

MALI PEACE PROCESS. CONSTITUTIONAL IMPLICATIONS OF THE ALGIERS PEACE PROCESS AGREEMENT

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More than half of the world's constitutions have been written or revised in the past two decades, often following a crisis (civil war or a volatile violent political transition), requiring international intervention, under the auspices of the United Nations. The purpose of this essay is to analyze how constitutions are often used as peace agreements.

Peace agreements or provisional administration agreements containing transitional power sharing arrangements are often established until the necessary conditions for both constitution-making and constitution drafting processes and for the holding of free and fair elections are met. The ultimate aim is to set the framework for the creation and emergence of a constitutional order as well as of a representative and legitimate government.

According to Katia Papagianni, these types of agreements have had an exponential growth in the past 15 years due to the consolidation of a methodology of intra-state conflict (civil war) resolution through negotiated peace agreements¹.

"[P]ower-sharing is a prevalent tool of conflict resolution: Sudan's 2005 Comprehensive Peace Agreement, Liberia's 2003 Accra agreement, Burundi's 2001 agreement and the DRC's (Democratic Republic of Congo) 2003 Sun city agreement all contained elements of power-sharing."²

Power-sharing arrangements allow for different parties to a conflict to constitute government, or be represented in different structures, in legislative processes, in the armed forces and in access to wealth:

"Power-sharing arrangements bring former belligerents into joint governments and guarantee them representation in the executive, the legislature, the army and/or the management of the country's wealth."³

¹ PAPAGIANNI, K. (2013), "Power-sharing: a conflict resolution tool?", Africa Mediators Retreat, 2013

² PAPAGIANNI, K. (2013), "Power-sharing: a conflict resolution tool?", Africa Mediators Retreat, 2013

³ PAPAGIANNI, K. (2013), "Power-sharing: a conflict resolution tool?", Africa Mediators Retreat, 2013

The inclusion of not only belligerents but also other social groups, such as civil society organizations, elders, women's group, albeit rare, being more inclusive, allows a better representation of society, building trust in the agreement and in the sustainability of the peace process:

"Guarantees of inclusion are intended to reassure weaker parties that they will not be exploited or marginalized in the new political order and to give them an incentive to commit to the agreement."⁴

However, the usefulness of power-sharing arrangements is not recognized by all, even though some recognize that it may effectively bring belligerents to the negotiations table and have them sign an agreement, critics suggest that these arrangements crystalize conflict dynamics, preventing inclusive social progress and hence a truly sustainable peace process.

"Pragmatists point out that power-sharing is a useful tool to convince all parties to sign peace agreements and to commit to joint state institutions and a common political process. Critics, however, emphasize that power-sharing freezes war-time power balances, prevents the evolution of the political process, and closes the door to new entrants to the political scene."⁵

However, one should distinguish between different types of agreements, with different characteristics, which serve different purposes. There are two major power-sharing mechanisms, one which is based on a negotiated agreement, and another one which is based on the creation of mechanism or systems of representation (such as an electoral system and law) through a negotiated agreement which defines criteria for representation, but that ultimately depends of the holding of elections and the participation of constituents.

"Power-sharing arrangements vary between those which specify the precise representation of groups in each state institution independent of elections and those which rely on indirect techniques, such as electoral rules, to ensure that political power is shared. Power-sharing agreements adopted in the context of peace agreements usually include a pre-agreed formula of group representation as well as rules on how and by whom decisions will be made."⁶

The objectives of power-sharing arrangements serve essentially four different purposes: defining representation mechanism, defining consensus-based decision-making mechanisms, distributing resources or funds and protecting specific groups⁷.

These arrangements however are always provisional, insofar as they aim at creating the necessary conditions for the emergence of constitutional order and of a legitimate representative government.

⁴ PAPAGIANNI, K. (2013), "Power-sharing: a conflict resolution tool?", Africa Mediators Retreat, 2013

⁵ PAPAGIANNI, K. (2013), "Power-sharing: a conflict resolution tool?", Africa Mediators Retreat, 2013

⁶ PAPAGIANNI, K. (2013), "Power-sharing: a conflict resolution tool?", Africa Mediators Retreat, 2013

⁷ PAPAGIANNI, K. (2013), "Power-sharing: a conflict resolution tool?", Africa Mediators Retreat, 2013

There are two usual phases in the establishment of constitutional order, one which refers to the preparation, revision and adoption of a constitution (which defines the framework for the establishment of the rule of law) and another phase which refers to the implementation of and respect for constitutionally established principles and institutions (namely through the election of a legitimate and representative government and through the establishment of functioning constitutionally defined institutions capable of defending the rule of law).

In case of a large (violent) political crisis or of violent conflict there is necessarily a break (or suspension) in constitutional order, making it indispensable to undertake corrective measures conducive to its reestablishment.

