

Beyond dichotomy: recognising and reconciling legal pluralism in Mali

Erwin van Veen
Diana Goff
Thibault Van Damme

CRU Report



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Cover photo: Toguna, a public building that can serve as a place for customary justice.

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The Netherlands Institute of International Relations 'Clingendael' is a think tank and diplomatic academy on international affairs. The Conflict Research Unit (CRU) is a specialized team within the Institute, conducting applied, policy-oriented research and developing practical tools that assist national and multilateral governmental and non-governmental organizations in their engagement in fragile and conflict-affected situations.

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Abstract

This report contends – and substantiates – that in the short-to-medium term better justice outcomes in Mali can only be achieved by stimulating greater mutual recognition of, and synergies between, the country’s customary and state judicial systems as more or less equal components of the country’s ‘justice ecology’. Accepting that the Malian state does not have, will not have and should not aspire to have a monopoly on the provision of justice for the next few decades is a critical starting point for making improvements to how justice is provided in matters that affect Malians in their daily lives. As this will be a contentious endeavour, a gradual approach is needed to identify directions for development that are both acceptable and feasible. A five-step process may provide this:

1. Map the nature and legitimacy of Mali’s many customary justice systems with the aim of developing a better understanding of their performance and development potential.
2. Organise ‘Justice Summits’ throughout Mali to discuss the problems that Malian citizens encounter in their justice systems and how these can be creatively resolved using state and customary justice mechanisms.
3. Make greater use of customary justice leaders as legal officials of the state to increase mutual exposure and create shared experience between the various elements of Mali’s legal pluralism.
4. Work towards recognition of those customary justice systems in positive law that enjoy adequate levels of popular legitimacy and are open to development in order to offer Malians more synchronised ‘paths to justice’.
5. Imagine what the next iteration of Malian justice could look like, based on the results of steps 1–4, drawing from the strengths of both state and customary systems while achieving both modernisation and maintaining an organic fit with Malian culture.

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As the analysis for this report was carried out in parallel with a more specific analysis of Mali’s penal process, we were able to make use of resources and findings in ways that enhanced both studies. For enabling this, we thank Roelof Haveman (Dutch embassy in Bamako, Mali) and Jan McArthur (International Development of Law Organization).

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The report’s contents as well as any errors naturally remain the responsibility of the authors.

Executive summary

The 2012 crisis in Mali not only increased the urgent need to address a legacy of atrocities committed during the various conflicts in its northern regions, it also highlighted a broader crisis of governance throughout the country that showed, inter alia, the provision of justice to be severely defective. Poor-quality justice reduces the ability of Malians to resolve their disputes peacefully, undermines the social contract between state and citizens, and acts as a barrier to development. Written for a mixed audience of high-level decision-makers and functional experts – Malian and international – this report examines how the provision of justice in Mali could be improved through efforts that would form a key part of a broad-based strategy to help the country regain, at least partly, the status of ‘emerging democracy’ which had won it so much praise before 2012.

The report’s main contention is that in the short-to-medium term better justice outcomes can only be achieved by stimulating greater mutual recognition of, and synergies between, Mali’s customary and state judicial systems as more or less equal components of the country’s ‘justice ecology’. Accepting that the Malian state does not have, will not have and should not aspire to have a monopoly on the provision of justice for the next few decades is a critical starting point for making improvements to how justice is provided in matters that affect Malians in their daily lives. The evidence that underpins this contention can be summarised in three sets of observations.

First, at the political level, Mali’s unsettled ordering of identities, as demonstrated most clearly by its various Tuareg uprisings, continues to impede the creation and acceptance of a shared and legitimate concept of justice for the entire Malian polity. Particularly in the north, state-provided justice is experienced as the expression and extension of state power. For its part, Mali’s wide variety of customary justice mechanisms reflects a strong sense of shared identity, but this is typically limited to a particular ethnic group and does not extend nationally. A further issue at the political level is the dominance of the Malian executive over the state, which perpetuates political and administrative capture by a relatively small circle of elites, and facilitates the (ab)use of public office. This makes it almost impossible for the state to support the provision of justice as an impartial public service. Mali’s customary justice authorities on occasion also display a measure of such executive dominance, since they are not necessarily legal specialists and can combine executive prerogatives with judicial elements in their roles. Nevertheless, abuse is reduced by the visibility of local executive power-holders and their proximity to the communities they serve. Customary justice mechanisms do, however, reflect conservative social values that are not necessarily respectful of constitutional rights granted to Malians.

Second, at the systemic level, the state judiciary is difficult to operate effectively from an administrative point of view because it is complex. This is largely the consequence of having imported a foreign (French) legal system without adequate customisation to make it congruent with Mali's history, capabilities and resources. To function, it requires a well-developed institutional ecology, which Mali does not have. The result is that complexity limits access. Additional factors that make the state system inaccessible to the average Malian are its general use of the French language, the cost of reaching and using it, and the cultural dissonance that results from its more procedural and punitive character compared with Mali's more informal and reconciliation-oriented customary justice practices. In contrast, such customary justice practices are much simpler, linguistically accessible and affordable, and enjoy cultural resonance in terms of their approach to justice. More problematically, however, their fragmentation creates a lack of transparency and predictability in the legal decisions they generate, since customary authorities have limited territorial coverage, are less bound by precedent and do not necessarily put their judgments into writing.

