Judicial Review and Democratization in Francophone West Africa: The Case of Mali

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Abstract: The Constitution of the Republic of Mali from 1992 introduced a centralized constitutional review by a specialized court for the first time in the country's history. Following the example of the French constitutional council, the Constitutional Court of Mali is competent to review laws only *a priori*, i.e. before promulgation. Furthermore, access to the court is restricted to few state institutions. Despite these limitations, the Court has played a role in the consolidation of democracy in Mali up to 2012. Two decisions stand out as exceptional in this respect: One is a decision from 1996 regarding a new election code. Here the Court pronounced itself on a number of issues relevant to democracy, especially the right of independent candidates to stand for elections. In another landmark decision in 2001, the Court stopped a constitutional reform on formal grounds and reserved at the same time the right to review constitutional amendments in substance. Even though the Constitutional Court has in parts actively shaped the democratization process over the past 20 years, it played only a marginal role in the crisis that has shaken the country since the year 2012: A coup d'état and an ongoing conflict in Northern Mali. The Peace Accord, signed in Algiers in 2015, awaits implementation. In August 2017 a constitutional reform was finally called off after protests from the political opposition and civil society.

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A. Historical and political context

I. Historical and political influences

Up until the 2012 coup d'état and the international military intervention in the North, Mali was considered an exemplary democracy in the region.[2] This reputation was based on the country's political stability since the adoption of a new democratic constitution in 1992, including regular and successful popular elections and a peaceful change of government in

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2 *Charlotte Heyl/ Julia Leininger*, Mali - hinter den Kulissen der ehemaligen Musterdemokratie, GIGA Focus 10 (2012).

2002. A relapse into the time of military dictatorships that had shaped Mali's history since the country's independence seemed highly unlikely.[3] However, Northern Mali has long been prone to crises. The conflict has a long history.

Mali gained independence from France in 1960. The First Republic was a Socialist one-party state under the rule of President Modibo Keïta. In 1968, a coup d'état under the leadership of General Moussa Traoré initiated a period of military rule. In 1974, President Traoré held a constitutional referendum that, however, did not result in substantial changes to the existing one-party regime. In the subsequently established Second Republic, the military remained the most powerful actor.[4] Following violent protests in 1990 and 1991, the military under the leadership of Lieutenant-Colonel Amadou Toumani Touré initiated another coup d'état and removed Moussa Traoré from office. The transitional government under Touré prepared the establishment of a multi-party democracy. Mali adopted a constitution that was modeled after the French example, featuring a semi-presidential system and an independent constitutional court.[5] The new constitution came into effect in February 1992,[6] and the founding elections of the Third Republic were held in spring of 1992.

Alpha Oumar Konaré became the first president of the Third Republic. His first term of office saw the signing of a peace agreement with the Tuareg in Northern Mali in 1996. As stipulated by the constitution, he did not run for a third term of office. In 2002, the charismatic Amadou Toumani Touré, transitional president of the years 1991-1992, was elected president. In the parliamentary elections, none of the parties gained a clear majority. Touré, who had run for office as an independent candidate, based his presidential rule on a cross-party consensus and on cooperation with various other societal groups. His cabinet included a number of independent experts and civil society actors. This mode of consensual politics was especially pronounced during Touré's first term in office, and gradually reduced the significance of parliament as a locus of political debate.[7] The 2007 presidential elections confirmed Touré's presidential role.

When Tuareg rebels occupied several towns in Northern Mali in early 2012, the Malian army was unable to prevent this turn of events. This led to rising discontent within the military. In March 2012, the military staged a coup d'état. In response to international pressure, especially on the part of the Economic Community of West African States (ECOWAS),

3 *Leonardo Alfonso Villalón/ Abdourahmane Idrissa*, The tribulations of a successful transition. Institutional dynamics and elite rivalry in Mali, in: Leonardo Alfonso Villalón/ Peter Vondoepp (eds.), The fate of Africa's democratic experiments. Elites and institutions, Bloomington 2005.

4 *Herbert Baumann*, Die Verfassungen der frankophonen und lusophonen Staaten des subsaharischen Afrikas, Berlin 1997.

5 *Klaus Grütjen*, Die Verfassung der Dritten Republik Mali vom 25. Februar 1992 - fortentwickelnde Verfassunggebung nach französischem Vorbild, Jahrbuch des öffentlichen Rechts der Gegenwart, Neue Folge Band 45 (1997).

6 Constitution of the Republic of Mali of 25 February 1992 (Décret N° 92-073/P-CTSP of 25 February 1992).

7 *Sten Hagberg/ Gabriella Körling*, Socio-political turmoil in Mali: The public debate following the coup d'état on 22 March 2012, Africa Spectrum 47 (2012), p. 114.

Mali reinstated constitutional order in April 2012. At the same time, Tuareg rebels and allied Islamic groups celebrated victories in Northern Mali and announced an independent state in April. A French military intervention in January 2013 pushed back the rebels. Later, the UN Stabilization Mission in Mali (MINUSMA) took over. The international community exerted pressure to quickly hold elections in order to bring the political crisis to an end. Finally, in August 2013, Ibrahim Boubacar Keïta was elected president. He pushed for constitutional reform in June 2017 but finally cancelled the scheduled referendum after protests. The reform proposal was part of the peace process detailed below.

II. The influence of international actors and models

Mali has close relations with the former colonial power France. When the French military succeeded in pushing back the Tuareg-Islamists in Northern Mali in 2013, many Malians welcomed the French intervention. The 2012 crisis also highlighted the important influence of the ECOWAS on the course of political events. Later, the African Union and the United Nations became more involved.

The different constitutions that Mali adopted since its independence were largely modeled after the French example. Even though this means that the structure of the Malian state is still shaped by French influences, the constitution of 1992 entailed important innovations and stronger regional harmonization. In 1992, a catalogue of fundamental rights was integrated into the Malian constitution, and the judiciary became known as an independent third power, instead of being considered a mere "authority" as is the case in France. The explicit prohibition of coup d'états (Art. 12 of the Malian constitution, in the following: MConst) is linked to the country's and the wider West African region's experiences with military coups. In addition to this, the president's accountability regarding matters of personal wealth constitutes an important difference between the Malian and the French constitution. Similar regulations regarding obligatory statements of accounts have also been integrated into the constitutions of other countries in the region.[8] The 1991 process of adopting the constitution by means of a national assembly was modeled after the example of Benin.[9] However, one particular aspect of the constitution of the Third Republic, the introduction of so-called '*spaces of democratic reflection*' has no precedent in the region. It stipulates that Malian citizens are to be involved in matters that directly affect them through participation in annual consultative forums.

Judicial review took a different turn in Mali than in France. At the outset, the power of judicial review was based at the state court. From 1965 onwards, it was situated at the supreme court in form of a constitutional review chamber. The constitutional review chamber of the supreme court checked all proposed laws with regard to whether or not they com-

8 *Albert Bourgi*, L'évolution du constitutionnalisme en Afrique: du formalisme à l'effectivité, Revue française de droit constitutionnel 52 (2002).

9 *Abdoulaye Diarra*, Démocratie et droit constitutionnel dans les pays francophones d'Afrique noire. Le cas du Mali depuis 1960, Paris 2010.

plied with the constitution, and was authorized to engage in review of the constitutionality of laws retrospectively. Its competency was not limited to the control and demarcation of the parliament's and the government's legislative powers. Initially, only the executive had access to judicial review. This limited form of judicial review did not in practice constitute an effective control mechanism: The constitutional chamber never reached the prescribed full membership of nine judges. The two judges who did make up the constitutional review chamber approved laws presented to them without scrutiny.[10] In formal and practical terms, judicial review was not given in the one-party state that existed up until 1991.[11] It was only the constitution of 1992 that introduced an autonomous constitutional court with more competences and broader right to standing.