The United Nations peace doctrine considers the establishment of constitutional order and the emergence of a legitimate representative government as sine qua non conditions for a sustainable peace.

Multidimensional peacekeeping operations have specific mandates that integrate both peacekeeping and peace-building strategies, in which constitution design and the holding of free and fair elections stand at the basis of the process of securing and building a sustainable peace.

“a free and fair election is a critical milestone in achieving the mission’s objectives. Whether it is to create the foundation of a newly democratic State or rehabilitate an existing democracy, a credible election will strongly influence the course of the mission and its relationship with the host government” (UN Handbook on Multidimensional Peacekeeping Operations)

The United Nations justifies both the importance of electoral processes and their role in electoral assistance in the following way:

“The role of elections in a post-conflict situation is to replace violent contest for political power with a non-violent one. An election is only effective, however, when the electoral process is widely accepted by the participating population as legitimate and binding. As an inherently sovereign process and one of the highest expressions of political self-determination, the electoral process is measured against internationally accepted standards of practices and principles. Although elections are ultimately judged by the citizenry of the country, States often request and even require the presence of external actors to overcome the electorate’s distrust for the process or to contribute to the international acceptance and recognition of the regime.” (UN Handbook on Multidimensional Peacekeeping Operations)

The principles and guidelines set forth by the *Handbook on Multidimensional Peacekeeping Operations* were later consolidated and further developed into the United Nations “Capstone Doctrine” on the issues, in the document prepared by DPKO and DFS, *United Nations Peacekeeping Operations: Principles and Guidelines*.

The “*Principles and Guidelines*” further reinforces the notion that “while United Nations peacekeeping operations are, in principles, deployed to support the implementation of a cease-fire or peace agreement, they have often required to play an active role in peacemaking efforts and may also be involved in early peacebuilding activities”⁸.

In the “core business” of multidimensional United Nations peacekeeping operations stand civil administration, elections, political process, rule of law and human rights, all directly or indirectly related to constitutional design and the holding of free and fair elections.

“Beyond simply monitoring cease-fires, today’s multi-dimensional peacekeeping operations are called upon to facilitate the political process through the promotion of national dialogue and reconciliation, the protection of civilians, assist in disarmament, demobilization and reintegration of combatants, support the organization of elections, protect and promote human rights, and assist in restoring the rule of law” (Principles and Guidelines)

There are six areas of peacebuilding where UN peacekeeping operations can have a mandate to operate: Disarmament, demobilization and reintegration (DDR); Mine Action; Security Sector Reform (SSR) and the rule of law; protection and promotion of human rights; electoral assistance; and support for the restoration of State authority⁹.

In the case of support for the restoration of State authority:

“Multi-dimensional United Nations peacekeeping operations may support the restoration of State authority by creating and enabling security environment, providing political leadership or coordinating efforts of other international actors. Support to the restoration or extension of State authority may include efforts to develop political participation, as well as operational support to the immediate activities of state institutions. Where relevant, it may also include (...) capacity building or support to larger processes of constitutional or institutional restructuring” (United Nations Peacekeeping Operations: Principles and Guidelines)

In the case of electoral assistance, the holding of free and fair elections “is often written into peace agreements underlying a multi-dimensional United Nations peacekeeping operations and represents a major milestone towards the establishment of a legitimate state”¹⁰.

In the benchmarks defined by the “*Principles and Guidelines*” both elections and constitutional order are clearly outlined as necessary for effective transition towards peace, in particular benchmarks 1, 3, 4, 5 and 6 (5 out of 7) “absence of violent conflict and large-scale human rights abuses, and respect for women and minority rights”¹¹, “the ability of the national armed forces and the national police to provide security and maintain public order with civilian oversight and respect for human rights”¹², “progress towards

⁸ *United Nations Peacekeeping Operations: Principles and Guidelines*

⁹ *United Nations Peacekeeping Operations: Principles and Guidelines*

¹⁰ *United Nations Peacekeeping Operations: Principles and Guidelines*

¹¹ *United Nations Peacekeeping Operations: Principles and Guidelines*

¹² *United Nations Peacekeeping Operations: Principles and Guidelines*

the establishment of an independent and effective judiciary and corrections system”¹³, “the restoration of State authority and the resumption of basic services throughout the country”¹⁴ and “the successful formation of legitimate political institutions following the holding of free and fair elections where women and men have equal rights to vote and seek political office”¹⁵.

Both constitution-making and the holding of free and fair elections are deeply intertwined since in order to hold free and fair elections in principle an existing constitution (or existing constitutional norms), which respect the international standards for democratic elections¹⁶. In fact, in the aftermath of conflict we can be facing two different case scenarios, one in which there is an existing legitimate functioning Constitution that was suspended, and another one where there is no legitimate Constitution (often in the case of a democratic political transition).