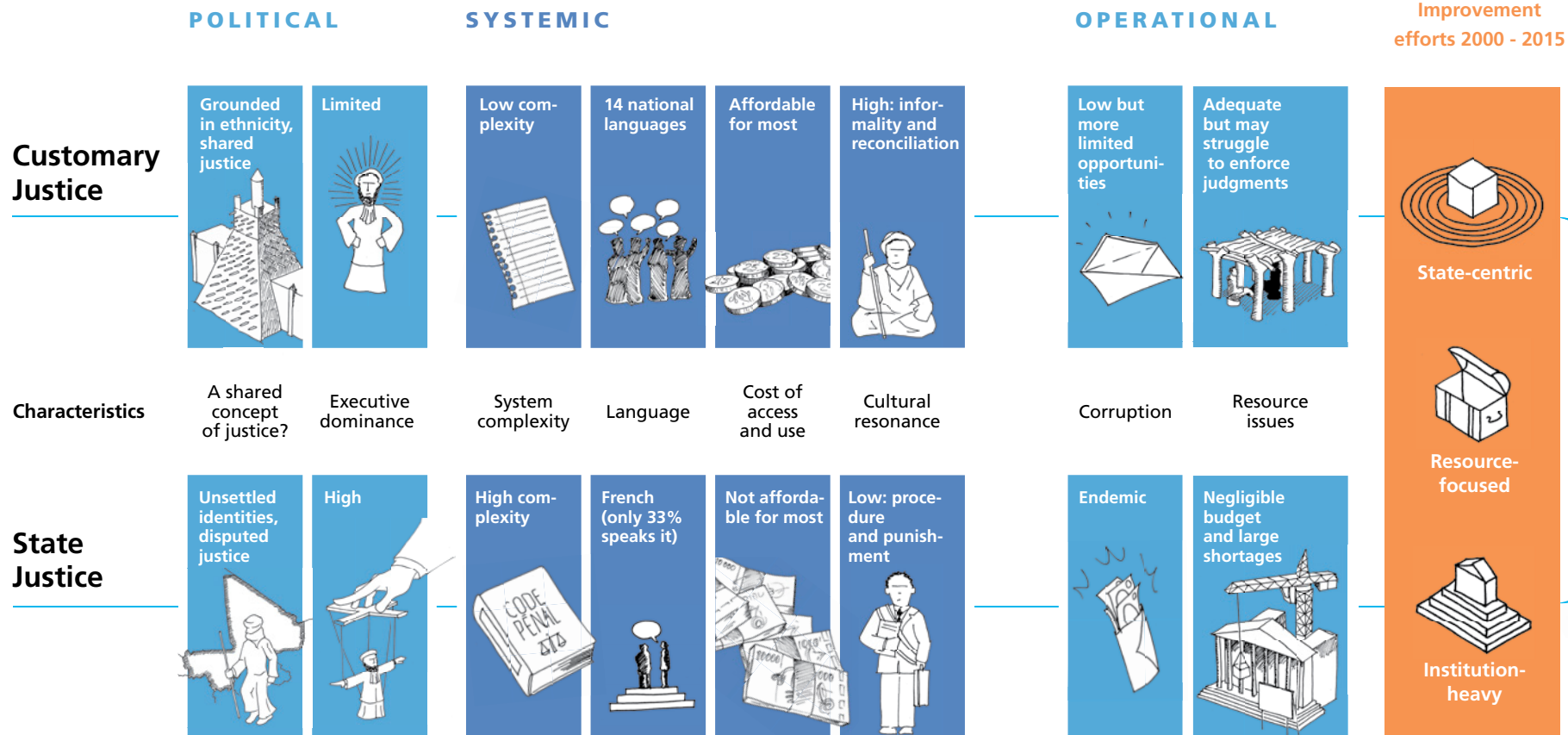
Third, at the operational level, the state judiciary suffers from endemic corruption, as well as a general shortage of tangible and intangible resources. This shortage is compounded by limited allocation and poor utilisation of the resources that do exist. Also at the operational level, customary authorities have little power to enforce judgments and moreover are marked by a certain level of corruption as well.

The upshot of these three sets of nested observations is that customary justice mechanisms are, despite their problems, the providers of choice for the vast majority of Malians. Not only are they frequently turned to, they are also well regarded. In contrast, over a decade of effort to improve the state judiciary – with significant international support – is only at the early stages of generating returns. And yet, of Mali's various justice systems, the one run by the state holds greater potential for ensuring more equal treatment of Malians before the law and for providing a legal framework that is better adapted to the exigencies of the 21st century because it is nation-wide in scope.

This suggests that a short- to medium-term 'hybrid' strategy (~10-20 years), which avails itself of customary and state elements, must be combined with a long-term strategy (~20-40 years), which gradually removes the political bottlenecks that have so far impeded the development of the state judiciary, to sustainably improve the quality of justice in Mali. As to the short- to medium-term strategy, there is no realistic alternative to stimulating greater mutual recognition of, and synergies between, Mali's customary and state justice systems. As this will be a contentious endeavour, a gradual approach is needed to identify directions for development that are both acceptable and feasible. The five-step process below may provide this:

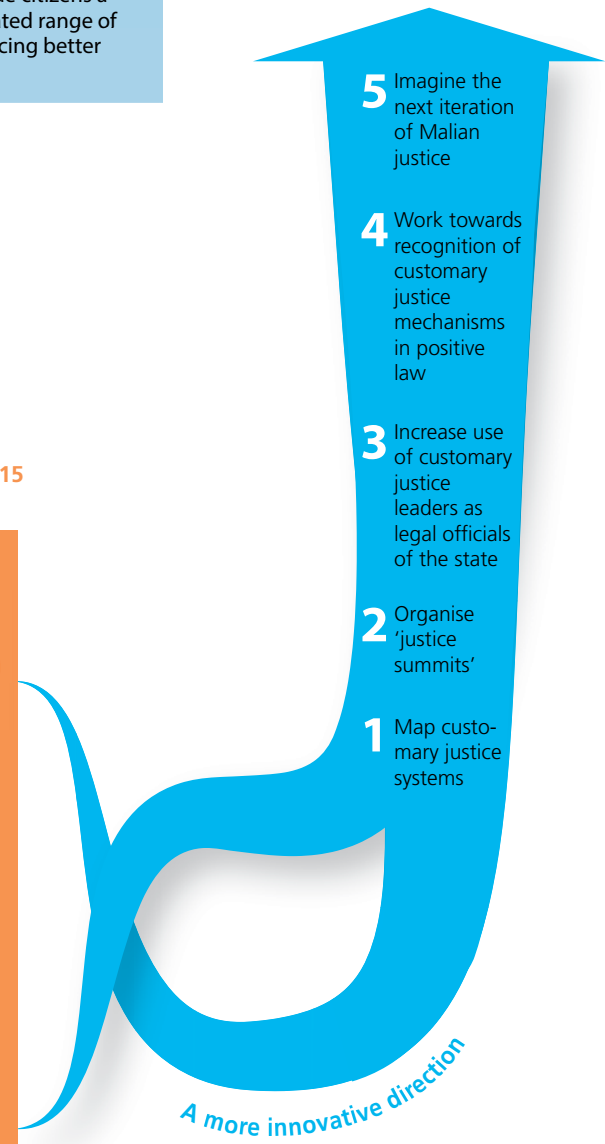
1. Map the nature and legitimacy of Mali's many customary justice systems with the aim of developing a better understanding of their performance and development potential.
2. Organise 'Justice Summits' throughout Mali on the basis of such a mapping to discuss the problems that Malian citizens encounter in their justice systems, how these can be creatively resolved and what role Mali's state and customary justice mechanisms can play in making this happen.
3. Make greater use of customary justice leaders as legal officials of the state to increase mutual exposure and create shared experience on the basis of which cooperation between both systems can grow, and which in the long term could possibly lead to the creation of one system. It may also deliver the practical benefits of reducing the caseload of state courts and increasing the enforceability of customary judgments.
4. Work towards recognition of those customary justice systems in positive law that enjoy adequate levels of popular legitimacy and are open to development with the aim of making better use of existing justice assets and offering Malians more synchronised 'paths to justice'.
5. Imagine what the next iteration of Malian justice could look like, based on the results of steps 1–4, drawing from the strengths of both state and customary systems while achieving both modernisation and maintaining an organic fit with Malian culture.

Beyond dichotomy: Innovating justice in Mali



Greater recognition between Mali's state and customary systems provide citizens a loosely integrated range of options producing better justice

Future state



Introduction

The violent events of 2012 highlighted a number of crucial obstacles to development that state and society in Mali continue to face. These include persistent identity boundaries that stimulate conflict, a deep lack of trust between a number of social groups and the state, as well as significant levels of insecurity and injustice. They also comprise a political system that is ill-suited to deliver public goods to Mali's citizenry and a lack of essential public facilities throughout the country, such as adequate infrastructure, protection of property rights and good-quality healthcare.¹

Two sets of issues – one factual, the other perceptual – have complicated efforts to address these obstacles. At the level of facts it is clear that Mali's development needs vastly outstrip the means for putting in place policies and measures to meet them. While this is the case in most societies, Mali's position on the 2014 Human Development Index, at 176 out of 187, suggests the challenges it faces are particularly daunting.² In addition, Mali is a state with relatively small areas having a medium-to-high population density and large areas with a very low population density. This makes broad and inclusive development beyond its densely populated core both politically unattractive and financially costly.³

At the level of perceptions, many Malian citizens consider their government ineffectual, self-serving and corrupt.⁴ While attitudes range from deep distrust of the state in the north to disgust with corruption in the south, they suggest that the political and

-
- 1 For an historical overview of the roots of conflict in the north and the historical persistence of such obstacles: Chauzal, G. and Van Damme, T., *The Roots of Mali's Conflict: Moving beyond the 2012 Crisis*, The Hague, the Clingendael Institute, Conflict Research Unit, 2015; Lecocq, B., *Disputed Desert: Decolonization, Competing Nationalisms and Tuareg Rebellions in Northern Mali*, Boston, Brill, 2010.
 - 2 United Nations Development Programme (UNDP), *Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience*, New York, UNDP Human Development Report, 2014.
 - 3 On the challenge of projecting authority in such settings: Herbst, J., *States and Power in Africa: Comparative Lessons in Authority and Control*, revised edition, Princeton, Princeton University Press, 2014. The author coins the term 'hinterland country' to describe the mix of area size and population density that characterises Mali (see also box 2). Although political control in hinterland countries is straightforward, these countries face huge difficulties in relation to territorial control and development.
 - 4 For example: Afrobaromètre, *Le citoyen, l'État et la corruption*, Sikasso, Présentation sur les résultats du round 5 des enquêtes Afrobaromètre au Mali, 2013; Several personal interviews, Van Veen, E. and Goff, D., Bamako, 27 March–3 April 2015; Chauzal and Van Damme (2015), *op. cit.*; Briscoe, I., *Crime after Jihad: Armed Groups, the State and Illicit Business in Post-Conflict Mali*, Clingendael CRU Report, The Hague, The Clingendael Institute, Conflict Research Unit, 2014.

administrative apparatus for making and delivering inclusive development choices is considerably flawed. Finally, and of more recent date, the international community has firmly interpreted the 2012 crisis as part of a 'perfect sandstorm' of organised crime and terrorism in the wider Sahel, which comes with an unhelpful superficial focus on security, to the neglect of deeper causes of crisis.⁵

Taken together, this array of factors creates a dauntingly difficult environment to climb out of. It also suggests that a broad-based strategy is required to help Mali recover aspects – real or imagined – of its 'emerging democracy' status that received so much praise before 2012. This report examines how efforts to improve the provision of justice in Mali could be a key component of such a recovery strategy.

The report argues, and substantiates its claim, that in the short-to-medium term better justice outcomes can be achieved only by stimulating greater mutual recognition of, and synergies between, Mali's customary and state judicial systems as more or less equal components of the country's 'justice ecology'. Accepting that the Malian state does not have, will not have and should not aspire to have, a monopoly on the provision of justice for several decades to come is a critical starting point for making improvements to the provision of justice in matters that are of concern to Malians in their daily lives. Available evidence also suggests that the continuation of efforts to realise judicial reform through large, state-centred and top-down initiatives is unlikely to bring about better justice. On the contrary, it is likely to waste resources and give rise to frustration. Instead, small improvements that build organically on the functioning aspects of Mali's many and varied justice systems offer a more promising path towards improved justice.