The competencies of judicial review in Mali follow the by now discontinued French practice of an *a priori* norms control that only accords the right to appeal to the court to a small number of institutions and focuses on the control of presidential elections, parliamentary elections and referenda. However, the independence of the judicial review mechanism was strengthened: In contrast to France, the president of the court is not nominated by the state president, but rather elected among the court's different members. The nominated councilors are mainly lawyers; former state presidents do not automatically become members of the constitutional court.

Following a failed constitutional reform in 2001 under president Konaré, president Touré commissioned the constitutional lawyer Daba Diawara to formulate proposals for a constitutional reform.[12] Contrary to many constitutional reforms across the region, the proposals for change in Mali were not aimed at one-sidedly strengthening the power of the executive: Instead, they aimed to codify the temporal limitation of the president's term of office as an eternal guarantee, and to include the rights of the opposition in the constitution to mention a few.[13] The referendum for deciding on these constitutional amendments that had been planned for the year 2012 did not take place. Another constitutional reform project finally failed in 2017. In parts, the constitutional reform was meant to give effect to the Peace Accord of 2015 but the president's proposal also included major changes like the introduction of a senate as second chamber. The opposition criticized an increase in presidential powers. Although the constitutional court demanded only minor changes and approved of

10 *Daba Diawara*, Le contrôle de constitutionnalité des lois au Mali, in: Gérard Conac (ed.), Les cours suprêmes en Afrique: La jurisprudence: droit constitutionnel, droit social, droit international, droit financier, 1989.

11 *Diarra*, note 9, p. 142.

12 Rapport "Mission de réflexion sur la consolidation de la démocratie au Mali, président du Comité d'experts", available at http://www.bamanet.net/index.php/actualite/essor/2032-a-voir-le-rapport-daba-diawara-sur-bamanet.html (last accessed on 15 September 2013).

13 See the commentary by *Issaka K. Souaré/ Paul-Simon Handy*, Mali: A Model for Constitutional Reform in Africa, available at http://www.polity.org.za/article/mali-a-model-for-constitutional-reform-in-africa-2010-05-10#comment (last accessed on 15 September 2013) and by *Stéphane Bolle*, La Constitution du Mali bientôt francisée?, available at http://www.la-constitution-en-afrique.org/article-25568198.html (last accessed on 15 September 2013).

the reform, the opposition was successful in its protests. The president cancelled the referendum on the constitution in the name of the unity of the country in August 2017.[14]

B. Institutional foundations

I. Model

Since the year 1992, Mali has had a specialized judicial review mechanism resembling the Continental European model, with an autonomous court beyond the successive stages of appeal in the ordinary judiciary. The autonomy of constitutional review is clearly set out in the text of the constitution: In the 1992 constitution, those ten regulations pertaining to the constitutional court are subsumed under a separate heading ('Titre IX: De la Cour Constitutionelle'). Art. 25 MConst lists the constitutional court as the republic's fifth institution, following the president of the republic, the government, the parliament, and the highest court (supreme court) that constitutes the top tier of the judiciary. According to Art. 82 MConst the supreme judicial council under the leadership of the president is tasked with the administration of judges' career progression, and with ensuring the independence of the judiciary.

II. Composition of the court

Art. 91 MConst sets out the composition of the constitutional court. The court is composed of nine judges known as councilors. They each have a mandate of seven years that can be renewed once. Three of the judges are nominated by the state president and another three are nominated by the president of the national assembly, in each case two of the nominees have to be lawyers. The supreme judicial council, led by the president, nominates an additional three judges. The councilors elect the president of the constitutional court amongst themselves (Art. 92 MConst; Art. 20 Organic Law, in the following: LO).

There is no age limit for the position of judge at the constitutional court, but it is required that candidates have a minimum of 15 years of work experience as lawyers, or that they have honorably served the state. Apart from relevant work experience, the moral and professional integrity of candidates constitutes an additional criterion during the selection process.[15] The constitution guarantees the overall independence of the judiciary (Art. 81 MConst), yet it sets out specific requirements that the members of the constitutional court have to meet. Holding the position of a councilor cannot be combined with another public office or with political activities (Art. 93 MConst; Art. 3 LO). The members of the constitu-

14 http://afrique.latribune.fr/politique/leadership/2017-08-19/mali-ibk-renonce-finalement-a-son-projet-de-revision-constitutionnelle-747446.html (last accessed on 3 October 2017).

15 Art. 1 LO (Loi N° 97-010 du 11 février 1997 portant loi organique déterminant les règles d'organisation et de fonctionnement de la Cour constitutionnelle ainsi que la procédure suivie devant elle modifiée par la loi n° 011 du 05 mars 2002).

tional court have to pledge an oath.[16] According to Art. 8 LO they are explicitly obliged to refrain from anything that might damage the independence and dignity of their public office. These regulations concerning the judges' "inner" independence take up more room in the constitution and the LO than those relating to the court's "external" independence. Accordingly, the councilors themselves carry the primary responsibility for upholding and safeguarding the institution's reputation and dignity.

In everyday practice, all nine members of the constitutional court are nominated once every seven years, irrespective of the duration of the individual judges' mandates. When the term of office of many of those judges who had been members of the constitutional court since its inception in 1994 ran out in 2008, all seats were newly assigned.[17] Those among the councilors who had subsequently been nominated only remained in office until the original mandate of the office came to an end.

The appointments to the constitutional court have so far not led to any political controversies in Mali, and have been carried out according to the law. The composition of the court outlasted the crisis following the 2012 coup d'état.[18] In 2015, new councilors were nominated fully in line with the constitution. Even though the judges are nominated by political actors, three key aspects safeguard the court's comparatively large degree of independence: The nominations are carried out by three different institutions, the constitution requires the nomination of lawyers, and the influential position of president of the court is filled through an internal election among the members, rather than being externally imposed.

C. Competences

Art. 85 MConst summarizes the mandate of the constitutional court. The constitutional court examines whether laws adhere to the constitution and guarantees fundamental rights and freedoms. It further monitors whether the actions of state organs and public authorities are in line with the constitution. The individual competencies are set out in Art. 86 MConst.

16 Art. 93 MConst.

17 http://www.malikounda.com/Actualites/Cour-constitutionnelleLes-neuf-nouveaux-sages-sont-la.html (last accessed on 30 August 2013).

18 Appointed by President Amadou Toumani Touré in 2008: Dao Rokiatou Coulibaly, Boubacar Tawaty (later succeeded by Madame Fatoumata Diarra), Amadi Tamba Camara; appointed by the president of the national assembly, Dioncounda Traoré 2008: Makan Keremakan Dembélé, Fatoumata Diall, Mohamed Sidda Dicko (succeeded by Amadou Keïta); appointed by the judicial council (*Conseil supérieur de la magistrature)*: Mme Manassa Danioko, Ousmane Traoré, Mallé Diakité. An overview of the composition of the court (as of 2008) is available at http://www.cc.insti.ml/contenu_page.aspx?pa=39 (last accessed on 4 August 2018).

I. Constitutional review

Reviewing the constitutionality of laws constitutes one of the key tasks of the Malian constitutional court. The constitutional court carries out this control prior to promulgation of the laws, i.e., in the time span that lies between their adoption by parliament and their announcement in the official journal of laws. Both a concrete and a retroactive abstract norm control are impossible in Mali.