Constitutional order greatly contributes to a peaceful and sustainable resolution of political crisis, however, it is important to analyze specific peace processes, and identify lessons learned, in order to understand what may have been the limitations and problems in the implementation of the model.

Even though the role constitutional order plays in building peace is undoubtedly, the process used is concomitant to a successful and sustainable outcome.

Constitution-making plays an important role in building the state, since it provides a legal framework for the exercise of state power, and defines the relationships between the government and its constituents. A constitution can be compared to the social contract between citizens and the state. In this sense, constitution making rather than being an exclusively technical legal exercise, is in fact an encompassing political process, based on the principles of popular sovereignty, in which citizens should be the ones making their constitution, either through an elected assembly or through other mechanisms of political representation and participation¹⁷.

The fact is however, this is not always the case. Several studies regarding constitutional processes in post-conflict countries, such as the UNDP Report “Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries” or the scholarly article “Peacemaking and Constitutional-Drafting: a Dysfunctional Marriage”. Drafting constitutions in post-conflict settings is particularly problematic, since societies are often characterized for being deeply divided.

¹³ *United Nations Peacekeeping Operations: Principles and Guidelines*

¹⁴ *United Nations Peacekeeping Operations: Principles and Guidelines*

¹⁵ *United Nations Peacekeeping Operations: Principles and Guidelines*

¹⁶ *EC Compendium of International Standards for Elections*

¹⁷ Wallis, J., *Constitution Making During Statebuilding*

As discussed in both the UNDP Report *Constitution-Making and Peace-Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries* and Hallie Ludsin's article *Peacemaking and Constitutional-Drafting: a Dysfunctional Marriage*¹⁸, these two scenarios also reflect two different approaches or trends in constitution-making.

One which considers that constitutions, as a foundational document, should be the basis for the emergence of democratic institutions and the rule of law ("constitutions before institutions"), and another one which considers that first there should be functioning institutions and general principals of social organization in order for a constitution which adequately reflects both the practices and aspirations of the population to emerge ("institutions before constitutions").

Jamel Benomar, in his UNDP report¹⁹ on the correlations between constitution-making and peacebuilding describes different processes of constitution drafting deriving from the two approaches, as well as the different institutions that result from different drafting processes. Benomar, following a comparative case study mythology building from different UN field experiences, identifies four fundamental issues related to constitution-making in post-crisis situations:

Firstly, it is beneficial to separate the conflict resolution phase (cessation of hostilities and initial peace agreement) from any process of constitution drafting or revising; secondly, it is beneficial to include all parties in the constitution-making process; thirdly, a previous or preliminary public discussion of foundational constitutional principles is paramount; and finally, the process should be inclusive and participatory, allowing for involvement of the larger population.

The criticism rose by both Benomar and Ludsin, in particular those related to the crystallization of conflict dynamics as well as those related to inadequate representation of constituents cannot be ignored.

Ludsin reflects upon the pressure exerted by (belligerent) parties as well as the larger international community in using constitution-making as a crisis exit strategy²⁰, contributing to an immediate cessation of hostilities but largely inadequate to address long term constitutional requirements, in particular those related to broader social values and aspirations, creating the foundations for a societal project.

According to Ludsin, premature constitution-making, in the aftermath of violence and conflict, in which no functioning interim institution has been

¹⁸ LUDSIN, H. (2011), "Peacemaking and constitutional-drafting: a dysfunctional marriage", *Journal of International Law*, Volume 33, Issue 1

¹⁹ *Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries*

²⁰ LUDSIN, H. (2011), "Peacemaking and constitutional-drafting: a dysfunctional marriage", *Journal of International Law*, Volume 33, Issue 1

established, often results in conservative documents which do not necessarily represent the values and aspirations of the entire population, often privileging belligerent groups (“ex-combatants”), and attributing high relevance to notions of national unity and reconciliation (without proper reparation or acknowledgment of wrongdoings), in detriment of the rights of minorities or women (unless minorities are belligerent). Premature constitutions hence freeze the reality of conflict (belligerent, conservative values, etc.) in the internal legal order.

In order to avoid this trap, Ludsin recommends multi-stage constitution making processes, allowing the establishment of minimum institutions and fundamental principals for a functioning democratic state, without committing to long term societal projects.

“A multi-stage constitutional process offers the best opportunity to salvage constitution-drafting as a peacemaking tool (...). The first step is an interim process to establish the procedure for drafting an interim constitution. (...) The adoption of the interim constitution is the second step in a multi-stage interim constitutional process. Interim constitutions establish a government and institutions to bring back stability and order to the country, which ideally are governed by human rights provisions contained in the text. Interim constitutions also detail the process for drafting a final constitution. (...) The primary advantage of a multi-stage process is that an interim constitution can secure immediate constitutional changes necessary (...) without rushing into a final drafting process and sacrificing long-term constitutional goals”²¹

Multi-stage constitution making allows time for the creation and implementation of inclusive and participatory processes, though which civil society and the overall population has had the time to benefit from civic education campaigns, and is also less reluctant or fearful to engage in critical and constructive norm-building processes. It also allows for civil society to develop and diversify, contributing thus for a more representative process.

