinea, Mali, Sudan – occurred in Sub-Saharan Africa, a region historically prone to coups d’état.<sup>2</sup> In the case of Mali, it was already the second coup in less than a year and the third within ten years following military takeovers in 2012 and 2020. This volatile political environment, combined with insecurity in central Mali and the border areas with Burkina Faso and Niger, has made Mali a highly fragile context for external interventions aimed at promoting the rule of law. According to the most recent available data by the World Justice Project (WJP), Mali’s rule of law situation ranked 114th across 140 countries globally and 22nd across 34 countries in Sub-Saharan Africa.<sup>3</sup> Particularly, although trust in state institutions was relatively high compared with peer countries in the region, trust in Malian courts scored lowest among government institutions in a 2020 WJP country survey.<sup>4</sup>

Over the past decade, international assistance aimed at the Malian judiciary has largely been focussed on criminal justice and the restoration of judicial capacity in northern and

\* Postdoctoral Fellow, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, johannes.socher@up.ac.za. This report is a redacted version of a study commissioned by the Research and Knowledge Transfer Hub for Rule of Law Assistance – RSF Hub, a cooperation between Freie Universität Berlin and the German Federal Foreign Office (Order No. 4700014178). I would like to thank Jens Koschel, Robert Poll and Kathrin Maria Scherr for their valuable feedback and support. All views expressed in this study are solely my own.

- 1 *Kimana Zulueta-Fülscher / Thibaut Noël*, The 2021 Coup Pandemic: Post-Coup Transitions and International Responses, in: International IDEA, Annual Review of Constitution-Building: 2021, Stockholm 2022, p. 74.
- 2 See *Patrick J. McGowan*, African Military Coups D’État, 1956-2001: Frequency, Trends and Distribution, *Journal of Modern African Studies* 41 (2003), p. 339.
- 3 World Justice Project Rule of Law Index, Mali, <https://worldjusticeproject.org/rule-of-law-index/country/2022/Mali> (last accessed on 14 November 2022).
- 4 World Justice Project Rule of Law Index, The Rule of Law in Mali: Key Findings from the Qualified Respondents’ Questionnaires and General Population Poll, Washington DC 2020.

central Mali.<sup>5</sup> By contrast, the German Government's efforts to promote the rule of law in Mali were aimed at constitutional reform through the support of a series of projects implemented by the Max Planck Foundation on International Peace and the Rule of Law (MPF-PR) between 2017 and 2022. This report outlines the political and legal context, analyses the achieved results and questions the sustainability of this intervention against the backdrop of growing concerns that the international community at large might soon withdraw its wider stabilization efforts in Mali.

## B. Constitutional and Political Developments, 1992-2016

Mali, a landlocked country in West Africa formerly under French colonial rule, gained independence in 1960. While its first constitution was largely modelled after the French Constitution, the 1992 Constitution departed in a number of ways, in particular by introducing a catalogue of fundamental rights. It establishes a presidential system with a unicameral legislature and, given the historical experience of military takeovers in 1968 and again in 1991, denounces "any coup d'état or putsch" as a "crime against the Malian people".<sup>6</sup>

During the two decades following the adoption of the 1992 Constitution, Mali was widely viewed as a relatively successful case of democratization after long periods of one-party and military rule.<sup>7</sup> The situation changed fundamentally at the beginning of 2012 when Tuareg rebels backed by Islamist groups initiated an insurgency in the northern region of Mali, thereby triggering the ousting of President Amadou Toumani Touré in a coup d'état over his handling of the crisis.<sup>8</sup> The newly established junta initially suspended the Constitution, but, under pressure from the Economic Community of West African States (ECOWAS), eventually announced to restore it. In August 2013, presidential elections were held and Ibrahim Boubacar Keïta was elected new President of Mali.<sup>9</sup>

Following an official request by the Malian Government in December 2012, French military began operations against the Islamists, joined by the African-led International Support Mission to Mali shortly thereafter. In mid-2013, the mission was replaced by the UN peacekeeping mission MINUSMA which has since been extended annually by United

5 See *Adam Day*, *Rule of Law: Support to Conflict Prevention and Sustaining Peace in Mali*, in: Adam Day / Jessica Caus (eds.), *Rule of Law and Sustaining Peace: Towards More Impactful, Effective Conflict Prevention*, New York 2021, p. 202.

6 *Constitution de la République du Mali*, 25 February 1992, Décret No. 92-073/P-CTSP, <http://www.courconstitutionnelle.ml/wp-content/uploads/2018/12/ConstitutionDuMali.pdf> (last accessed on 23 November 2022).

7 For an assessment of international support until that point see *Nicolas van de Walle*, *Foreign Aid in Dangerous Places: The Donors and Mali's Democracy*, in: Danielle Resnick / Nicolas van de Walle (eds.), *Democratic Trajectories in Africa: Unravelling the Impact of Foreign Aid*, Oxford 2013, p. 87.