The procedure differs according to the type of law under review: It is mandatory that organic laws are submitted to the constitutional court prior to their announcement by the president of parliament (Art. 88 section 1 MConst; Art. 45 section 1 LO). The same applies to the internal rules of procedure of the parliament, the High Council of Communities (the regional chamber), and the Economic, Social and Cultural Council, that each have to be submitted for review by the respective president prior to their coming into force.[19] All other laws can be submitted for review by the state president, the prime minister, or the president of parliament, as well as collectively by a group that makes up ten percent of all parliamentarians. In addition, the president of the High Council of Communities or one tenth of all members of its council, as well as the president of the supreme court, have the option of consulting the constitutional court prior to the promulgation, and to submit laws to constitutional review (Art. 88 section 2 MConst; Art. 45 section 2 LO).

There is a special provision concerning the extent of judicial review of laws that, according to Art. 88 section 2, have been voluntarily submitted for examination: The constitutional court explicitly does not limit its review to those sections of the law that the applicants object to, but extends its examination to the constitutional legality of the entire law.[20] This is different from the French model.[21]

According to Art. 90 MConst, as well as Art. 48 LO, it is mandatory that international agreements are submitted for judicial review. However, it is questionable to what extent this rule is adhered to in practice. Those decisions accessible to the public do not include any cases in which an applicant submitted an international agreement to the constitutional court for examination.[22] It remains unclear whether the obligation to submit such agreements for judicial review is habitually neglected, or whether according decisions are not published.

19 Art. 47 LO.

20 Decision N° 96-003 of 25 October 1996: "Considérant que la Cour Constitutionnelle saisie conformément aux termes de l'article 88 alinéa 2 de la Constitution et l'article 31 alinéa 1 de la loi organique n° 92-O28 du 5 Octobre 1992 en vue d'examiner certains articles contestés de la loi se reconnaît le droit d'examiner l'ensemble des articles de la loi attaquée; que c'est la loi dans toutes ses dispositions qui est soumise à l'examen de la Cour Constitutionnelle.".

21 *Pierre-Eric Spitz*, La Cour constitutionnelle du Mali et le droit électoral, Cahiers du Conseil constitutionnel 2 (1997).

22 The court officially lists 0 proceedings on international agreements in an overview for ACCPUF.

The constitutional court confirms the constitutional legality of organic laws, other laws and international agreements within one month of the original submission for review. In urgent cases, this time period is reduced to eight days (Art. 89, 90 MConst).[23]

II. Monitoring the democratic decision-making process

The constitutional court constitutes the key institution for monitoring the process of democratic decision-making.[24] In the organic law, the regulations pertaining to the control of presidential elections and parliamentary elections are listed before those pertaining to norms control, and take up more space (Art. 31 – 45 LO). The constitutional court exercises control over the orderly proceedings of presidential elections, parliamentary elections, and referenda (Art. 86 MConst). It announces the respective electoral results and, if necessary, decides on the postponement of (presidential) elections (Art. 33 MConst).

Prior to the elections, the constitutional court confirms and announces the list of candidates (Art. 149 Code electoral 2006 for presidential elections; Art. 160 Code electoral for parliamentary elections). Within the next 48 hours, the president of the national election commission (*Commission Electorale Nationale Indépendente – CENI*), the political parties, and all candidates can contest the list of candidates before the constitutional court (Art. 31 section 2 LO). If this occurs, the constitutional court comes to an immediate decision regarding the contested candidacy (Art. 33 MConst; Art. 31 section 2 LO and Art. 67 and 150 Code electoral for presidential elections). Objections to the overall candidatures can only be raised by candidates, political parties, or representatives of administrative districts, and are decided before the start of election campaigns (Art. 31 sections 4 and 5 LO).

After the elections, the constitutional court examines the orderly casting of votes and checks the results on the basis of both electoral protocols compiled by the election offices, and reports submitted by independent observers commissioned by the court.[25] It announces the final results (Art. 155 Code electoral). The election proceedings and the results can be contested before the court by each candidate and each political party.[26] Moreover, the implementation of the elections can also be contested by members of the electoral board. They can point out irregularities in the casting of votes in the electoral protocol of their respective electoral office (Art. 33 MConst).

23 LO does not provide for any time spans in Art. 45 – 50.

24 Art. 31 LO : “Tout le contentieux relatif à l’élection du président de la République et des députés à l’Assemblée nationale relève de la compétence de la Cour constitutionnelle.”.

25 *Diarra*, note 9, p. 333.

26 Art. 32 (new) LO: “La Cour constitutionnelle durant les cinq (5) jours qui suivent la date du scrutin peut être saisie de toute contestation sur l’élection du président de la République ou des Députés. Dans les quarante huit heures qui suivent la proclamation des résultats provisoires des premier et deuxième tours de l’élection du président de la République ou des députés, tout candidat, tout parti politique peut contester la validité de l’élection d’un candidat devant la Cour constitutionnelle.”; *Diarra*, note 9, p. 335.

In case irregularities have occurred, the constitutional court can annul a candidate's election, correct the result, and, if applicable, declare that a different candidate has won the election (Art. 40 LO, Art. 163 Code electoral).

The constitutional court monitors the orderly execution of referenda and declares the results. It has to respond to the government's formal enquiry regarding the organization of the referendum (Art. 26 LO). In case of a referendum, all registered voters, political parties, and representations of administrative districts are entitled to lodge complaints (Art. 28 LO).

III. Conflicts over the attribution of competences between organs of the state

The constitutional court monitors whether governmental bodies and public authorities act in accordance with the constitution (Art. 85 section 2 MConst). In line with Art. 86 of the 1992 constitution, the constitutional court also regulates the demarcation of competencies between different governmental bodies. However, the organic law does not provide any detailed guidance in case of conflict between different governmental bodies.

Irrespective of this, the constitutional court has adjudicated in cases of conflict between different governmental bodies, and has accepted applications from the president of parliament as well from individual members of parliament.[27] In an additional decision from the year 2001, the constitutional court declared that the demarcation of competencies lies within its scope of responsibility as a matter of principle. However, the application failed because the unions were not entitled to lodge applications. Therefore, only the governmental bodies affected by conflicts over competencies are entitled to initiate court proceedings on disputes amongst themselves.[28]

Apart from this, the constitutional court also decides on the legal character of norms. This constitutes a special case of the demarcation of competencies between parliament and government. Mirroring a typical feature of the French legal system, Art. 70 MConst sets out the ultimate catalogue of the parliament's legislative competencies. In all other fields of law, the government is entitled to set out legal provisions by means of regulations (Art. 73 MConst). In case of doubt, the prime minister or the president of parliament can call upon

27 Decision N° 06-173 of 15 September 2006: "Considérant qu'aucune disposition constitutionnelle ou légale ne détermine expressément les personnes habilitées à saisir la cour constitutionnelle aux fins de statuer en matière de régulation du fonctionnement des institutions et de l'activité des Pouvoirs Publics; que ce vide juridique de procédure ne saurait bloquer le fonctionnement des Institutions de la République; qu'ainsi par arrêt n° 00- 120 du 27 juillet 2000 la Cour Constitutionnelle a déclaré recevable la requête du président de l'Assemblée nationale.".