However, it also allows determining general principles of social organization and granting essential rights and liberties, which are sine qua non conditions for the emergence of a sustainable peace, without resulting in *dead letter* constitutions (or worse even, constitutions without constitutionalism).

Malian Conflict and Peace Process Analysis

Mali was a French colony until 1960. Ever since its independence, and even prior to that, the *Tuareg* people, a nomadic group from North Mali that constitutes around 10% of the 15.3 million Malians, have held many rebellions²². In 1916, 1960s, 1972 and 1973 major revolts were stage by the *Tuareg*, in particular following severe droughts that particularly affected the

²¹ LUDSIN, H. (2011), “Peacemaking and constitutional-drafting: a dysfunctional marriage”, *Journal of International Law*, Volume 33, Issue 1 Volume 33, Issue

²² The World Bank, <http://data.worldbank.org>

North of the country, having dramatic consequences on its population. After the 1980s, the North started having major influence from Libya²³.

The worse clashes occurred between 1990 and 1996, opposing Tuareg militias, the Malian government forces and incursions from Islamist groups present in the region, which resulted in the death of 2,500 people and forced a military intervention by France anti-terrorism unit in 2004²⁴.

Since the early 2000s, observers in the region have been concerned about the presence of Islamist groups, and in particular of Al-Qaeda of the Islamic Maghreb (AQIM), and their potential destabilizing effect in an already fragile environment, affected by both “localized armed actions by Tuareg and other groups in the politically and economically marginalized north of the country” and “the increasingly dysfunctional nature of the Malian state”²⁵.

However, the extent of the crisis that stroke the country in January 2012 had not been predicted by any of them.²⁶

In January 2012, the *Mouvement national de libération de l’Azawad* (MNLA), backed by Islamist groups, launched attacks against Malian troops stationed in the North of the country, demanded independent and progressed its offensive towards the South. Faced with unresponsiveness from the Malian Government, Captain Amadou Sanogo of the Malian Army perpetrated a military coup against Malian President Amadou Toure forming a military junta and self-proclaiming himself leader of the *Comité national pour le redressement de la démocratie et la restauration de l’état* (CNRDR).

“Mali descended into turmoil at the beginning of 2012 when the National Movement for the Liberation of Azawad (MNLA) chased the Malian army out of the north and demanded independence for this vast part of the country. With its roots in the Algerian civil war, AQIM has established itself in northern Mali over the last decade, building local alliances that allowed it to significantly weaken both the state and the MNLA and resulted in armed jihadi groups – Ansar Dine and the Movement for Oneness and Jihad in West Africa (MUJAO) – taking control of the north in June 2012. This and the coup in Bamako on 21 March 2012 brought the country to its knees.”²⁷

Following these events both the Economic Community of West African States started to mobilize in attempting to de-escalate the situation. Eventually (and reluctantly) the Security Council authorized the deployment of an African-led International Support Mission to Mali, proposed by ECOWAS, passing resolution 2085, on 20 December 2012.

After attacks from jihadi groups moving further south, interim President Dioncounda Traore called for France’s support that promptly deployed a military operation - “Operation Serval” - to deter the progression of these

²³ ECP, *Yearbook on Peace Processes 2014*

²⁴ ECP, *Yearbook on Peace Processes 2014*

²⁵ International Crisis Group, *Mali: Avoiding Escalation*

²⁶ International Crisis Group, *Mali: Avoiding Escalation*

²⁷ International Crisis Group, *Mali: Security, Dialogue and Meaningful Reform*

groups. The French military, supported by Canadian troops and the Malian army took back Gao, Timbuktu and Kidal from jihadist control, paving the way for a future UN peacekeeping Mission on the ground, despite the still extremely volatile and unstable situation in northern Mali.

The first reaction of the UN Security Council to the situation on the ground, following the MNLA attacks to military facilities in northern Mali and the military coup conducted by Captain Sanogo, was to encourage a regional solution to the problem, expressing “support for the joint efforts of ECOWAS, the AU and the transitional authorities in Mali”.²⁸

Influenced by France’s presence in the Security Council, the UN expressed its “readiness to respond positively to a request from the Malian armed forces to reclaim the northern half of the country”²⁹, however ECOWAS, the African Union and western African states were still determined to handle the situation at regional level.

At the same time, the United Nations backed the negotiations of a framework agreement, signed on 6 April 2012 under the auspices of ECOWAS, which sets the way forward for a roadmap conducive to the restoration of constitutional order and national unity.