Although substantiated in the rest of the report, this is a sensitive and highly charged assertion in an era in which Weber's concept of the state remains dominant and colonial boundaries immutable. In consequence, a political strategy is needed to take action on the report's observations, as are sound, substantive initiatives. It is for this reason that the report targets a mixed audience of high-level decision makers and functional experts – Malian and international – who are willing to think 'outside the box' and deviate from the notion that the provision of justice is the prerogative of the state alone.

A study on the topic of justice in Mali is relevant for several reasons. First, the atrocities committed during the 2012 conflict by state security forces, radical groups and insurgents alike have made it even more urgent that justice is rendered in the north if the social contract between the Bamako-centred state and its northern citizens is

5 International Crisis Group, *The Central Sahel: A Perfect Sandstorm*, Africa Report No. 227, 2015a.

to be patched up.⁶ Second, many of the state-perpetrated injustices that need to be addressed in the north also prevail throughout the rest of the country. This applies, to a lesser extent, to atrocities associated with the 2012 conflict, in addition to matters such as corruption and unlawful detention. Fairer and better justice is required to shore up the legitimacy of the state and forestall social unrest. Third, an improved justice system, with more opportunities for redress and greater accountability, could stimulate progress in various core areas relevant to development. Fairer competition for jobs in public office, more equal legal treatment of Mali's citizens and more efficient utilisation of public funds represent only a few such areas.

In terms of the report's structure, Section 1 examines the political context in which justice in Mali is provided, with a particular focus on the consequences of unsettled identities and executive dominance over the country's governance. The Section points to the need for a broad political approach to improve the provision of justice. Section 2 discusses systemic constraints on, and popular expectations of, Mali's state and customary justice systems that impede their performance at the strategic level. Section 3 examines the operational performance of Mali's customary and state justice systems, including transitional justice and past improvement efforts. It provides an overview of practical challenges to better justice that are nested in broader political and strategic ones. Finally, the conclusion offers a strategy for gradually achieving greater mutual recognition of, and synergies between, Mali's customary and state justice systems as a pragmatic and yet innovative path towards better justice for the country's citizens.

6 For example, many Malians consider that a sustainable solution to the 2012 crisis requires that the perpetrators of past crimes are brought to justice. See: Coulibaly, M., *Perceptions populaires des causes et conséquences du conflit au Mali*, Bamako, Afrobaromètre, 2014; Allegrozzi, I. and Ford, E., *Reconstruire la mosaïque : Perspectives pour de meilleures relations sociales après le conflit armé au Nord du Mali*, Bamako, Oxfam/WilDAF/FeDDAF, 2013.

1 Understanding the politics: the possibilities for justice in an executive-dominated state

This section offers an historical contextualisation of how two incomplete trajectories of governance in Mali – from state to nation and from executive-dominated to representative government – prevent justice from being rendered on the basis of a shared identity and continue to enable use of the state judiciary for purposes other than providing an impartial public service to Mali’s citizens. It suggests that as long as this situation persists, a state judiciary that functions accessibly, fairly and transparently on a national scale will be difficult to realise. The section helps create an understanding of the current political boundaries of justice provision in Mali before subsequent sections analyse the strategic and operational difficulties entailed in any efforts to improve this provision.

Unfinished business: (i) From state to nation?

On 17 January 2012, the National Movement for the Liberation of Azawad (MNLA) initiated the fourth Tuareg uprising since Mali’s independence in 1960 by attacking a military garrison in the north-eastern town of Menaka.⁷ The ensuing events and developments echoed long-standing tensions within and between Mali’s southern and northern population groups that have historically been marked by mutual distrust.⁸

7 At its peak, the MNLA controlled the cities of Menaka, Aguelhoc, Lere, Tinzatouene, Tessalit, Kidal, Timbuktu and Gao but, unable to preserve unity between its Tuareg and Arab elements, it was gradually overthrown by the newly created Ansar Dine of Iyad ag Ghali, assisted by the Movement for Oneness and Jihad in West Africa (MUJAO) and Al-Qaeda in the Islamic Maghreb (AQIM). The four Tuareg uprisings took place in 1963, 1990-96, 2006-09 and 2012. See: Lecocq (2010), *op. cit.*; Chauzal and Van Damme (2015), *op. cit.*

8 One of the causes of historical distrust is that certain populations in Mali’s north, especially the Tuareg and Arabs, have a history of attacking other ethnic groups (Songhay, Fulani and Bambara) to plunder their resources and capture them as slaves. For more detail: Keita, N., ‘De l’identitaire au problème de la territorialité. L’OCRS et les sociétés Kel Tamacheq au Mali’, in: *Mali-France: Regards sur une histoire partagée*, Donniya et Khartala, Bamako/Paris, 2005.

Arguably, the more flexible boundaries and shifting governance arrangements of Mali's pre-colonial past enabled greater accommodation of diverse sets of interests which, in turn, helped prevent such distrust from escalating into full-scale violence.⁹ However, decolonisation and independence saw Mali acquire fixed boundaries, with state power within those boundaries accruing to local elites that used to be part of, or closely associated with, the French colonial administration.¹⁰

When these elites took charge of Mali after colonial rule was handed over to them, they, perhaps unsurprisingly, asserted centralised political authority over the entire country by projecting power in a way that economically and politically marginalised its northern areas (for example through the use of French as the language of administration). Added to the already significant geographical and climatic difficulties of governing and developing Mali's vast hinterland,¹¹ this approach gradually transformed the once prosperous north into a disadvantaged region while creating significant grievances in the process.