28 Decision N° 01-0123 of 30 March 2001: "Considérant qu'en cas de conflit d'attribution entre les institutions de l'Etat la saine de la cour Constitutionnelle ne peut et ne doit se faire que par les Institutions concernées"; the court ruled a similar complaint admissable in another decision: Decision N° 02-132 of 6 April 2002 the court declared itself competent to review the internal regulations of the regional assembly (based on Art. 88 section 2 MConst*)*.

the constitutional court to decide on the legal character of regulations, and thereby on the parliament's or the government's legislative competency.[29]

IV. Constitutional amendments

The role of the constitutional court in procedures concerning constitutional amendments is limited. According to Art. 118 section 2 MConst, constitutional amendments have to be decided upon in a referendum. Given that Art. 41 MConst stipulates that the constitutional court has to issue a report on the objective of the referendum, it is by definition involved in the reform plans. In a widely discussed decision, the constitutional court used its right to appeal according to Art. 88 section 2 in order to carry out a substantive examination of a constitutional amendment, and to declare it constitutional under Art. 118 MConst. The constitutional court thus considers itself in principle entitled to adjudicate the constitutional nature of constitutional amendments.[30]

V. Other competences

The constitutional court's other competencies are listed in various sections of the 1992 constitution: In response to an application by the president of parliament or the prime minister, the constitutional court shall if necessary, declare the prevention of the state president (Art. 36 MConst; Art. 54 LO). Further, the constitutional court issues comments on the objectives voted upon in referenda (Art. 41 MConst), and it is consulted (alongside other governmental bodies) with regard to the special powers accorded to the state president during a state of emergency (Art. 50 MConst; Art. 55 LO).

According to Art. 85 MConst, the constitutional court guarantees fundamental rights and freedoms. However, the constitution does not provide for any procedure dedicated to exercising this guarantee. As most other constitutional bodies in the region – and different from the Benin example – the Malian constitutional court has not tried to develop its own procedures. It seems to have stayed in the French tradition of mostly controlling the legislative.

D. Scope of judicial review, binding force, and implementation

The constitutional court has so far not issued any explicit statements with regard to the legal tests it applies. Diarra assumes that it is based on the constitutional block: The constitution including its preamble, the Universal Declaration of Human Rights, and the Banjul Charta. According to Diarra, the organic laws are also part of this bloc.[31] In the case of

29 Art. 73 MConst and Art. 51, 52 LO.

30 See *Diarra*, note 9; *Karim Dosso*, Les pratiques constitutionnelles dans les pays d'Afrique noire francophone : cohérences et incohérences, Revue française de droit constitutionnel 90 (2009).

31 *Diarra*, note 9, p. 311.

elections, the extended regularity block applies, i.e., the norms of electoral law are included.[32]

The decisions of the constitutional court are final. There are no possibilities of appeal. The constitutional court's decisions bind all public authorities, the administration, and the courts, as well as all natural and legal persons (Art. 94 MConst).

An application for judicial review has suspending effect: It suspends the declaration of the respective law. An unconstitutional regulation cannot be declared or applied (Art. 89 sections 3 and 4 MConst). If a law is partially unconstitutional, it can come into effect without those sections considered unconstitutional. Alternatively, the state president can resubmit the law to parliament (Art. 46 LO). International agreements that are judged unconstitutional cannot be ratified (Art. 90 section 4 MConst, Art. 49 LO).

In its 2006 evaluation of the association of francophone constitutional courts (*Association des Cours Constitutionelles ayant en Partage l'Usage du Français* (ACCPUF)), the constitutional court came to a positive assessment of the implementation of its decisions.[33] The constitutional court also comes to a positive assessment of the implementation of its decisions regarding the rules of procedure of state organs. Indeed, no law that has been contested by the constitutional court has ever come into force. In some cases, parliament engages in several rounds of corrections until the respective law is in line with the constitution.[34]

E. Judicial practice / case law between 1992 and 2013

I. Number of decisions related to the respective areas of competency

The constitutional court has fulfilled its tasks without interruption since it first became active in 1995. However, the full array of its decisions is not available in form of a continuous compendium or complete collection. Altogether, the court has issued an approximate 203 decisions between the years 1994 and 2012.[35] This includes applications that were rejected as inadmissible.

32 *Diarra*, note 9, p. 318.

33 "Depuis l'installation de la Cour, aucune autorité de l'exécutif (president de la République, Premier minister) ne s'est immiscée dans la prise de ses decisions. De plus, les autorités ont mis à execution les decisions rendues par la Cour en matière de contrôle de constitutionnalité, en matière éléctorale et référendaire", in Bulletin N° 7 L'indépendance des juridictions (Association des Cours Constitutionnelles ayant en Partage l'Usage du Français, 2006), available at http://www.accpuf.org/publications (last accessed on 15 September 2013).

34 Access au juge constitutionnel, Rapport de la Cour Constitutionnelle du Mali 2000, available at http://www.accpuf.org/mali/cour-constitutionnelle (last accessed on 15 September 2013).

35 On the webpage of the Constitutional Court of Mali (http://www.cc.insti.ml/) 131 decisions (from the years 1996-2009 and one from 2013) are available. In 2009, the secretary of the court has compiled an overview of all decisions since 1994. Accordingly, the court has rendered 189 decisions and casted 8 advisory opionions up until 2009. Since then there have been another 13 decisions

Apart from electoral conflicts, decisions on the constitutional nature of laws make up the largest share of the overall body of decisions issued by the constitutional court. With regard to these, one has to differentiate between the obligatory review of organic laws and the optional review of other laws. Up to and including the year 2011, the constitutional court issued approximately 35 decisions in response to obligatory admissions, i.e., with regard to the examination of organic laws or procedural rules of state organs.[36] Between 1994 and 2011, it issued approximately 10 further decisions under the optional constitutional review of other laws.[37] At least six of the constitutional court's decisions explicitly pertain to the constitutional nature of the activities of state organs, and to the demarcation of competencies. The by far largest share of decisions relates to elections: According to an official overview, 141 decisions were issued until 2011. In addition to this, the constitutional court had by 2011 issued eight official commentaries, at least two of which referred to constitutional reforms. In 2012, five further commentaries were issued. In the context of the judicial review of a law in 2001, the court also decided on a constitutional amendment.

II. Role of the court in the context of elections and political conflicts

There are equal intervals between presidential and parliamentary elections in Mali, so that both elections take place in the same year in short succession. The four electoral years that the Third Republic has seen to date (1997, 2002, 2007, and 2012/2013) constitute challenges for the country and for the constitutional court. Shortcomings in electoral law as well as in the institutional design and the practical organization of elections have led to tensions during all presidential and parliamentary elections that have so far taken place in the Third Republic.[38] Attempts at reform have so far been unsuccessful.

officially recorded. There is no official overview for 2012 but at least one decision and 5 advisory opinions are available.

36 Based on overview of the secretary of the court: *Greffe de la Cour Constitutionnelle*: "Statistique des décisions rendues par la cour constitutionnelle du Mali de l'année de la création de l'institution 1992 au 31 décembre 2008"; "Statistique des décisions rendues par la cour constitutionnelle du Mali au cours de l'année 2009"; "Etat des décisions rendues par la cour constitutionnelle du Mali au cours de l'année 2010"; "Etat des décisions rendues par la cour constitutionnelle du Mali au cours de l'année 2011".

37 Decision N° 09-001 of 2 February 2009; decision N° 06-173 of 15 September 2006. In 2000, the court rendered a first decision on the demarcation between legislative powers of the executive and the legislative (based on Art. 85 section 2 MConst); in 2012 the court decided on the regular functioning of state institutions (prevention of the president). Possibly also decision N° 01-126 of 2 Oktober 2001 on a former minister and decision N° 08-189 of 28 November 2008 ruling on the right of standing of political parties.

38 *Villalón/ Idrissa*, note 3; *Diarra*, note 9, p. 356.