In December 2012, the Security Council authorized the deployment of an African-led African-led International Support Mission in Mali (AFISMA)³⁰, mandated to “take all necessary measures, in compliance with applicable international humanitarian law and human rights law and in full respect of the sovereignty, territorial integrity and unity of Mali”³¹.

On 29 January 2013, the Malian National Assembly adopted a Roadmap for Transition (*Feuille de Route pour la Transition*), which later resulted in the Ouagadougou Peace Accords, a preliminary agreement for the holding of presidential elections and inclusive peace negotiations, signed on 18 June 2013.

Both the Roadmap and the Peace Accords follow the recommendations issued by the Security Council in S/RES/2085 of 20 December 2012 urging “the transitional authorities of Mali, consistent with the Framework agreement of 6 April 2012 signed under the auspices of ECOWAS, to finalize a transitional roadmap through broad-based and inclusive political dialogue, to fully restore constitutional order and national unity, including through the holding of peaceful, credible and inclusive presidential and legislative elections, in accordance with the agreement mentioned above which calls for elections by April 2013 or as soon as technically possible, requests the Secretary-General, in close coordination with ECOWAS and

²⁸ UN Security Council Resolution S/RES/2056, 5 July 2012

²⁹ UN Security Council Resolution S/RES/2012, 12 October 2012

³⁰ UN Security Council Resolution S/RES/2085, 20 December 2012

³¹ UN Security Council Resolution S/RES/2085, 20 December 2012

the African Union, to continue to assist the transitional authorities of Mali in the preparation of such a roadmap, including the conduct of an electoral process based on consensually established ground rules and further urges the transitional authorities of Mali to ensure its timely implementation”³²

In order to ensure the expedite restoration of democratic governance and constitutional order, the adequate conduction of the electoral process, and an inclusive dialogue for peace, the United Nations Security Council deployed the Multidimensional Integrated Stabilization Mission in Mali MINUSMA³³, passed on 25 April 2013, by the UN Security Council passes resolution S/RES/2100.

MINUSMA’s mandate is one of the most comprehensive in UN Peacekeeping operations’ history, following the trend of most recent missions of having a larger and more complex set of competencies determined.

The mandate falls into seven different categories, namely the “stabilization of key population centres and support for the reestablishment of State authority throughout the country”, the “support for the implementation of the transitional road map, including the national political dialogue and the electoral process”, “the protection of civilians and United Nations personnel”, the “promotion and protection of human rights”, the “support to humanitarian assistance”, the “support for cultural preservation” and “support for national and international justice”.

Of these seven areas of mandate, four are directly and indirectly related to requirements of constitutional order and elected representative government, more specifically, MINUSMA has been given a mandate to exercise its support in this area in concrete ways:

“support the transitional authorities of Mali to extend and re-establish State administration throughout the country”, “support national and international efforts towards rebuilding the Malian security sector, especially the police and gendarmerie through technical assistance, capacity-building, co-location and mentoring programmes, as well as the rule of law and justice sectors”, “assist the transitional authorities of Mali in developing and implementing programmes for the disarmament, demobilization and reintegration (DDR) of former combatants and the dismantling of militias and self-defense groups, consistent with the objectives of reconciliation”, “assist the transitional authorities of Mali to implement swiftly the transitional road map towards the full restoration of constitutional order, democratic governance and national unity in Mali”, “exercise good offices, confidence-building and facilitation at the national and local levels, including through local partners as appropriate, in order to anticipate, prevent, mitigate and resolve conflict”, “assist the transitional authorities of Mali and communities in the north of Mali to facilitate progress towards an inclusive national dialogue and reconciliation process, notably the negotiation process referred to in paragraph 4 above, including by enhancing negotiation capacity and

³² UN Security Council Resolution S/RES/2085, 20 December 2012

³³ UN Security Council Resolution S/RES/2100, 25 April 2013

promoting the participation of civil society, including women's organizations”, “support the organization and conduct of inclusive, free, fair and transparent presidential and legislative elections” and “to assist the transitional authorities of Mali in their efforts to promote and protect human rights”³⁴.

The elections were successfully conducted in July and December 2013, paving the way for new peace talks, which were in stalemate until June 2015, in particular due to peace spoilers in northern Mali and the Sahel region.

Analysis of the *Algiers Peace Agreement* and its Constitutional Implications

An historical peace agreement, the Agreement for Peace and Reconciliation in Mali (*Accord pour la paix et la réconciliation au Mali issu du processus d'Alger*), was signed between the Government of Mali and belligerent groups on 20 June 2015. This agreement calls for a constitutional revision on five different occasions, notably in its Article 3 and Article 60.