8 International Crisis Group, *Mali: Avoiding Escalation*, Africa Report No. 189, 18 July 2012.

9 BBC News, *Ibrahim Boubacar Keita wins Mali Presidential Election*, 13 August 2013, <https://www.bbc.com/news/world-africa-23677124> (last accessed on 7 March 2023).

Nations Security Council resolutions.<sup>10</sup> A peace agreement was signed in 2015 between the rebels and the Malian Government; implementation of the agreement has however stalled,<sup>11</sup> and fighting was ongoing at the time of writing (January 2023).

### C. The Constitutional Court of Mali

Like in other francophone West African countries,<sup>12</sup> constitutional review in Mali follows the concentration model, i.e., through a specialized institution separate from the regular judiciary.<sup>13</sup> Constitutional review is located at the Constitutional Court of Mali, which was largely modelled after continental European constitutional courts.<sup>14</sup>

#### I. Organization and Composition

The organization and composition of the Court is outlined in articles 91–92 of the 1992 Constitution and is further detailed in an Organic Law.<sup>15</sup> The Court consists of nine members – called Councilors – holding mandates of seven years that can be renewed once. The functions of Councilors are incompatible with any public or administrative functions or any private or professional activities. Councilors may resign by letter addressed to the President of the Court. If a Councilor resigns (as well as in cases of permanent incapacity or death), he or she shall be replaced within thirty days. The functions of the Councilors may only be terminated before the expiration of the mandate by a majority vote of two-thirds of its members.

In addition to the Councilors, the Court employs a number of administrative and technical staff as well as advisers. The President of the Court is assisted by an Administrator with a team of support staff. In addition, the General Secretariat, headed by a Secretary General, directs the administrative services of the Court. The Registry, headed by a Chief Registrar, is responsible for maintaining all registry services.

- 10 The United Nations Multidimensional Integrated Stabilization Mission in Mali was established by UN Security Council Resolution 2100 (2013) and has since been extended annually by one year.
- 11 See The Carter Center, Report of the Independent Observer, Observations on the Implementation of the Agreement on Peace and Reconciliation in Mali, Resulting from the Algiers Process, June 2022.
- 12 For an overview of the different models in the region see *Markus Böckenförde / Babacar Kante / Yuhniwo Ngenge / H. Kwasi Prempeh*, *Judicial Review Systems in West Africa*, Stockholm 2016.
- 13 For detailed accounts on constitutional review in Mali see *Abdoulaye Diarra*, *Démocratie et droit constitutionnel dans les pays francophones d'Afrique noire: Le cas du Mali depuis 1960*, Paris 2010, pp. 267–367; *Lisa Heemann*, *Judicial Review and Democratization in Francophone West Africa: The Case of Mali*, *Verfassung und Recht in Übersee* 51 (2018), p. 166.
- 14 See *Alexander Stroh / Charlotte Heyl*, *Institutional Diffusion, Strategic Insurance, and the Creation of West African Constitutional Courts*, *Comparative Politics* 47 (2015), p. 169.
- 15 Loi no. 97-010 of 11 February 1997, last modified by Loi no. 02-011 of 5 March 2002, <http://www.courconstitutionnelle.ml/loi-organique/> (last accessed on 23 November 2022).

## II. Competences

Broadly speaking, one can differentiate between four different areas in which West African constitutional review bodies are granted adjudicative powers: constitutional review; electoral disputes; referendums; and conflict of jurisdiction between public authorities.<sup>16</sup> This is also the case for the Constitutional Court of Mali, for which articles 86–90 of the Constitution set out the competences of the court.<sup>17</sup> In particular, the Court is the key institution monitoring the democratic decision-making in Mali. According to article 87 of the Constitution, it ‘shall resolve, in the case of contested validity of an election, by any elector, any candidate, any political party or delegate of the Government’. To date, the Court has overseen all parliamentary and presidential elections since its creation in 1992.<sup>18</sup> Although the Constitution includes a long list of rights and freedoms and provides in its article 85 that the Constitutional Court “guarantees the fundamental rights of the human person and the public freedoms”, it does not provide for a direct or indirect access procedure to enforce them.

## III. International Cooperation and Assistance

The Constitutional Court of Mali cooperates with and receives assistance from a number of international institutions and organisations. It is a member of the Association of Francophone Constitutional Courts, a network of fifty constitutional review bodies led by the French Constitutional Council.<sup>19</sup> The Court furthermore cooperates with the Council of Europe’s Venice Commission, including by contributing to the Commission’s CODICES database.<sup>20</sup> The Constitutional Court furthermore receives technical assistance from MINUSMA. Following a first project which had focused on providing office equipment and training advisers on information technology, two further projects have been launched since: one on computer processing of electoral data,<sup>21</sup> and one aimed at building capacities on the management of electoral disputes, human rights and institutional reforms. Directed at the Court’s advisers and technical staff, a first workshop on human rights and referendum was organized in March 2022 with national and international experts from the region.