1. Decision CC-EL No 97-047 of 25 April 1997

The constitutional court for the first time oversaw elections in 1997. Even prior to the actual elections, the court played a central role as an important level of appeal: It received 30 complaints by candidates and parties before election day. A large share of these complaints was rejected as inadmissible, yet the court interfered in the electoral campaign in a regulatory manner. In its decision CC-EL Nº 97-039 of 11 April 1997, it ruled in favor of an independent candidate who had been refused access to the media by the state media supervision. In another decision, decision CC-EL Nº 97-040 of 11 April 1997, the Court reviewed a complaint regarding the length of broadcasting time granted to each candidate, and ultimately rejected the appeal as inadmissible.

In response to the chaos that characterized the first parliamentary elections after the founding elections of the Third Republic, the constitutional court acted with great resolve. In view of wide-spread irregularities on the day of the elections, it decided on 25 April 1997 to annul the parliamentary elections that had taken place two weeks before.[39] In this tense situation, the constitutional court decided on its own course of action: It examined the more than 80 complaints that had been lodged, and on the basis of these examinations concluded that there was no evidence of fraud. It ultimately annulled the elections because of wide-spread irregularities yet stopped short of confirming the accusations of intentional fraud that had been raised by the opposition.[40]

The parties in opposition reacted to this decision by calling for a boycott of the upcoming presidential elections. Due to this, the office holder President Konaré ran against only one other candidate and won. The disappointed opposition parties continued to call into question that the conditions for free and fair elections were given, and therefore also boycotted the newly scheduled parliamentary elections in July/August 1997. The governing party won 128 out of 147 seats; as a consequence of the boycott, the opposition was hardly represented in parliament during the ensuing electoral term 1997-2002.[41] The constitutional court annulled parts of the electoral results, yet confirmed the overall electoral victory of the governing party. This did not constitute a desirable outcome. However, the constitutional court had proven its independence during the 1997 elections.[42]

2. Decision No 02-133/EP of 6 April 2002

Prior to the presidential election 2002, the constitutional court took an unusually active stance in its decision Nº 02-133/EP of 6 April 2002. Despite the fact that the admissibility

39 Decision CC-EL N° 97-046 of 25 April 1997.

40 *Stefanie Hanke*, Systemwechsel in Mali. Bedingungen und Perspektiven der Demokratisierung eines neopatrimonialen Systems, Hamburg 2001; *Villalón/ Idrissa*, note 3; *Diarra*, note 9.

41 *Virginie Baudais/ Chauzal Grégory*, Les partis politiques et l' "indépendance partisane" d'Amadou Toumani Touré, Politique africaine 104 (2006).

42 *Diarra*, note 9, p. 357-358.

conditions were not met, the constitutional court accepted to review the complaint regarding the candidacy of Amadou Toumani Touré, arguing that it was "in the national interest" to decide this question. In the following, the constitutional court examined and confirmed Touré's candidacy, because in line with existing legislation he had left the army six months prior to announcing his candidacy. This decision was uncontested in substantive terms, yet it indicated the constitutional court's interest in playing an active role.[43] This constituted one of the reasons for outspoken public criticism of the constitutional court in 2002, to which the Court ultimately reacted by issuing a press statement on its own behalf.

Touré won the presidential elections in May 2002. The following parliamentary elections of July 2002 did not result in a clear winner. The constitutional court again annulled part of the results, yet confirmed the overall outcome of the election.[44] In comparison to the deeply contested 1997 elections, the elections in 2002 constituted a step forward: They brought about the first peaceful change in government of the Third Republic.[45] The constitutional court's partial annulment of the electoral results indicates that neither the shortcomings in the organization of the election nor the weakness of electoral institutions had been remedied. However, the constitutional court's role as an important supervisory authority and appeal board at all stages of the electoral process, i.e., from the announcement of candidates running for office to the official publication of the results, had been strengthened.

3. Decision No 07-175 of 12 May 2007

With the elections of 2007, Mali lived up to the standards of a democracy: In spite of initial protests, the defeated opposition ultimately accepted the results. As had been the case with previous elections, the opposition contested the presidential elections that took place in April 2007. However, the constitutional court confirmed the outcome on 12 May 2007 and ruled the complaints to be without grounds. As in previous years, the court corrected the final outcome on the basis of an independent examination it had carried out.[46] Despite the comparatively positive atmosphere and the substantial reduction in partial results that had to be corrected, it was obvious that problems in electoral law and in the organization of elections persisted. Due to this, the opposition parties again announced a boycott of the parliamentary elections to be held in July 2007.[47] Thanks to the mediation of religious authorities (the Islamic Council and the churches), a solution was ultimately found, and the parliamentary elections took place as planned.[48]

43 *Stéphane Bolle*, Les juridictions constitutionnelles africaines et les crises électorales, 2009.

44 Decision N° 02-144/CC-EL of 9 August 2002; *Pierre Boilley*, Présidentielles maliennes: l'enracinement démocratique?, Politique africaine 86 (2002); *Baudais/ Grégory*, note 41.

45 *Boilley*, note 44, p. 181.

46 Decision N° 07-175 of 12 Mai 2007.

47 *Virginie Baudais, Enrico Sborgi*, The presidential and parliamentary elections in Mali, April and July 2007, Electoral Studies 27 (2008).

48 Decision N° 07-179 of 10 August 2007.

Overall, the constitutional court has established itself as an important supervisory authority and appeal board for elections. However, the fact that the voter turnout has since 1997 remained constantly low – around 30% – indicates that the voters remain skeptical.[49]

4. Decision No 12-001 of 10 April 2012

The fourth presidential and parliamentary elections of the Third Republic were scheduled for the year 2012. Having completed his second term of office, President Touré was not allowed to run for office again. The presidential elections were to be held at the same time as a referendum on the planned constitutional reform. However, in March 2012, shortly before the planned elections, the military came to power through a coup d'état and suspended the constitution. It was only in response to international pressure that Mali reverted to constitutional order on 6 April 2012. On 8 April 2012, President Touré officially resigned in order to clear the way for a transitional president. And only then did the constitutional court become active: In its decision N° 12-001 of 10 April 2012, it confirmed the resignation and the prevention of the state president. It further granted the transitional government a period of 40 days for organizing presidential elections.[50]

The year 2012 can be considered an important indicator for understanding the role of judicial review in the consolidation of Malian democracy. The 2012 crisis did not constitute a traditional political conflict, in the sense that it went far beyond any conflict that a constitutional court can resolve within the boundaries of the constitutional order. However, it at the same time showed the constitutional court's possibilities as well as its will to play an active role in times of crisis. The initial suspension of the constitution that was later partially retracted, followed by repeated breaches of the constitutional order, opened up a number of possible options to the constitutional court that had to choose between insisting on strict adherence to the constitution and adapting to the changed circumstances. Following the coup d'état and the stepping down of President Touré in 2012, the constitutional court on the one hand officially recognized the transitional government, yet on the other hand stipulated a strict time limit for holding new elections (decision N° 12-001 of 10 April 2012). This initial positioning was followed by a number of non-binding advisory opinions that extended the term of office of the transitional president (advisory opinion N° 12-003 of 31 May 2012) and the regional chamber (advisory opinion N° 12-005 of 25 June 2012), as well as the time period for holding new parliamentary elections (advisory opinion N° 12-004 of 8 June 2012).