This led, predictably, to discontent, unrest and episodes of violence of which the four Tuareg uprisings are the most prominent. They have largely been interpreted by the elites that run the Malian state as existential challenges to their authority and suppressed as rebellions by military means. For example, the north was placed under martial law after the first Tuareg uprising (1963) and gradually militarised through the appointment of southern military personnel in key civilian and military positions. Such officials tended to behave as occupiers in a newly conquered country, adding the injury of defeat to the insult of humiliating elders, enforcing local marriages and behaving disdainfully towards local populations.¹²

9 This builds on Herbst's (2014), *op. cit.* argument regarding the control of space in pre-colonial Africa.

10 It is useful to recall that the combination of the growing functionality of the state and the rapid expansion of colonial empires in the late 19th century generated a need for large numbers of competent local administrators. This increased the educational and administrative opportunities for local urban elites. Even though such opportunities remained limited in many ways, they did bring together groups of individuals whose shared educational and administrative experiences formed a basis for their common understanding of territory and community – in the case of Mali, an understanding of the centralised French state. This development gave the advantage to the southern elites of the Malian territory, as Bamako was the centre of gravity of the French administration. For example, French schools were only established in Touareg areas in about 1947. For the general argument: Andersen, B., *Imagined communities*, London, Verso, 2006 [1983]; more specifically on Mali: Lecocq (2010), *op. cit.*

11 On this point: Herbst (2014), *op. cit.*

12 For a comprehensive analysis of the military administration of the north: Chauzal, G., 'Les règles de l'exception : La régulation du politique au Mali et au Niger', PhD dissertation, Sciences Po Bordeaux, June 2012.

Divisions between northern communities were also opportunistically used by Bamako to prevent the Tuareg tribes from posing a real challenge, for example by arming Songhay militias such as the Ganda Koy or Ganda Iso. This approach further fragmented the already fragile social texture of northern populations which – contrary to what some may believe – feature a great variety of Tuareg, Arab, Songhay and Fulani groups with different cultures, languages and traditions, not to mention different political mythologies.¹³ Unsurprisingly, it also led to further violent clashes, enabling the Malian government to portray the issue as a security threat that required forceful pacification. The current international focus on narco-jihadism ironically replicates this approach, albeit for different reasons. The resulting accumulation of grievances and distrust made it more and more difficult to achieve sustainable peace, as the lengthy negotiations leading to the recently concluded Algiers peace process illustrate.¹⁴ Moreover, the implementation of the peace agreement is unlikely to proceed as fighting continues in spite of it, thus probably further strengthening the negative spiral of grievance and distrust.¹⁵

It was only after the second Tuareg uprising from 1990 to 1996 that the Malian government changed its approach from military suppression to administrative neglect. While on paper the National Pact (concluded in 1992) sought to maintain Mali's territorial integrity, provide the north with greater autonomy and reduce the level of violence, in practice it led to the wholesale retreat of what few state institutions existed in the north, including the judiciary.¹⁶ The resulting vacuum enabled a few more strands to be woven into the tapestry of grievance, marginalisation and conflict in the north in the decades between the second Tuareg uprising and the fourth (2012): those strands being the growing prominence of jihadi-terrorist groups on the regional scene, the development of criminal-terrorist alliances of convenience and the increasingly criminal role of the Malian shadow state as it continued its divide-and-rule politics beneath the surface of the National Pact.¹⁷

13 Le Roy, E., 'L'introduction du modèle de l'État en Afrique francophones : logiques et mythologiques du discours juridique', in: *Décolonisations et nouvelles dépendances*, eds Coquery-Vidrovitch C. and Forest A., 1986; Lecocq, B. et al., *One Hippotamus and Eight Blind Analysts: A Multivocal Analysis of the 2012 Political Crisis in the Divided Republic of Mali*, Extended Editors Cut, 2013, <http://media.leidenuniv.nl/legacy/lecocq-mann-et-al---one-hippo-8-blind-analysts-editors-cut.pdf> (accessed 10 July 2015); Allegrozzi and Ford (2013), *op. cit.*

14 International Crisis Group, *Mali: la paix à marche forcée?*, Africa Report No. 226, 2015b.

15 See: 'Mali: après l'attaque d'Anéfis, la CMA interrompt sa participation au suivi des accords d'Alger', *Jeune Afrique*, 25 August 2015, <http://www.jeuneafrique.com/259317/politique/apres-lattaque-danefis-gatia-cma-interrompt-participation-suivi-accords-dalger/>; and 'Mali: IBK en visite en Algérie et au Niger pour appuyer l'accord de paix', *Jeune Afrique*, 2 Septembre 2015 (both accessed 9 September 2015).

16 Lecocq (2010), *op. cit.*; ICG (2015b), *op. cit.*; Chauzal (2012), *op. cit.* The presence of the state judiciary in the north was even further reduced after 2012, given that most of its infrastructure had been destroyed. The state re-established only a very weak presence in Timbuktu in 2014 and in Gao in 2015. Grunewald et al., *op. cit.*; several personal interviews, Goff, D., Bamako, 27–30 March 2015; Bengaly, A. et al., 'Etude sur la justice dans les régions du nord : Analyse de la situation et propositions', unpublished report, Bamako, April 2015.

17 Lecocq et al. (2013), *op. cit.*; Briscoe (2014), *op. cit.*

The purpose of this examination of developments leading up to the 2012 crisis is to show that the event should be seen largely as one marker of many that starkly underlined the continued lack of congruence between the Malian state and the Malian nation. If a nation is defined as an ‘imagined political community’,¹⁸ the limit of Mali’s community runs somewhere close to the northern bend of the Niger river.¹⁹ Although the area naturally is a patchwork of (intermixed) ethnic groups, this imaginary line (see figure 1 below) serves to juxtapose Mali’s Bambara and Tuareg populations that dominate the political discourse within and about the country. The long and the short of it is that the Malian state has not been able to transcend the different concepts of identity delineated by this imaginary line through acting as arbiter of the different interests that compete for power in Mali’s polity and as a neutral provider of collective services.²⁰

Figure 1 Mali’s administrative divisions and the informal demarcation of its ‘north’



This map was re-produced from the site of l’association ‘Bani Kono’, <http://bani.kono.free.fr/geographie.php> (accessed 27 July 2015)

18 Anderson (2006) [1983], *op. cit.*

19 This is not to suggest that an overarching Malian identity does not exist, but rather that accommodation (especially in terms of citizenship and governance) of the various identities that exist within the Malian polity is limited and that their relative ordering within the Malian state is both unequal and disputed.