16 See *Böckenförde / Kante / Ngenge / Prempeh*, note 12, p. 103.

17 See *Diarra*, note 13, pp. 296–367; *Heemann*, note 13, pp. 171–175.

18 For an assessment of the relevant caselaw between 1992 and 2013 see *Heemann*, note 13, p. 181.

19 See *Association des cours constitutionnelles francophone*, Cour constitutionnelle du Mali, <https://acf-francophonie.org/cour/mali/> (last accessed on 19 November 2022).

20 See Venice Commission, Venice Commission: Cooperation with Constitutional Courts, 2017, [https://www.venice.coe.int/files/Publications/JU\\_info\\_Brochure\\_eng.pdf](https://www.venice.coe.int/files/Publications/JU_info_Brochure_eng.pdf) (last accessed on 19 November 2022).

21 See MINUSMA, Traitement informatique des données électorales : la Cour Constitutionnelle du Mali se met à jour, 7 April 2022, <https://minusma.unmissions.org/traitement-informatique-des-donnees-electorales-%C3%A9es-%C3%A9lectorales-%C2%A0-la-cour-constitutionnelle-du-mali-se-met-%C3%A0-jour> (last accessed on 14 November 2022).

Discussed topics included independence of constitutional court judges, management of electoral disputes, and the right to participate in the referendum.<sup>22</sup>

#### D. The First Project

MFPRR is a non-profit organization based in Heidelberg, Germany, from where it “provides assistance to the reconstruction or restructuring of the internal organization to states which have experienced radical change in relation to their constitutional law”.<sup>23</sup> MPFPR has been active in Mali since 2016. The first project that was specifically targeted at the Constitutional Court started in January 2017 and lasted until December 2019.

##### I. Constitutional and Political Developments, 2017–2019

During the implementation period, the Constitutional Court issued a number of important decisions. In particular, it was involved in the 2018 presidential elections in line with its mandate in electoral matters and ultimately confirmed the re-election of Ibrahim Boubacar Keïta as President of Mali in August 2018.<sup>24</sup> In addition, parliamentary elections were scheduled for 2018. Initially, the Constitutional Court expressly confirmed that elections would need to take place after the National Assembly’s mandate has ended.<sup>25</sup> A second Opinion overturned however this earlier finding and invoked force majeure without specifying the conditions triggering the situation.<sup>26</sup> The Opinion was widely criticized and damaged the Court’s reputation as an independent and impartial institution.<sup>27</sup> This notwithstanding, the Court later ruled that the law extending the mandate of the National Assembly until June 2019 had been constitutional, and in another decision confirmed the constitution-

22 See MINUSMA, La Cour Constitutionnel forme son personnel aux droits de l’homme et aux réformes institutionnelles, 5 April 2022, <https://minusma.unmissions.org/la-cour-constitutionnel-forme-son-personnel-aux-droits-de-l%E2%80%99homme-et-aux-r%C3%A9formes-institutionnelles> (last accessed on 14 November 2022).

23 MPFPR, About Us, <https://www.mpfpr.de/foundation> (last accessed on 10 January 2023).

24 Arrêt N°2018-04/CC, 20 August 2018, Recueil des arrêts, avis et autres décisions de la Cour Constitutionnelle du Mali (henceforth: RAADCCM), vol. 7 (2018-2019), p. 90.

25 Avis No. 2018-01/CCM, 12 September 2018, RAADCCM, vol. 7 (2018-2019), p. 119.

26 Avis No. 2018-02/CCM, 12 October 2018, RAADCCM, vol. 7 (2018-2019), p. 123.

27 See e.g., the open letter dated 20 June 2019 by the “Trop c’est Trop Movement” to the Constitutional Court of Mali, Malinet, Prolongation du mandat des députés : «C’est une violation flagrante de la Constitution du 25 février 1992», estime le mouvement ‘Trop C’est Trop’, <https://www.maliweb.net/contributions/prolongation-du-mandat-des-deputes-cest-une-violation-flagrante-de-la-constitution-du-25-fevrier-1992-estime-le-mouvement-trop-cest-trop-2824518.html> (last accessed on 16 November 2022).

ality of the mandate's further extension until May 2020.<sup>28</sup> Again, the Court was heavily criticized.<sup>29</sup>

## II. Project Activities

The project component focusing on the strengthening of the capacities of the Constitutional Court had two subcomponents: a series of eight capacity-building workshops for the Councilors, and the preparation and publication of the Court's caselaw.

### 1. Capacity-Building Workshops

In total, eight capacity-building workshops were conducted, targeted at the nine Councilors, the Secretary General and the Administrator of the Court. Workshops usually took a comparative perspective and were conducted by research staff of MPFPR supported by local consultants with regional expertise, whose presentations were complemented by inputs of the Councilors themselves to share their national perspectives. The third and fifth workshop deviated from this format and involved the participation of two German Constitutional Court Judges.