Once the initially stipulated 40 days had passed, the constitutional court issued a statement as requested by the prime minister (advisory opinion N° 12-003 of 31 May 2012) that extended the mandate of the transitional government until the election of a new president. It accepted that due to "exceptional circumstances" and "higher powers" the election had not

49 See http://africanelections.tripod.com/ (last accessed on 15 September 2013).

50 Decision N° 12-001 of 10 April 2012.

been held within 40 days as originally planned.[51] In this instance, the constitutional court did not engage with questions of judicial review, but instead referred to a state of exception and to "higher powers" as reasons for extending the transition period.[52]

In its advisory opinion N° 12-004 of 8 June 2012, the constitutional court formulated its own stance regarding the election of a new parliamentary president. The parliament had declared its president Dioncounda Traoré to be prevented because it considered the office of state president during the transitional period that Traoré had taken up in April 2012 to be incompatible with the office of parliamentary president. The members of parliament requested the constitutional court to issue an advisory opinion regarding the election of a new parliamentary president. The constitutional court held that while both offices were mutually incompatible, the law did not contain any clear grounds of prevention. The deputy parliamentary president was therefore to continue carrying out the tasks of incumbent parliamentary president; a reelection was deemed unnecessary. In this situation, the constitutional court had an appeasing effect on the dispute between the different parties, each of which had intended to use the election of a new parliamentary president as an opportunity to position itself for the presidential elections.[53]

III. Most important decisions against the appointing authority

Since the constitutional court's councilors are appointed by three different institutions – the parliamentary president, the state president, and the supreme judicial council – that belong to two different public powers, there are no decisions against the appointing authority as such. Nonetheless, the state president (and therefore the executive) plays a central role in decisions about appointments to the constitutional court. Not only does the state president himself nominate three councilors, but in his position as chair of the supreme judicial council also influences the nomination of a further three councilors. Since in addition to this, the parliamentary president is chosen from the ranks of the governing majority, decisions against the appointing authority most often amount to decisions at the expense of the executive.

From the outset, the constitutional court accorded great importance to reviewing the constitutionality of laws, and examined the constitutional nature of laws in an open and unbiased manner. This is true for the mandatory examination of organic laws as well as for the optional examination of other laws. In both instances, the court has proven that it does not act as an obedient stamp of approval for the executive or the parliament. There have been many cases in which it has declared laws fully or partially unconstitutional. Between 1994 and 2000, for instance, parliament had to revisit four different laws because the constitu-

51 Advisory opionon N° 12-003 of 31 Mai 2012.

52 See *Hagberg/ Körling*, note 7, p. 117 and 119.

53 Press statement on the advisory opinion N° 12-004 of 8 June 2012 on the election of the president of the national assembly available at http://www.maliweb.net/news/politique/2012/06/11/article,72182.html (last accessed on 15 September 2013).

tional court had criticized regulations contained in these laws.[54] Overall, a routine of decisions at the expense of the executive has emerged, and is accepted by all relevant actors.

1. Decision No 96-003 of 25 October 1996 on electoral reform

The constitutional court's 1996 decision regarding the planned electoral reform is of central importance for a number of reasons. Beyond being a decision at the expense of the nominating power, it helped overcome the conflict between the government and the opposition, and formulated basic principles of an at the time young democracy. Through this early decision, the constitutional court established its role as an independent institution of the Third Republic.

In terms of timing, the decision was reached prior to the first presidential and parliamentary elections following the founding elections of the Third Republic. In 1996, the electoral law that had served as a provisional framework for the transitional elections of 1992 was to be reformed and consolidated. The reform of the electoral law was contested in parliament. In particular, the governing party ADEMA would have clearly benefited from the majority voting system proposed by the government. The opposition parties opposed this vehemently, and advocated a system of proportional representation. After parliament had adopted the law, 14 members of parliament lodged a complaint with the constitutional court, and requested an examination of whether the contested section were in line with Art. 88 section 2 MConst.

The court ultimately declared more than 20 provisions contained within the law to be unconstitutional. The following aspects were most important for the process of democratization, and for the role of constitutional review:

aa) Scope of examination: In its decision, the court did not limit itself to an examination of the sections contained in the request for review, but instead clearly stated its intention to conduct a constitutional review of the entire law.[55]

bb) The constitutional court objected to regulations concerning the composition of the CENI, as well as to its budget and to the composition of subordinate regional and local electoral commissions, on the grounds that they did not sufficiently safeguard the institution's independence.

cc) The constitutional court asserted its role as a central institution during the supervision of the presidential elections. Since the constitution explicitly accords this task to the

54 Access au juge constitutionnel, Rapport de la Cour Constitutionnelle du Mali, Mars 2000, available at http://www.accpuf.org/mali/cour-constitutionnelle (last accessed on 15 September 2013).

55 See decision: "Considérant que la Cour Constitutionnelle saisie conformément aux termes de l'article 88 alinéa 2 de la Constitution et l'article 31 alinéa 1 de la loi organique n° 92-O28 du 5 Octobre 1992 en vue d'examiner certains articles contestés de la loi se reconnaît le droit d'examiner l'ensemble des articles de la loi attaquée; que c'est la loi dans toutes ses dispositions qui est soumise à l'examen de la Cour Constitutionnelle.".

constitutional court (Art. 33 MConst), the CENI cannot take on this task, despite the latter being foreseen in the electoral law.

dd) The constitutional court declared that alongside some other regulations regarding the registration of candidates, the criteria specifying who is eligible to stand for election were also in breach of the constitution: It is prohibited to require candidacies to be linked to political parties. Independent candidates have to be admitted to run in the elections.[56]

ee) The court further declared that certain office holders' limited eligibility to stand for election breaches the principle of equality.[57]

ff) The constitutional court also considered the details of the electoral system. The law stipulated that the decision whether a system of proportional representation or of majority representation applied depended on the size of the administrative district. The constitutional court confirmed breaches against the principle of non-discrimination contained in the preamble and in Art. 2 MConst, against the notion of popular sovereignty contained in Art. 26 MConst, and against the right to general, equal and secret elections contained in Art. 27 MConst. Based on these reasons, it declared the envisaged mixed electoral system to be unconstitutional.[58]

Ultimately, the constitutional court decided that a large part of the regulations it deemed unconstitutional could not be separated from the law as a whole. Due to this, it declared the electoral law to be unconstitutional.

Decision N° 96-003 of 25 October 1996 is multi-faceted: It is not only addressed at the nomination power or the executive, but as an early decision also sets standards regarding the scope of judicial review. Moreover, it offers an interpretation of Malian democracy

56 Reasoning in the decision: "Considérant que l'article 27 alinéa 1 de la Constitution dispose "le suffrage est universel, égal et secret"; que l'article 28 alinéa 1 de la Constitution dispose "les partis concourent à l'expression du suffrage. Ils se forment et exercent librement leurs activités dans les conditions déterminées par la Loi"; que dans un système de démocratie pluraliste, les candidatures, sous réserve des conditions d'éligibilité définies par la loi, sont libres c'est-à-dire que chacun a le droit de se présenter fut-ce de son propre chef; que l'adhesion d'un citoyen à un parti est libre; que par conséquent la mise en oeuvre des droits politiques d'un citoyen n'est pas fonction et ne saurait être fonction de son adhesion à un parti; que selon les dispositions de l'article 28 de la Constitution, les partis concourent c'est-à-dire participent à l'expression du suffrage, donc ne peuvent être les seuls à concourir à l'expression du suffrage; que les partis politiques ne peuvent pas être les seuls à incarner l'expression du suffrage sauf à méconnaître les dispositions suivantes de l'article 26 de la Constitution" la souveraineté nationale appartient au peuple tout entier qui l'exerce par ses représentants ou par voie de référendum.".

57 Reasoning in the decision: "[Q]ue l'éligibilité est un droit constitutionnel dont toute limitation constitue une restriction; qu'en conséquence les limitations au principe de l'égalité de candidature et au droit d'éligibilité ne doivent concerner que des cas susceptibles d'influencer réellement le vote des électeurs.".