20 Except, perhaps, the brief effort to create a francophone West African or Senegalese–Malian federation in 1959, which might have more readily accommodated ethnic groups that did not neatly fit within colonial boundaries. See: Lecocq (2010), *op. cit.*; Lecocq et al. (2013), *op. cit.*

This unresolved matter of identity and the associated difficulties of governance is crucial to the provision of justice, since disputed identities makes it difficult to establish a concept of justice that is considered legitimate by all and a practice of justice in which its provision is experienced as the extension of impartial public authority instead of as an instrument through which state power is expressed. It is therefore no coincidence that the state has never been central to the provision of justice provision in the north.²¹ Despite vigorous onslaughts on their legality and functionality by both the colonial and Malian administrations, traditional chiefs and religious leaders dominate dispute resolution in these regions, including in criminal matters.²²

Nevertheless, the irrelevance, and to some extent the perceived illegitimacy, of the state justice system in Mali's northern regions is not necessarily problematic from a day-to-day justice perspective in which most disputes are about family, land, commercial matters and small-scale crime.²³ The regions of the north generally have well-established customary mechanisms to deal with such disputes in ways that focus on preventing further violence, stimulating reconciliation, and restoring the equilibrium between communities. These mechanisms tend to be regularly used and well regarded.²⁴

This situation, however, is highly problematic for any strategy that unilaterally seeks to rapidly extend the presence of the state justice system into the north, for example as part of the recently concluded peace agreement.²⁵ The preceding analysis suggests that the basic questions of how Mali as an 'imagined community' should take shape, and of what governance arrangements are workable for its vast northern areas, given their legacy of violence, will need to be answered gradually and via trust-building approaches that consult citizens as much as possible. This will take years, if not decades. It also suggests – and this is further elaborated in section 2 below – that the most realistic short-term option for dealing with matters of quotidian justice is to support, stimulate and develop existing customary mechanisms where these continue to be locally accepted and legitimate. This would ideally be done in ways that ensure their compatibility as far as possible with a newly reconstituted state judiciary, for example via regular exposure of customary

21 Bengaly et al. (2015) *op. cit.* (see methodology).

22 Personal interviews, Goff, D., Bamako, 27 March and 1 April 2015; personal interview, Van Veen, E., Bamako, 28 March 2015; Grunewald et al. *Etudes sur les zones à faible densité : Etude de cas « Mali »*, Bamako, Rapport Groupe U.R.D, 2014.; Bengaly et al. (2015), *op. cit.*

23 Larger-scale, organised crime is a different matter, however. Customary justice mechanisms are generally not able to address this kind of crime effectively because of its scope, use of violence and complexity. See, for example: Bengaly et al. (2015), *op.cit*

24 Bengaly et al. (2015), *op. cit.*

25 There are indications that certain donors, for example the Dutch, are pursuing such a strategy: <http://nos.nl/artikel/2056186-nederland-geeft-vn-missie-mali-2-miljoen-extra.html> (Dutch language) (accessed 7 September 2015).

justice leaders to their customary and state peers via events and/or associations (see the conclusions for more detail).

In short, not only is state-provided justice largely absent from the north of Mali, it is also contentious, given the unresolved identity and governance issues. This points to the need to build on what already exists and is locally considered legitimate as an obvious way to improve justice mechanisms as part of a broader strategy for Mali's recovery in the short term. In the long term, the possibility of a hybrid customary-state system needs to be explored for the provision of justice in northern Mali, or a state system that is built on customary as well as French traditions.

Unfinished business: (ii) From executive government to representative governance?

The other incomplete trajectory of governance that influences how justice is organised and provided is Mali's stalled transition from executive-dominated government to representative governance. Representative governance here refers to mechanisms of rule in which the different interests competing for power and resources in Mali are adequately represented and transparently mediated, and in which functioning checks and balances exist for each of its composite elements. This obviously does not have to take the form of Montesquieu's classic *trias politica*, but should be tailored to Mali's particular circumstances. Inspirational examples of innovative, designed-to-fit-locally forms of representation include neighbouring Niger's governance arrangements with its Tuareg population, or the role of traditional chieftains in the governance of Sierra Leone.

A brief reflection on the nature of government in Mali suffices to highlight the issues in question. Mali was governed by two successive autocratic regimes from its independence in 1960 to the proclamation of its first democratic constitution and presidential elections in 1992. One eight-year period of autocratic rule under President Modibo Keita was followed by a 23-year period of military rule under President Moussa Traoré, who came to power through Mali's first coup in 1968. During these 31 years of autocratic rule, Mali's formal justice system served as an instrument of state. To put it bluntly, it was designed for and tasked with achieving and defending the political objectives of the ruling party, especially the interests of its elites. On one occasion, President Keita unequivocally asserted that the judiciary was "at the service of the state".²⁶ The Marxist tendency to consider the party – his *Union Soudanaise-Rassemblement Démocratique Africain* (US-RDA) – as the "nation's engine and the only driving force of the state" clearly placed the judiciary under

26 Diarra, A., *Démocratie et droit constitutionnel dans les pays francophones d'Afrique noire : Le cas du Mali depuis 1960*, Paris, Editions Karthala, 2010.

state control without even notional independence.²⁷ His successor, President Traoré, went as far as constitutionally establishing Mali as a single-party state.²⁸ Although this new constitution technically provided for an independent judiciary, in reality the way that legal affairs were conducted proved to be a continuation of business as usual.