“Les Institutions de l'Etat malien prendront les dispositions requises pour l'adoption des mesures réglementaires, législatives, voir constitutionnelles nécessaires à la mise en œuvre des dispositions du présent Accord, en consultation étroite avec les Parties et le soutien du Comité de suivi prévu par le présent Accord.” (Article 3^o)³⁵ (emphasis added)

Interestingly, in the wording of the Article 3 of the Agreement (which reads, the institutions of the Malian State will undertake the necessary steps in order to adopt regulatory, legislative and eventually constitutional measures in order to implement the provisions of the present Agreement), there is a deliberate choice to explicitly call for regulatory and legislative reform but only to consider Constitutional reform. The reason for such choice reflects the reluctance of the Malian Government (and possibly of the Algerian mediators) in reopening the debate around its Constitution, with potential repercussions regarding claims for autonomy. Even though any effort to alter territorial integrity is limited in Article 118 of the Constitution.

“Aucune procédure de révision ne peut être engagée ou poursuivie lorsqu'il est porté atteinte à l'intégrité du territoire.” (Constitution du Mali, 1992)

Again on its Article 60, the Government is encouraged to undertake all measures deemed necessary to implement the Agreement, including what concerns the increase of public services in the North, the rapid adoption of constitutional, legislative and regulatory texts, the transfer of resources and necessary means for the functioning of local administration, and the increase of political participation of its citizens:

³⁴ UN Security Council Resolution S/RES/2100, 25 April 2013

³⁵ *Accord de Paix issu du Processus d'Alger*, 20 June 2015, signed in Bamako (The institutions of the Malian State will undertake the necessary steps in order to adopt regulatory, legislative and eventually constitutional measures in order to implement the provisions of the present Agreement, in close consultation with the Parties and with the support of the Follow-up Committee established in this Agreement)

“Encourager le Gouvernement à prendre toutes les mesures jugées nécessaires à la mise en œuvre effective des dispositions de l’Accord, y compris:

- la présence des services publics déconcentrés et décentralisés au Nord ;*
- l’adoption diligente des textes constitutionnels, législatifs et réglementaires pour permettre la mise en œuvre des dispositions de l’Accord ;*
- le transfert des ressources et des moyens requis pour le fonctionnement effectif des collectivités territoriales et l’exercice de leurs compétences ;*

- la prise des mesures pour permettre l’appropriation au niveau local des nouveaux outils démocratiques convenus dans l’Accord, notamment à travers l’actualisation des listes électorales, l’encouragement à l’enrôlement et à la participation aux élections locales, et l’accompagnement de la création des institutions et procédures nouvelles.” (Article 60^o)³⁶

The Algiers Peace Agreement also defines an interim period; which follows the signature of the Peace Agreement and extends for a period of eighteen to twenty-four months. This interim period should establish the necessary conditions for reconciliation, for the voluntary return of IDPs and refugees and for the foundation of a new democratic and culturally diverse Mali.³⁷

One of the objectives of the interim period is to expand existing legislation, including revising the constitution, to include the provisions of the Peace Agreement:

“garantir l’adoption de textes réglementaires, législatifs, voire constitutionnels, permettant la mise en place et le fonctionnement du nouveau cadre institutionnel et politique, sécuritaire et de défense, de développement économique, social et culturel, de justice et de réconciliation nationale”

“l’adoption diligente des textes constitutionnels, législatifs et réglementaires pour permettre la mise en œuvre des dispositions de l’Accord” (Algiers Peace Agreement, Annex I, Interim Period)

In both Article 60 and Annex I, the choice of wording is again relevant, since the Government is *encouraged* to take the referred measures, and is thus not legally bound by the terms of the Agreement. However, there is a clear expectation from the text of the Agreement of a diligent constitutional reform in the next coming years. The choice of words also reflects the necessary restraint concerning the sovereign exercise of constitution drafting, which is an exclusive competency of the People of Mali and of its Constituent Assembly or National Parliament.

Aside from the explicit references to constitutional reform, there also many implicit constitutional implications in the Algiers Peace Agreement, in particular those that refer to the protection of fundamental rights, including the protection of cultural rights, minorities, youth and women’s rights; the organization and administration of public affairs; regional administration and the defense and security sectors, including the armed forces and the police;

³⁶ Accord Paix issu du Processus d’Alger, 20 June 2015, signed in Bamako

³⁷ Accord Paix issu du Processus d’Alger, 20 June 2015, signed in Bamako

and finally adherence to regional and international norms. All these are issues typically defined in Constitutional texts.

According to Cass Sunstein “the central goal of a constitution is to create the preconditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves”³⁸, and is based on the premise that “self-government makes it far more likely that citizens will have good lives”³⁹.

Constitutions, according to Bacelar Gouveia, define the system of principles and norms that regulate the organization, functioning and limits of the public power of the state, and establish the rights of people which belong to a specific political community. Constitutions allow for a balance between public power of the state and a community of people on behalf of which the state acts and from which he draws its legitimacy.