The first workshop focused on "Principles of Constitutional Interpretation: Comparative Perspectives". Topics included not only methods and techniques as well as sources of interpretation, but also a training on the CODICES database.<sup>30</sup> A second workshop focussed on "Indirect Individual Access to Constitutional Justice", a topic chosen against the backdrop of the expected introduction of such a procedure in the Malian constitutional system in the future.<sup>31</sup>

The third workshop was the first in a series of events dedicated to fundamental rights. Due to the participation of the German Constitutional Court Judges, a more interactive format was chosen, with the third day being entirely dedicated to the dialogue between the Councilors and their German counterparts, who made presentations on the principle of equality and freedom of expression and the right to strike under German law.<sup>32</sup> Three further workshops on fundamental rights were conducted.<sup>33</sup>

28 Arrêt No. 2018-06/CC, 5 December 2018, RAADCCM, vol. 7 (2018-2019), p. 114; Arrêt No. 2019-03/CC, 28 June 2019, RAADCCM, vol. 7 (2018-2019), p. 139.

29 See, e.g., *Brahima Fomba*, «Loi organique» de prorogation de mandat des députés: La démocratie malienne prise en otage!, aBamako, 8 July 2019.

30 MPFPR, First Workshop for the Constitutional Court of the Republic of Mali, undated activity report.

31 MPFPR, Second Workshop for the Constitutional Court of the Republic of Mali, undated activity report.

32 MPFPR, Third Workshop for the Constitutional Court of the Republic of Mali, undated activity report.

33 See MPFPR, Support to the Constitutional Reform Process in Mali and Capacity Building for the Constitutional Court of Mali, Final Report, June 2020, pp. 27–31.

The fifth workshop on “Constitutional Courts and Electoral Litigation” took place against the backdrop of the upcoming presidential elections and the expectation that the Constitutional Court may receive a high number of complaints in the course of the process. It was the second time that two (different) German Judges participated and made presentations – a seemingly ill-fitted occasion considering that the role of the German Constitutional Court in electoral disputes is rather limited. This notwithstanding, most participants praised the presence of the German Judges in their evaluation forms, although more comparative law components were simultaneously suggested.<sup>34</sup>

A last workshop covered “Constitutional Courts’ Judgment Drafting and Communication Strategies”. Presentations looked at the practice of a selection of civil law and common law countries, with examples from the German Constitutional Court as well as the supreme courts of Kenya, the United Kingdom, the United States and Zimbabwe, respectively.<sup>35</sup>

## 2. Preparation and Publication of the Court’s Caselaw

The second project pillar targeted at the Constitutional Court of Mali consisted in the preparation and publication of the court’s caselaw. So far, publication of decisions of the Court had been incomplete and spread over different publication organs. The compilation of a complete caselaw aimed at providing a useful resource for the Court but also for research purposes. The preparation had furthermore the objective to empower the Court to fully cooperate with the Venice Commission by making its judgements available in the CODICES database.<sup>36</sup> In addition, an online version of the compilation was prepared to make the decisions available to a wider audience, and, thereby, to assist in increasing the transparency and legitimacy of the Court.<sup>37</sup> All decisions were published together with a technical sheet modelled after the Venice Commission, with metadata, keywords and a summary.<sup>38</sup>

Volumes 1–6 were handed over in April 2019 and volume 7 in December 2019 and were simultaneously made available online on the Court’s website.<sup>39</sup> Hardcopies were distributed to the Court, the Office of the President, the National Assembly, the National Institute for the Training of the Judiciary, the Faculty of Public Law of the University of Legal and Political Sciences in Bamako, Malian public law practitioners, and MINUSMA.

34 See MPFPR, Fifth Workshop for the Constitutional Court of the Republic of Mali, undated activity report.

35 MPFPR, Final Report 2020, note 33, pp. 28-29.

36 *Ibid.*, p. 31.

37 *Ibid.*, p. 33.

38 *Ibid.*, p. 31.

39 Cour Constitutionnelle du Mali, Recueils /Études, <http://www.courconstitutionnelle.ml/etudes/> (last accessed on 9 November 2022).

Copies were so popular that they ran out of print; a second edition was therefore printed and distributed in December 2019.<sup>40</sup>

### *III. Evaluation Findings*

After the project had ended in December 2019, the German FFO commissioned an external evaluation of the project. Implemented by a Swiss-based consultancy firm between January and December 2020, the evaluation used a mixed methods approach and followed international evaluation standards aimed at gaining insights into the relevance, effectiveness, efficiency, impact, sustainability and connectivity of these interventions.<sup>41</sup> In February 2021, a final report was presented to the German FFO.<sup>42</sup>

The project's relevance was evaluated as very high. Objectives and project design responded to the identified needs and priorities. In particular, the participatory approach used for the selection of workshop topics through consultations with the Court ensured that learning contents were consistently considered of high importance and interest for the judges, the evaluation found.<sup>43</sup>