Mali's second coup in 1991, led by Amadou Toumani Touré (ATT), overthrew the country's autocratic regime and marked the start of its democratic transition. The coup ended on a hopeful note with the introduction of a new constitution in January 1992 and the election of Alpha Oumar Konaré as the country's president in April of the same year. This rapid transition to democracy won praise and support from numerous international observers who were quick to elevate Mali as a model for other African countries.²⁹ On the face of it, there was much that looked positive. For example, Mali's new constitution firmly established a pluralist liberal democracy as the basis for further development, suggesting a clean break from the more autocratic notions of governance that previous regimes had ascribed to.³⁰ This shift in how Mali was governed also reverberated through the country's state judiciary, at least on paper. The new 1992 constitution once more enshrined the separation of powers, for the first time formally elevating the judiciary to the level of the executive and legislative powers.³¹ New judicial institutions, such as a Constitutional Court, were also created.³²

However, two key factors have largely prevented these changes from making the transition from paper to reality. One factor, which extends well beyond the state judiciary, is that governance in Mali continues to be grounded in neo-patrimonial networks and patronage, and features limited political competition.³³ In short, bureaucratic-legal changes such as the constitutional modifications mentioned above are in reality adjusted to fit the pre-existing configuration of power and interests. For example, it is well established that President ATT built large networks of support during his

27 In the words of Mamadou Diarra, political commissar of Modibo Keita, in: Diarra (2010), *op. cit.*

28 The 1960 constitution was replaced by a military order for the period 1968–74. A new constitution came into force on 2 June 1974.

29 See Thiriot, C., 'Rôle de la société civile dans la transition et la consolidation démocratique en Afrique: Éléments de réflexion à partir du cas du Mali', in: *Revue internationale de politique comparée*, 2(9), 2002; Wing, S., *Constructing democracy in transitioning societies of Africa: Constitutionalism and deliberation in Mali*, London, Palgrave Macmillan, 2008.

30 Diarra, A., 'Définition, genèse et rôle de l'Etat Malien', paper presented at the Forum multi-acteurs sur la gouvernance au Mali, Bamako, 1 March 2012.

31 Article 81 of the 1992 constitution stipulates that the judicial power is independent of the executive and legislative power. This was the first time that the judiciary was referred to as the judicial 'power', on a par with the executive and legislative powers.

32 Moulaye, Z., Diabaté, A. and Y. Doumbia, *Gouvernance de la Justice au Mali*, Berlin/Bamako, Friedrich Ebert Stiftung, 2007.

33 Lecocq (2010), *op. cit.*; Briscoe (2014), *op. cit.*; Chauzal and Van Damme (2015), *op. cit.*

mandates as president through the nomination of representatives of rival political parties to official positions at different levels of his administration. The net effect of these appointments was not just that four of the six biggest Malian political parties refrained from presenting a candidate to stand against him when he came up for re-election in 2007, it also further entrenched “the politicization of the Malian administration, which created conditions conducive to all kind of abuses to the benefit of the ruling party”.³⁴

This situation is by no means atypical for fragile states.³⁵ In such a context, executive control over the judiciary tends to be exercised through informal and material controls that have the effect of rendering formal legal safeguards of independence inoperative. For instance, in Mali the Ministry of Justice controls the budget of the judiciary and the careers of the state’s legal professionals (such as public prosecutors), and exercises strong influence over the careers of judges. Reportedly, the minister makes even members of the Supreme Court “tremble”.³⁶ Another example is that the Higher Council of the Magistracy (CSM: Conseil Supérieur de la Magistrature – the institution in charge of appointing, promoting, rotating and sanctioning staff employed in the state judiciary, including judges) has generally failed to vigorously pursue corrupt or underperforming judges.³⁷ Considering the neo-patrimonial context in which it operates, this should be no surprise, but it does hinder the effective and fair provision of justice as a public service. Likewise, the CSM is also criticised for the lack of transparency in its disciplining of judicial magistrates, as its decisions are not made public, and for the fact that only the Minister of Justice can bring proceedings against a judge. A final example of the informal influence that the executive has over the judiciary can be found by

34 For example: Makalou, B., ‘Administration et pouvoir politique dans le contexte de la gestion consensuelle du pouvoir au Mali’, paper presented at the Colloque Démocratie et gestion partagée du pouvoir: l’expérience Malienne depuis 2002, Bamako, 7 September 2007; Chauzal (2012), *op. cit.*; also: Lecocq et al. (2013). The research done for this report suggests, incidentally, a surprising absence of detailed analysis of the political interests of, and power relations between, Mali’s ruling political elites. The country’s ‘poster-child of democracy’ status before 2012 presumably obviated the need for such analysis but it is urgently required, as many problems that Mali’s justice systems face are embedded in broader socio-political relations of power and influence.

35 Neo-patrimonial control and patronage are not limited to Mali, and nor is the discovery of their existence of recent date. Consider, for example: Chabal, P. and J-P. Daloz, *Africa Works: Disorder As Political Instrument*, Indianapolis, Indiana University Press, 1999; or more recently: Booth, D., *Development as a collective action problem: Addressing the real challenges of African governance*, London, Overseas Development Institute, 2012.

36 *Cosmetic Changes in Store for the Malian Judiciary*, Wikileaks, 16 October 2009, https://www.wikileaks.org/plusd/cables/09BAMAKO666_a.html (accessed 6 March 2015).

37 One interviewee stated that the prevailing view among the members of this body is that you do not discipline your friends or equals. In consequence, it rarely has recourse to sanctions or anyway does not implement them. Personal interview, Goff, D., Bamako, 2 April 2015. See also: Bengaly, A., *La protection juridictionnelle des droits de l’homme au Mali*, Paris, l’Harmattan, 2015.

examining the course of the presidential elections of 1997, 2002 and 2007. Box 1 below outlines how, during these elections, serious doubts were cast on the impartiality of the Constitutional Court, which was created in 1992 and which is in charge of establishing the validity of elections.

Box 1 The role of the Constitutional Court in the presidential elections of 1997, 2002 and 2007

1997: In a tense climate of political competition, opposition parties requested the Constitutional Court to invalidate the first round of the legislative elections after severe irregularities in the voting process had emerged. The Constitutional Court concurred and an emboldened opposition subsequently requested a freeze of the whole electoral process (including the presidential elections), dissolution of the electoral committee for reasons of partiality, and better-balanced media access. The Court, however, allowed the elections to continue and this resulted in Alpha Oumar Konaré remaining president. Although the Court expressed partial agreement with the opposition's demands, it did not intervene.