The contemporary definition of the constitutional state, understands the state has a norms-based system in which political power is voluntarily subject to the authority of written law, which recognizes certain inalienable and fundamental rights to individuals and which is based on popular sovereignty through political representation established through cyclical electoral processes. This constitutional model is based on principles of natural law which establish that the rights of individuals, both as human beings and as citizens, are in fact abstractly located above the will of the state, and that state merely recognizes (rather than creates) otherwise existing rights.

Let us now take a closer look of the major aspects of the Peace Agreement that may have a constitutional implication in case of a reform, starting with its Preamble and Sections I and II.

One of the first aspects of the Peace Agreement that has constitutional implication, is mentioned both in the Preamble and Chapter 1 (Principles and Commitments), which relates to regional and international instruments and norms, as well as to the protection of cultural rights, minorities, youth and women’s rights, refers to the first section of the Constitution «*Titre Premier: Droits et Devoirs du Peuple Malien*».

In fact, the 1992 Constitution explicitly, in its Preamble, refers to regional or international norms, in particular the Universal Declaration of Human Rights and the African Charter on Human and People’s Rights. The Constitution also affirms in its Preamble its willingness to protect the rights of women and children, as well as cultural and linguistic diversity. However, not all rights enshrined in these instruments or otherwise stated in the Preamble

³⁸ SUNSTEIN, C.R. (2001)*Designing Democracy, What Constitutions Do*

³⁹ SUNSTEIN, C.R. (2001)*Designing Democracy, What Constitutions Do*

are fully protected in the Constitutional text. The same goes for the rights protected by International Covenant for the Protections of Civil and Political Rights and in the International Covenant on the Protection of Economic, Social and Cultural Rights.

For the first time, the Peace Agreement, in its Chapter 2, recognizes the existence of the «Azawad», defined as a «socio-cultural, memorial and symbolic reality shared by the populations of the North of Mali», which is an integral part of the Malian State and of its territorial integrity.

This recognition entails certain responsibilities and rights, including the development of institutions based on local administration (collectivités territoriales), the access to management of public affairs by the peoples of its regions, a higher representation of peoples from the North of Mali in national institutions, the consolidation of the rule of law and access to justice, the development of defense and security sector based on principles of unity, inclusiveness and representation, access to local security and the establishment of a special Development Zone for the North :

“Outre les mesures visées ci-dessus, le règlement définitif du conflit nécessite une gouvernance qui tienne compte des spécificités locales et qui s’articule autour des éléments suivants:

- la mise en place d’une architecture institutionnelle fondée sur des collectivités territoriales dotées d’organes élus au suffrage universel et de pouvoirs étendus;
- la gestion des populations des régions concernées de leurs propres affaires sur la base du principe de la libre administration;
- le renforcement de l’État de droit en rapprochant la justice des justiciables;
- la mise en place d’un système de défense et sécurité basé sur les principes d’unicité, d’inclusivité et de représentativité
- une participation active et significative des populations, en particulier celles du Nord, à la gestion de la sécurité locale;
- la mise en place d’une Zone de Développement des Régions du Nord, dotée d’un Conseil consultative interregional et d’une Stratégie spécifique de développement adaptée aux réalités socio-culturelles et géographiques ainsi qu’aux conditions climatiques (...)”
(*Algiers Peace Agreement*, Chapter 2)

In its Chapter 3, Article 6, the Agreement further densifies the rights and responsibilities of the populations of the North, by stating that the Parties agree to establish institutional frameworks that allow for both local and national level representation, in particular through the creation of a Regional Assembly, elected by direct universal suffrage, to which the State administration will partially transfer competencies and resources, as well as judicial, administrative and financial powers as appropriate.

The current Constitution, in its sections concerning territorial administration and the organization of political power, establishes the President of the Republic, the Government and the National Assembly as those sharing political power, in accordance with principles of separation of powers and checks and balances. There are no constitutional provisions recognizing regional forms of administration or establishing a Regional Assembly.

Also in Chapter 3, Article 6, the Agreement refers to the establishment at the national level, of a second higher chamber:

“(...) diligenter le processus de mise en place de la deuxième chambre du Parlement sous la dénomination de Sénat, de Conseil de la Nation ou de toute autre appellation valorisante de sa nature et de son rôle, et en faire une institution dont les missions et la composition favorisent la promotion des objectifs du présent Accord” (Algiers Peace Agreement)

Such recommendation necessarily entails a Constitutional reform since, according to the current provisions of the Malian Constitution, the Parliament is composed of a single chamber:

“Le Parlement comprend une chambre unique appelée Assemblée Nationale.” (Art 59, Constitution du Mali).