The findings related to the project's effectiveness and impact were less straight-forward. For instance, the evaluation found that although the project consistently reached all nine Councilors with the workshops, it was not targeted at other Court staff. Moreover, while the Councilors had self-assessed that their knowledge had increased significantly through their participation in the workshops, it was less clear whether this increased knowledge also translated into "better" court decisions.<sup>44</sup> Generally, the evaluation found that the more the activities were oriented at the concrete national context, the more effective they were perceived. Conversely, workshops with a more theoretical approach were considered less effective. The preparation, publication and dissemination of the Court's caselaw, on the other hand, had a high impact according to the evaluation and was found to be an important contribution to the transparency and accessibility of the Court's decision-making.<sup>45</sup>

However: With the replacement of all nine Councilors in mid-2020 (see following section), many of the achieved results were frustrated. As the evaluation highlighted, apart from the caselaw compilation, all project activities were aimed at the individual capacities of the Councilors rather than at building organisational structures and institutional knowl-

40 MPFPR, Final Report 2020, note 33, pp. 33, 40.

41 See OECD/DAC Network on Development Evaluation, Better Criteria for Better Evaluation, Revised Evaluation Criteria, Definitions and Principles for Use, Paris 2019.

42 BSS Volkswirtschaftliche Beratung, Evaluierung Instrument Fortbildung von Verfassungsrichtern und -richtern, Final Report, Basel 2021.

43 Ibid, p. 22.

44 Ibid, p. 27.

45 Ibid, p. 28.



edge, thereby rendering any further considerations on the project's sustainability largely theoretical.<sup>46</sup>

### E. The Interim Period

The year 2020 marked a turbulent period for Mali's political and constitutional development. In April, parliamentary elections were finally held after having been postponed twice earlier. The 2020 elections were marred by violence and, in combination with the ongoing armed conflict and the Government's controversial handling of the COVID-19 pandemic, ultimately led to protests calling for President Keïta's resignation.<sup>47</sup>

In line with its mandate, the Constitutional Court was involved in the monitoring of the elections and had to decide over any disputes that arose in the process. As such, the Court published the final results of the first round and had to decide also over a total of 79 complaints in the second round of the elections. With its decision of 30 April 2020, the Court rectified the results for thirty-one seats, thereby increasing the representation of "Rally for Mali", the party aligned to President Keïta, by ten seats in the National Assembly.<sup>48</sup> The decision was perceived as controversial and untransparent as it did not specify the evidence it relied on and did not provide any explanation on the methodology it used to rectify the results, thereby possibly violating the principle of due process.<sup>49</sup> Irrespective of its actual quality, the decision in any case further damaged the Court's reputation in the eyes of the Malian public after the controversial role it had already played in the extension of the National Assembly's mandate in 2018.<sup>50</sup>

In July 2020, pressed by a plan put forward by a mediation team from ECOWAS, President Keïta announced the "de facto dissolution" of the Court. Notwithstanding that such a measure is not envisaged in the Constitution – and therefore arguably unconstitutional – all nine Councilors were replaced by presidential decree. The decision could however not resolve the socio-political crisis in the country, and only shortly after the new Councilors had been sworn in a group of military officers arrested Keïta and other high-level government officials and established the National Committee for the Salvation of the People (CNSP), a military body headed by Colonel Assimi Goïta. While the public and opposition groups

46 Ibid, p. 52.

47 Jason Burke, Mali's Protesters Turn to Populist Imam to End Cycle of Corruption, *The Guardian*, 18 July 2020.

48 Arrêt No. 2020-04/CC-EL, 30 April 2020, RAADCCM, vol. 8 (2020-2021), p. 153.

49 Cf. African Commission on Human & Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003, Principle 2 i.

50 See e.g., Mahamadou Konaté, Arrêt de la CC du 30 avril 2020, truffé de non-sens: La Cour dicte sa conclusion sans exposer son raisonnement, aBamako, 9 May 2020.

welcomed the coup, the international community widely condemned the military takeover and asked for the restoration of constitutional order.<sup>51</sup>

In October 2020, a Transitional Charter was enacted which had been prepared by an expert committee appointed by the CNSP.<sup>52</sup> It envisaged an 18-month transition period and established three main institutions: a President of the Transition as head of state and a Vice President in charge of security and defence; a Transitional Government headed by a Prime Minister and appointed by the President of the Transition; and a National Transition Council acting as the transitional legislature. The President and Vice President of the Transition as well as the members of the Transitional Government are excluded from running in the first presidential and parliamentary elections concluding the transitional period. The Transitional Charter complements the 1992 Constitution and takes precedence in case of contradictions between the two. In the event of dispute over interpretation, the Constitutional Court shall decide (Article 25 of the Transitional Charter). All other provisions relating to the Court remained unchanged. Bah Ndaw, a retired colonel and former defence minister, became President and Goïta, the leader of the CNSP, was appointed Vice President of the Transition.

## F. The Second Project

After the 2020 coup, the German Government increased its efforts to strengthen the rule of law in Mali. Apart from funding a new project to strengthen the capacities of the judicial system implemented by the United Nations Institute for Training and Research (UNITAR), the German FFO decided to also resume its constitutional assistance in Mali through a follow-up project with MPFPR, which started in January 2021 and lasted until December 2022.