58 Reasoning in the decision: "[Q]u'à l'évidence les citoyens maliens, selon leur localité, si cette loi devait connaître application, ne seront pas "égaux en droit"; qu'il s'agit d'une discrimination fondée apparemment sur la densité de la population, qu'ainsi les citoyens voteront différemment selon leur localité.".

based on the principle of equality. It delineates the competencies of the constitutional court and defends them against encroachment on the part of other institutions like the CENI.

On another level, the proceedings before the constitutional court have forced the parties to the conflict in parliament to objectify argument in favor of the type of electoral system they respectively preferred. In the new reading in parliament, the government and the parliament succeeded in finding a compromise, so that the new electoral law passed before the 1997 elections.

2. Decision No 01-128 of 12 December 2001 on the constitutional amendment

Based on the 1997 electoral law, the constitutional court decided on another one of the executive's large-scale reform project in 2001.[59] 43 delegates lodged a complaint against the law on constitutional reform, and applied for constitutional review. In its decision, the court referred to two of the complaints. The substantive complaint (of 13 November 2001) was based on the constitutional court's own advisory opinion on the reform plans (*Avis*) 01-001 Référendum of 4 October 2001) that the state president had previously requested according to Art. 41 MConst. In this advisory opinion, the constitutional court had noted several points of constitutional concern. The members of parliament referred to this advisory opinion and objected the changes regarding the reformulation of Art. 5 MConst (protection of basic rights and freedoms), Art. 95 MConst (on the immunity of the state president), Art. 41 MConst (discontinuation of the constitutional court's right to issue advisory opinions on referenda), Art. 91 MConst (changing the terms of office of members of the constitutional court), and Art. 122 MConst (interim regulations).

The second complaint lodged by members of parliament on 20 November 2001 concerned formal constitutionality. The applicants complained that the text of the law had been changed retroactively, and that the version published in the official law gazette was therefore not in line with the version adopted in parliament.

Ultimately, the constitutional court held that the published version of the constitutional amendment was unconstitutional on formal grounds, due to the retroactive changes. The substantive complaint was rejected as unfounded. While it had considered substantial criteria and noted constitutional concerns in its advisory opinion N° 01-001 of 4 October 2001, this advisory opinion that the state president had requested under Art. 41 MConst was not legally binding.[60] The court clarifies that in the framework of its power of judicial review under Art. 88 section 2 MConst it examines whether a constitutional amendment infringes on the fundamental principle of Art. 118 MConst, i.e., the republic's form of government,

59 *Dosso*, note 30.

60 Reasoning in the decision: "Considérant que l'avis n° 01-001/Référendum du 4 Octobre 2001 de la Cour Constitutionnelle, délivré en application de l'article 41 de la Constitution est, comme tout avis non déclaré contraignant, un avis qui ne lie pas son destinataire donc dont il peut ne pas être tenu compte sans pour autant vicier la procédure de la révision constitutionnelle.".

laicism, or multi-party democracy.[61] Since the law in question did not infringe on these principles, the constitutional complaint was unfounded in substantive terms.

The decision put a stop to the constitutional amendment. It was only in 2008 that the state president initiated a new reform process. The constitutional court not only decided at the expense of the executive, but also reinforced its competency to examine the constitutionality of constitutional amendments in substantive terms.[62] Kpodar points out that the criteria on which the court based its constitutional review (the republic's form of government, laicism, and multi-party-democracy) provide a large margin of interpretation in the examination of laws, because the contents of this "eternity clause" are unspecified.[63]

3. Decision No 09-01 of 2 February 2009 on the lack of participation in the legislative process by the Conseil Economique, Social et Culturel

In 2009, the president of the Economic, Social and Cultural Council lodged a complaint before the constitutional court, because he had not been formally consulted according to Art. 198 MConst on a proposed law reforming family law and abolishing the death penalty. Without further explanation, the constitutional court declared itself competent under Art. 85 section 2 MConst, and decided that the provisions contained in Art. 108 MConst had to be honored. However, this did not impair the constitutional realization of the law. The constitutional court therefore refrained from derailing the executive's reform plans. Instead, the fact that this heavily contested law ultimately did not come into force was due to a decision by state president Touré who – following protests from the conservative camp – decided not to proclaim the law. A new conservative family law was adopted in 2011/12.

IV. Most important decisions pertaining to the separation of powers

Similar to the situation in other African states, the Malian semi-presidential system is dominated by the executive.[64] This distribution of powers is contained in constitutional texts. However, due to state president Touré's consensus-oriented course of politics since 2002, the importance of the Malian parliament diminished even further. The bipartisan consensus

61 Reasoning in the decision: "Considérant que la loi portant révision constitutionnelle ne saurait être inconstitutionnelle de par les matières qu'elle a traitées dès lors qu'elle n'a pas révisé la forme républicaine et la laïcité de l'Etat, ou le multipartisme; qu'en outre la procédure de son élaboration et de son vote a été régulière; qu'en conséquence il y a lieu d'écarter les motifs évoqués dans la requête en date du 13 Novembre 2001 comme non fondés.".

62 Noteworthy in the francophone context: conception très militante, potentiellement antidémocratique, de la défense de l'Etat de droit; *Placide Moudoudou*, La constitution en Afrique: morceaux choisis, Paris 2012, p. 233.

63 *Adama Kpodar*, Réflexions sur la justice constitutionnelle à travers le contrôle de constitutionnalité de la loi dans le nouveau constitutionnalisme: les cas du Bénin, du Mali, du Sénégal et du Togo, Revue béninoise des sciences juridiques et administratives (2006), p. 125; *Dosso*, note 30.

64 *Bourgi*, note 8, p. 730.

led to a blurring of differences between the political parties' positions. This amounted to a situation where parliament served as a site for confirming the arrangements that parties and other non-parliamentarian actors had previously agreed upon. The population was therefore under the impression that the political elites were mainly interested in safeguarding their own positions of power, rather than in finding solutions to their problems.[65] The constitutional court adopted two decisions during this period of consensual politics. In 2006 and in 2007, the court strengthened minority rights within the *Assemblée Nationale*.

1. Decision No 06-0173 of 15 September 2006 on the rights of delegates

In 2006, members of parliament lodged a complaint with the constitutional court, aimed at annulling the elections to the parliament's steering committee. Due to the fact that the steering committee's term of office had already expired at the end of the parliamentary year, the court did not annul the elections. However, it interpreted Art. 11 and 12 of the parliamentary rules of procedure in line with the constitution, and declared that the practice of making extra-parliamentary arrangements regarding appointments to the steering committee were in breach of Art. 64 MConst. All members of parliament have to have the opportunity to run for a seat on the steering committee, irrespective of their membership in a specific political fraction. Further, members of parliament are free to vote for candidates of their choice and do not have to follow prior decisions by the parliamentary party leader.[66]

Through this decision, the constitutional court strengthened the voices of individual members of parliament who, in the context of president Touré's consensual politics, only had limited political influence.

2. Decision No 07-181 of 15 September 2007 on the parliamentary rules of procedure

In the context of a judicial review conducted according to Art. 88 section 2 MConst, the constitutional court in 2007 reached another decision pertaining to the separation of powers. When reviewing the new parliamentary rules of procedure, the constitutional court criticized a number of regulations that limited the independence of members' of the parliament. In this context, the constitutional court rejected the system of electing the steering committee *en bloc* and held that members of parliament have to be free in their election of steering committee members. Similarly, the Court considered the practice of appointing individuals to the parliamentary control committee according to proportional representation of all parliamentary parties to be an illegitimate interference with the independence of members of parliament. The court also rejected the regulation that only committee chairmen and parlia-

65 *Hagberg/ Körling*, note 7, p. 115.