In its Chapter 4, again the Agreement calls for more regional participation in social, cultural and development issues, both at the programming and implementation levels.

“Les parties reconnaissent la nécessité d’un partage des missions et responsabilités entre l’Etat et les collectivités territoriales, pour assurer le niveau d’efficacité requis et la prise en compte des besoins et demandes des citoyens et des communautés à la base” (Article 7, Chapter 4, Algiers Peace Agreement).

The systematic reference to more regional participation in both decision-making and implementation, calls for an adequate reflection of notions of decentralization in the Constitutional text. In particular, given the specific activities that are to be administered at the regional level, including urban and territorial planning, establishment and management of infrastructure (including communications, roads, health and education), economic activities and law enforcement (police), as well as the establishment of a regional taxation scheme and of regional and budgeting and administration.

The regional dimension of the Agreement, is further developed in Section IV of the text, which creates a Development Zone for the North of Mali, based on notions of local development, local ownership and adequacy of development programs to realities on the ground.

The following section of the Algiers Peace Agreement, Section III, concerns defense and security and in particular the organization and administration of armed forces and security forces. Security Sector Reform, with statebuilding and legislative reform, is one of the most important aspects of post-conflict

peacebuilding, however there are no concrete constitutional implications of the Agreement, since the current Constitution of Mali pays very little attention to these sectors.

Having said that, it is practice in post-conflict settings to include provisions regarding the security sector, including armed forces and security forces, defining their constitutional roles and political authority over them.

In what concerns Section V, regarding reconciliation, justice and humanitarian issues, the Agreement establishes important reconciliation and peacebuilding mechanisms including a National Charter for Peace, Unity and National Reconciliation as well as a Commission for Truth, Justice and Reconciliation, it also provides guidance on how to address and deal with war crimes and crimes against humanity in a peace and reconciliation context.

These are some of the most important aspects of any peace agreement, which should focus, among other issues, on recovery from past wrongs, healing and rebuilding lost bonds between communities. Research as demonstrated however, as it has been discussed earlier, that Constitutional texts should not reflect too much conflict dynamics and should rather establish a longer term societal project.

This Section however does recognize the importance and value of cultural, religious and traditional figures in issues of justice, in particular for mediation and alternative dispute resolution, which is not currently reflected in the Section regarding the organization of the judicial system of the Constitution.

Conclusion

In the case of Mali, the conflict is essentially intra-state, even though it has acquired a transnational dimension since the 2000s. The peace process was divided in two stages, a first stage aiming at the re-establishment of constitutional order through the holding of free and fair elections, conducive to a second phase, in which peace negotiations resumed.

MINUSMA⁴⁰ was mandated by the Security Council to support the electoral process conducive to the restoration of constitutional order, both presidential and parliamentary, as established by the Roadmap to transition⁴¹, approved by the Malian National Assembly, the Ouagadougou Peace Accords⁴² and the May 2014 Cease-Fire⁴³.

⁴⁰ MINUSMA, Multidimensional Integrated Stabilization Mission in Mali, Resolução do Conselho de Segurança S/RES/2085, 20 December 2012

⁴¹ ASSEMBLEE NATIONALE du Mali, *Feuille de Route pour la Transition*, 29 Janeiro 2013

⁴² *Accord de Paix de Ouagadougou, Accord préliminaire à l'élection présidentielle et aux pourparlers inclusifs de paix au Mali*, 18 June 2013, Ouagadougou, Burkina Faso

⁴³ *Accord de Cessez-le-feu*, 23 May 2014, Bamako, Mali

The second phase, of peace and reconciliation, was conducted through multi-actor mediation, led by Algeria, addressing grievances of the populations of Northern Mali, in view of a modification of living conditions, of establishing concrete representation mechanisms and of developing the region.

These negotiations largely ignored extremist Islamic groups for a complex set of reasons that we are not in a position to discuss in this paper, in particular the reluctance the UN and other countries with vested interests (in particular France and Algeria) have in negotiating with these groups for different reasons.

Even though the Malian conflict has a transnational dimension to it, in practice, the negotiation process followed a similar path to conventional intra-state violent conflict, opting for a two-step (or multi-step) approach to building peace.

The first step secured the cessation of hostilities and the re-establishment of constitutional order using the pre-existing constitutional legal framework, followed by (not so inclusive) peace negotiations calling for a broader participatory national dialogue and reconciliation as well as for a constitutional revision.

According to this multi-step approach, the new Constitution can more adequately reflect the concerns, aspirations and values of the entire population, including populations in the North, as well as the underlying principles to concrete institutional reform and development measures to increase the living conditions and the representation mechanisms of the North of Mali.

The Prime-Minister of Mali, Modibo Keita, has already announced the Constitutional Revision, but no further announcements have been made in a still fragile environment where new strikes from jihadist groups have been felt, after the signature of the Peace Agreement.

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