### I. *Constitutional and Political Developments, 2021–2022*

On 24 May 2021, in what has been described as a “coup within a coup”,<sup>53</sup> President of the Transition Ndaw, his prime minister, and the minister of defence were arrested by the Malian Army led by CNSP leader Goïta; the next day, Goïta announced that the three politicians were stripped of their powers.<sup>54</sup> Only a few days later, the Constitutional Court

51 France 24, African Union Suspends Mali’s Membership as International Community Condemns Coup, 19 August 2020, <https://www.france24.com/en/20200819-mali-coup-leaders-face-international-condemnation-au-suspends-membership> (last accessed on 7 March 2023).

52 Charte de la Transition, 1 October 2020, Décret No. 2020-0072/PT-RM, Journal Officiel de la République du Mali, Spécial No. 17, 61 (2020), <https://constitutionnet.org/sites/default/files/2020-10/mali-jo-2020-17-sp.pdf> (last accessed on 23 November 2022).

53 See *Jean-Hervé Jezquel*, Mali, a Coup within a Coup, International Crisis Group, 27 May 2021.

54 See *Emmanuel Akinwotu*, Mali: Leader of 2020 Coup Takes Power After President’s Arrest, *The Guardian*, 25 May 2021.

ruled that Vice President of the Transition Goïta should fill the vacancy left by Ndaw's resignation.<sup>55</sup> With this decision, the Court neither considered article 121 of the Constitution prohibiting coups nor took it account of the circumstances surrounding Ndaw's resignation. Moreover, the Court's interpretation that the vacancy of the President of the Transition was to be filled by its Vice President is questionable, as the Transitional Charter is silent on the matter and the Constitution provides that in case of a vacancy acknowledged by the Court, the functions of the President of the Republic are entrusted to the President of the National Assembly (and not the Vice President).<sup>56</sup>

In June 2022, a Constitutional Commission was established and a new timeline for the transition was announced: a constitutional referendum was scheduled for March 2023 and general elections for February 2024.<sup>57</sup> In addition, a new electoral law was adopted by the National Transition Council. The agreement on the new timeline and the adoption of the new election law were widely seen as important milestones for Mali's political transition.<sup>58</sup> Following a series of consultations with a broad range of stakeholders, including political parties, civil society organizations and signatory movements of the 2015 peace agreement, the Constitutional Commission presented a first draft constitution to Goïta in October 2022.<sup>59</sup> The draft strengthens the power of the President and introduces a bicameral legislature. It furthermore establishes a Court of Audit, while the High Court and the High Council of Territories would be abolished. Mali would continue to remain a secular, unitary state with no regional autonomy. Importantly, the draft furthermore foresees the introduction of an indirect access procedure before the Constitutional Court in cases where a litigant argues that a legislative provision infringes their rights and freedoms guaranteed by the Constitution of Mali.

55 Arrêt No. 2021-02/CC/Vacance, 28 May 2021, RAADCCM, vol. 8 (2020-2021), p. 248.

56 A detailed legal assessment of the decision is provided in *MPFPR*, Support the Constitutional Court of Mali, Responses to Questionnaire, Heidelberg 2022, p. 3–4.

57 *David Baché*, Mali: le calendrier électoral proposé par les autorités passe son premier test, RFI, 29 June 2022.

58 See, e.g., United Nations Security Council, Report of the Secretary-General: Situation in Mali, 3 October 2022, UN Doc. S/2022/731, para. 5.

59 Avant-Projet de Constitution de la République du Mali, 12 October 2022, Décret No. 92-0731 P-CTSP, [https://koulouba.ml/wp-content/uploads/2022/10/Avant-Projet-Constitution\\_octobre\\_2022.pdf](https://koulouba.ml/wp-content/uploads/2022/10/Avant-Projet-Constitution_octobre_2022.pdf) (last accessed on 20 December 2022). A second draft was presented in February 2023, without announcing whether it would be put to a referendum in March 2023 as originally planned, see Africanews, Mali: Transition President Receives “Final” Draft of Constitution, 28 February 2023, <https://www.africanews.com/2023/02/28/mali-junta-leader-receives-final-draft-of-constitution> (last accessed on 10 March 2023).

## II. Project Activities

The activities targeted at the Constitutional Court of Mali in the second project were essentially a continuation of the efforts of the first project and consisted of a series of capacity-building workshops and the updating of the caselaw compilation.