66 Reasoning in the decision: "Considérant que les conclusions de la réunion des présidents des groupes ne peuvent pas signifier que les députés doivent obligatoirement les suivre ce qui correspondrait à une injonction de voter dans tel sens, étant entendu que l'injonction constitue un mandat impératif prohibé par les dispositions de l'article 64 de la constitution.".

mentary party leaders were allowed to request an interruption of parliamentary sessions, arguing that this also interfered with the independence of members of the parliament under Art. 64 MConst.

There are other decisions in which the constitutional court explicitly referred to the principle of the separation of powers, or in which it has protected its own independence as a state organ.[67] In its decision N° 96-004 of 11 November 1996 on the organic law, the constitutional court rejected instances of interference with the immunity of members of the constitutional court, arguing that the institution had to remain independent in order to fulfill its constitutional obligation.[68]

3. Decision No 97-058 of 17 September 1997

The author of this report did not have access to the original version of another important decision on the separation of powers. This decision is discussed by the former constitutional judge Diarra (1994-2008) in his monograph on Malian constitutional law since the year 1960.[69] According to him, the decision N° 97-058 of 17 September 1997 relates to the president's power to initiate legislation, contained in the parliamentary rules of procedure. In this early decision, the constitutional court discussed the separation of powers in the context of a judicial review of the parliamentary rules of procedure. The regulation stipulated that the state president could at any time demand that the parliament engages with a draft law. Referring to the principle of the separation of powers, the constitutional court rejected this as an illegitimate interference with parliamentary procedures.[70]

F. Self-understanding and public perception

The constitutional court plays an important yet not a dominant role in the Malian process of democratization, and in the country's power structure. The court's influence is most prominent during years in which elections take place. In these instances, the court has defended its stance in a self-assured manner. Irrespective of its critics it has made use of its right to independently review elections, and to reach conclusion about the validity of electoral results on this basis.[71]

The court generally exercises self-constraint with regard to non-judicial questions. It does not comment on politics outside of the cases brought before it, and does not overtly

67 Advisory opinion N° 12-004 of 8 June 2012 on the incompatibility of the offices of transitional president and president of the national assembly.

68 Reasoning in the decision: "qu'en conséquence la Cour Constitutionnelle en tant qu'Institution doit être indépendante pour pouvoir exercer ses fonctions.".

69 *Diarra*, note 9.

70 *Abdoulaye Diarra, La protection constitutionnelle des droits el libertés en Afrique noire francophone depuis 1990; les cas du Mali et du Bénin, Afrilex (2001).*

71 *Diarra*, note 9.

position itself as an independent actor within the realm of its possibilities, i.e., in the context of the cases it deals with. Its decisions remain fact-bound, and it does not advocate on its own behalf.[72]

Considering this overall state of affairs, a press statement that the constitutional court issued on its own behalf in August 2002 stands out. Seeing itself confronted with continuous attacks from different sources, the court stated that while it was not allowed to respond to its critics, it still wanted to highlight its constitutional role in the oversight and control of elections.[73] This took place against the background of the presidential and parliamentary elections of the year 2002. The press statement indicates the constitutional court's determination to be heard by the general public, and to gain recognition in the political realm. It at the same time recognizes that limits of its influence and bases its appeal on the importance of respecting the constitution. However, at the beginning of the year, the constitutional court had exercised a lack of restraint when commenting on Touré's decision to announce his candidacy. It accepted a complaint despite a lack of admissibility, justifying this with reference to the "national interest" connected to Touré's candidacy.[74]

Apart from during the years in which elections take place, the constitutional court's work is rarely commented upon. While the press has acknowledged the court's important decisions (in particular the one in 1997 on the electoral law, and the one in 2001 on the constitutional amendment), the court is not normally recognized as an independent actor that pursues a certain agenda.

The public perception of the court is further impeded by the fact that its hearings are not open to the public, and that only decisions pertaining to matters of electoral law are publically announced (Art. 25, 50 LO).

G. Final assessment

Since its foundation in 1992, the Republic of Mali has been applauded for its exemplary democratization process. Irrespective of certain shortcomings, democratic elections seemed to have become established as the only access to political power.[75] Beyond its clearly delineated constitutional role in processes of democratic decision-making, the constitutional court has made a major contribution to solving a political conflict. Decision Nº 97-003 of 25 October 1997 on the reform of the electoral law facilitated a compromise between government and opposition, and thereby solved a protracted conflict in parliament.[76] Thanks to this, the first elections of the Third Republic that were of great symbolic relevance took

72 The court was rarely called upon to decide in own matters: the proposals for constitutional revisions and organic laws on the organisation of the court are among the few.

73 Communiqué de Presse, 28 August 2002.

74 Decision N° 02-132 of 6 April 2002.

75 *Heyl/ Leininger*, note 2.

76 *Diarra*, note 9.

place as planned, even though the organization of the election showed many shortcomings. The constitutional court successfully intervened in two other instances in which there was a threat of the parliament being blocked by protracted conflicts (decision Nº 06-173 of 15 September 2006 and decision Nº 07-181 of 15 September 2007).

The constitutional court at the same time does not play an active role in conflicts over the protection of basic rights. Since between 2007 and 2009 none of those eligible to lodge complaints brought the reform of the heavily contested family law before the court, it did not become engaged in this dispute over the rights of women and children. Instead, the debate was dominated by conservative religious groups, while progressive factions alongside non-governmental organization unsuccessfully demanded the effective protection of women's rights as stipulated in the constitution. In this case, an individual complaint mechanism as foreseen in the report on the constitutional reform process could serve as a path to guarantee Malian citizens' basic rights.

Compared to other countries in the region, the Malian constitutional court has only limited competencies. However, this analysis of case law has shown that the Malian constitutional court has mastered this challenge and has found ways to exert influence and assert its positions in conflicts over competencies.

The fundamental problems of the Third Republic came to light early on: Apart from the conflict in the North, these problems comprised significant shortcomings in electoral law and organization that in turn undermined legitimacy and threatened the process of democratization. Especially President Touré's politics of consensus between 2002 and 2012 diminished the importance of parliament as a site of meaningful political debate. In consequence, parliament had little power to counter the dominant executive. A combination of these factors ultimately led to a sudden rupture with the idea of an "exemplary democracy" by means of a military coup d'état. The constitutional court did not play a leading role in the solution of this crisis in 2012. Among the reasons for this is the fact that the constitution does not entail formal procedures for exceptional circumstances of this sort. At the same time, the solicited commentary from the year 2012 indicates a certain awareness on the part of those responsible that the constitutional court ought to be involved in questions like mandate extension.

Overall, the prospects for a process of consolidation have increased after the successful presidential elections of 2013 and the signature of a Peace Accord in 2015. The constitutional court has continued to issue detailed decisions with substantial deliberations on the electoral law and the constitutional reform. Yet uncertainties exist with regard to the once again abandoned constitutional reform and the presidential elections scheduled for 2018. Since the introduction of the system of multi-party democracy in 1992, all attempts to reform the constitution have failed. However, there is a need to remedy institutional shortcomings of the Third Republic and to implement the Peace Accord of 2015. In the African context, a careful approach to constitutional amendments constitutes a rare exception, and this indicates that in Mali, the constitution that has been adopted by the National Assembly enjoys a significant level of respect. From the perspective of the constitutional court, a re-

form could not only constitute an important broadening of competencies regarding the protection of basic rights, but also ease the burden of controlling the elections that continue to be riddled by flaws. The constitutional court has since 1992 established itself as an independent institution and stands a good chance of making an important contribution to consolidating the future process of democratization.