### 1. Capacity-Building Workshops

In total, four capacity-building workshops were conducted over the course of the entire implementation period. Apart from the Councilors, the Secretary General and the Administrator, the Chief Registrar was now also included among the participants. Unlike in the previous project, German Constitutional Court Judges did not participate. A second difference was a clear focus on the Court's role in electoral disputes. The decision was made against the backdrop of the upcoming general elections which had been scheduled for February 2022 (but were then however postponed until February 2024, see above). The focus on elections was also intended to help restoring the Court's reputation following the controversial handling of the 2020 elections.<sup>60</sup>

The first workshop on "Electoral Law and electoral Litigation" covered international and regional standards applicable to electoral processes, the jurisdiction, attribution and powers of constitutional courts in electoral matters, the handling of irregularities and the invalidation of electoral results by constitutional courts.<sup>61</sup> It was followed by a second workshop on "Methodology and Legal Techniques in Electoral Litigation". Compared to the previous project, the approach was more tailored to the regional context and sessions focussed on aspects specific to the French legal tradition with regard to judgement drafting, legal reasoning in the context of electoral litigation and other electoral law matters such as the rectification of electoral results. Comparative insights were drawn from decisions of the constitutional courts of Benin, Gabon and Niger.<sup>62</sup> The second workshop furthermore included a separate session dedicated to communication strategies of apex courts in their dealings with the public and the media. Again, concrete examples from the region were used, in particular the communication strategy of the Supreme Court of Kenya in the aftermath of its decision to annul the 2017 presidential elections.<sup>63</sup>

The other two workshops were concerned with the (correctly) anticipated introduction of an indirect access procedure. The third event covered "Enforcement and Defence of Fundamental Rights before Constitutional Courts through Indirect Individual Petitions",<sup>64</sup>

60 MPFPR, Support to the Transitional Process in Mali, Project Proposal, 9 November 2020, p. 8.

61 MPFPR, Support to the Transitional Process in Mali, Interim Report, 27 July 2021.

62 MPFPR, Support to the Transitional Process in Mali, Interim Report, 29 March 2022.

63 Ibid, p. 6.

64 Ibid, p. 8–9.

and a last workshop on “Fundamental Rights in Comparative Perspective” concluded the workshop series.<sup>65</sup>

## 2. Updating of the Court’s Caselaw

With the aim to bring the Constitutional Court’s caselaw compilation up to date, a second project component consisted in the preparation of two additional volumes covering all decisions issued by the Court since the first project had ended. Volume 8, covering the years 2020 and 2021, was handed over in May 2022, and volume 9, covering the year 2022, was planned to be handed over in December 2022.

### *III. Adjustments and Implementation of Evaluation Recommendations*

Although large parts of the external evaluation of the first MPFPR project were concerned with the project management and monitoring from the perspective of the German FFO, the final report also made some recommendations addressed to MPFPR. The following section analyses to what extent these recommendations were implemented in the follow-up project. In addition, some significant changes compared to the first project are briefly discussed.

#### 1. Workshop Topics and Format

A first change in the project design was a focus in the workshops on two thematic areas: election litigation and indirect access procedure. In both cases, the decision was based on a clearly formulated needs assessment. The downside of this thematic narrowing was, however, that other previously selected topics were not part of the workshop series anymore. A second change consisted in the workshop format. Many sessions took a more regional, context-specific perspective and were less theoretical compared to the workshop series in the first project. Moreover, there were less presentations of “German” case studies, which may also be due to the discontinued involvement of the German Constitutional Court.

#### 2. Integration of Other Actors

Arguably the most significant recommendation resulting from the evaluation was the suggestion to integrate other actors within and beyond the Constitutional Court in the project design.<sup>66</sup> While the project only slightly expanded its capacity building workshops by including also the Registrar among the participants and refrained from providing workshops to advisors and technical staff of the Court, it now also included a lecture series at the Faculty of Public Law of the University of Bamako as well as a workshop series with the Supreme Court of Mali. The latter activities complemented the workshops with the

65 MPFPR, Support to the Transitional Process in Mali, Interim Report, 27 July 2022, p. 7.

66 BSS Volkswirtschaftliche Beratung, note 42, p. 59.

Constitutional Court dedicated to the indirect access procedure and were added to the second project in anticipation that the Supreme Court would operate as a filter in such a procedure before a case reaches the Constitutional Court. In addition, a roundtable event with judges from both courts was planned for December 2022.<sup>67</sup> Other actors were not included in the project, even though MPFPR itself had found earlier that litigants and their counsels often lack the knowledge and understanding of the law of evidence and procedure before the Constitutional Court, thereby creating the risk that – justified – dismissals of unsubstantiated claims may contribute to a perception of a politicized court.<sup>68</sup>

### 3. Improved Coordination

Another recommendation resulting from the evaluation was the improvement of coordination between different actors working on the ground.<sup>69</sup> As outlined above, MINUSMA simultaneously implemented a capacity-building project aimed at the advisers and technical staff of the Constitutional Court with a specific focus on the Court's role in elections. While it appears from the project documentation that MPFPR wasn't aware of MINUSMA's activities to support of the Constitutional Court, MPFPR stated on request that their local consultant in Bamako was informed and kept the project team in Heidelberg updated on the topics covered in the MINUSMA workshops in order to avoid duplication of efforts.<sup>70</sup>

## G. Conclusions

In November 2022, Germany decided to withdraw its troops from MINUSMA by May 2024,<sup>71</sup> thereby following a wider trend of countries deciding to pull out their troops from Mali.<sup>72</sup> Already earlier, the German FFO had decided to also discontinue the support for the Constitutional Court of Mali in its current form despite the expressed interest by both the Court and MPFPR to continue the cooperation.

In retrospect, at least three key lessons can be learned from the German Government's support to the Constitutional Court of Mali from 2017 to 2022. First, the intervention serves as an example for the importance of integrating feedback loops in the project design of rule

67 MPFPR, July 2022 Interim Report, note 65, p. 7.

68 MPFPR, Legal Assessment of the Decision of the Constitutional Court of Mali of April 30, 2020, July 2020, p. 4, 6–7.

69 BSS Volkswirtschaftliche Beratung, note 42, p. 61.

70 MPFPR, Responses to Questionnaire, note 56, p. 5.

71 Bundesministerium der Verteidigung, Bundesregierung hat entschieden: Bundeswehr zieht bis Mai 2024 aus Mali ab, 23 November 2022, <https://www.bmvg.de/de/aktuelles/bundeswehr-zieht-bis-mai-2024-aus-mali-ab-5530382> (last accessed on 1 December 2022).

72 On the possible impact of these decisions for the peacekeeping mission see *Jean-Hervé Jezquel / Franklin Nossiter / Ibrahim Maiga*, MINUSMA at a Crossroads, International Crisis Group, 1 December 2022.

of law interventions in fragile contexts. As has been argued elsewhere,<sup>73</sup> constant reflection on the (continued) appropriateness of the selected instruments is essential, in particular in fragile situations where the politico-social context can change almost overnight. Arguably, the extraordinary and possibly unconstitutional “de facto dissolution” of the Constitutional Court in 2020 could not have been anticipated. However, after the Councilors *had been* replaced and the external evaluation even pointed to possible ways to mitigate that risk in the future, the project design was not adjusted accordingly by, e.g., extending the workshop programme to the Court’s administrative and technical staff. While another extraordinary replacement of the Councilors in the future might seem unlikely, past experience shows that it can happen if such a measure is considered political expedient in the context of the overall transition process.

Second, the Constitutional Court of Mali’s controversial role in key political events such as the 2020 elections and the 2021 “coup within a coup” raises the fundamental question whether and to what extent external actors can actually stay “neutral” when supporting constitutional courts in fragile contexts. According to its mission statement, MPFPR “provides advice to and builds legal capacities in its partner countries as a politically neutral and unbiased actor”.<sup>74</sup> But is that even possible when supporting constitutional courts? Constitutional review bodies are not mere technical institutions where legal texts are interpreted – they (and by extension arguably also their supporters) are political actors themselves.<sup>75</sup> To be clear: This is not to suggest that the Constitutional Court of Mali followed a political agenda when it confirmed the re-election of Keïta as President of Mali or when it ruled that Goïta should fill the vacancy left by President of the Transition Ndaw’s resignation. But experience in other countries shows that constitutional courts can be politicized, and empowerment of these institutions does therefore not necessarily lead to more constitutionalism. Constitutional assistance committed to promoting democratic values and international norms<sup>76</sup> should therefore articulate “red lines” which, if crossed, lead to discontinuation of cooperation.

Third, the termination of the cooperation of MPFPR with the Constitutional Court of Mali due to lack of funding for the foreseeable future highlights the importance of exit strategies. While some achieved results will be sustainable even without continuous

73 See *Johannes Socher / Gregor Walter-Drop*, Reflexiver Instrumentengebrauch, in: Matthias Kötter / Tilmann J. Röder / Jens Deppe / Julie Trappe / Tilmann Schneider (eds.), *Rechtsstaatsförderung. Handbuch für Forschung und Praxis*, Stuttgart 2022, p. 318.

74 MPFPR, The Max Planck Foundation, <https://www.mpfpr.de/foundation> (last accessed on 9 January 2023).

75 See, e.g., for the context of the South Africa *Heinz Klug*, Finding the Constitutional Court’s Place in South Africa’s Democracy: The Interaction of Principle and Institutional Pragmatism in the Court’s Decision Making, *Constitutional Court Review* 3 (2010), p. 1.

76 Cf. United Nations, Guidance Note of the Secretary-General on United Nations Constitutional Assistance, New York 2020, p. 2: “The UN is committed to providing constitutional assistance in a manner that respects national sovereignty, promotes democratic values and international norms...”.

external support, others might subside over time if not followed-up on by other actors. The preparation, publication and dissemination of the caselaw collection for instance certainly constitutes a significant and lasting achievement that stands on its own feet. Moreover, through the uploading of the compilation on the Court's website the entire caselaw is now accessible to lawyers, researchers, civil society and the wider public at no cost. Other achieved results such as the strengthened capacities of the Court through the workshops in the second project might however turn out to be less sustainable and eventually subside if no replacement activities will be provided in the future by other actors such as MINUSMA. The upcoming constitutional referendum and elections will in any case show whether the Court will be able to regain trust through more conclusive and transparent reasoning and improved communication and to what extent it has been – and by then still continues to be – prepared to act as a fair arbiter in the transition process of Mali.



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