2002: The vote was characterised by numerous irregularities, such as the discovery of fake voting stations, irregular distribution of ballot papers and votes cast by non-registered voters. Despite their magnitude and cross-country character, the Constitutional Court did not invalidate the entire first round of the presidential elections, but only cancelled 541,019 votes. This gave ATT (the preferred candidate of the outgoing president) c. 29% of the vote; Soumaila Cissé (the candidate of the president's own party) c. 21% and Ibrahim Boubacar Keita (IBK) (Mali's current president) c. 20%. This triggered a run-off between ATT and Cissé that was won by ATT. The episode raised suspicions that the outgoing president exerted pressure on the Constitutional Court to make sure his favoured candidate was elected.

2007: The elections were again hotly contested and surrounded by allegations of fraud. Interestingly, the re-election of ATT with 70% of the vote was not legally contested despite a public declaration by the President of the Constitutional Court that: "many politicians, candidates from all orders and affiliations, have become permanently involved in widespread fraud". Justifying its decision not to cancel the results, he argued that "when it comes to electoral litigation, we have time constraints and a deadline that we need to respect. The proofs [of fraud] that we are talking about, are not easy to bring forward in these conditions."

Comparing these episodes suggests that the Court has become increasingly enmeshed in webs of political relations and interests that mean it is difficult for it to function effectively and impartially

This box is based on: Chauzal, G., 'Les règles de l'exception : La régulation du politique au Mali et au Niger', PhD dissertation, Sciences Po Bordeaux, June 2012; intervention by Laurent Bigot (former French diplomat), 16 June 2012, <https://www.youtube.com/watch?v=Rn67xaLPCBM> (accessed 5 March 2015); declaration by Salif Kanouté, President of the Constitutional Court, Bamako, 10 August 2007 – for an excerpt: <http://www.maliweb.net/category.php?NID=21170> (accessed 27 July 2015)

Another factor that has prevented effective implementation of the legal changes of 1992 that sought to create greater judicial independence is that the executive continues to have significant powers of appointment in relation to positions in the highest organs of the Malian judiciary, namely the Supreme Court, the Higher Council of the Magistracy and the Constitutional Court. As these powers are *ex ante* in nature, the executive is largely ensured of favourable legal proceedings and rulings if and when desired. This largely obviates the need for overt executive intervention during legal proceedings.³⁸

Specifically, the members of the Supreme Court are appointed by a decree of the Council of Ministers, which is presided over by the President. The president and vice-president of the Supreme Court are named directly by the President in conformity with the recommendation of the Higher Council of the Magistracy (CSM). However, the CSM is also easily controlled by the executive since its chair is the President and its vice-chair the Minister of Justice and eight more of its members are officials (effectively appointed by the executive), while the Minister of Justice, as noted before, exercises significant influence over the 13 judges who make up the remainder of its 23-strong membership.³⁹ While the composition of the CSM is not exceptional compared with other francophone countries (including France itself), in a neo-patrimonial context it means that nominations of judges, designation of their posts and disciplinary procedures will typically be undertaken on the basis not of (de)merit, but of loyalty and personal relations.⁴⁰ Finally, of the nine members who make up the Constitutional

38 The research indeed found few cases of direct interference. One case could be identified in which the executive (in this case in the person of the Minister of Justice) simply ignored a judgment not to its liking and ordered the continued detention of a man whose conviction had been overturned by the Supreme Court (Wikileaks [2009], *op. cit.*)

39 *Ibid.*; Bengaly (2015), *op. cit.*; Moulaye et al. (2007), *op. cit.*; personal interview, Goff, D., The Hague, 20 February 2015.

40 One interviewee asserted that the Higher Council of the Magistracy in fact seeks to nominate judges who are flexible and easy to manipulate. This body also controls the discipline of judges and designates their postings, so if a judge steps out of line he or she can be sent to an undesirable location or removed from office. Malian Constitution, Title VIII, Art. 84; personal interview, Goff, D., The Hague, 20 February 2015; personal interview, Goff, D., Bamako, 31 March 2015.

Court, the President chooses three directly while the CSM – informally controlled by the executive – chooses another three.⁴¹ As noted, the Constitutional Court happens to be in charge of supervising elections.⁴² This arrangement provides the executive with more or less direct control over the CSM and indirect control over both the Supreme and the Constitutional Courts.⁴³

In short, dominance of the executive over the judiciary has persisted since 1992, although in more insidious ways than during Mali's preceding periods of autocratic rule. It is mostly through the Ministry of Justice and the Higher Council of the Magistracy that executive control and influence can be exercised.⁴⁴ The dual effect of such executive dominance is that it greatly reduces the credibility and impartiality of the state judiciary, as well as its ability to address its own internal problems.

Stepping back in time, one can observe that Mali has been ruled by autocratic regimes during 31 out of the 55 years in which it has existed as an independent state (c. 60% of the time). There have been four uprisings, and power has changed hands eight times at the presidential level, three times via coups and five times via elections.⁴⁵ Of these elections, at least three were characterised by serious irregularities and the last one was conducted in crisis mode. It therefore seems reasonable to suggest that, despite Mali's turn to democracy 23 years ago, it has not yet been possible to create a stable mechanism for the transfer of power at the pinnacle of the Malian polity that is peaceful, fair and transparent. The playing field for political competition remains uneven. Any effort to address this issue is hindered by the low permeability of Mali's political elites. At the top, it is largely the same individuals and coalitions that have 'competed' for

41 Malian Constitution, Title IX, Art. 91.

42 Bengaly (2015), *op. cit.*

43 For the exact rendering of the formal rules stipulating the composition of these three institutions of law see : Malian Constitution, Title III, Articles 39 and 47; Présidence de la République Mali, *Loi organique no. 3-033* du 07 Octobre 2003, fixant l'organisation, la composition, les attributions et le fonctionnement du conseil supérieur de la Magistrature, Bamako.

44 It is worth mentioning that formally removing the CSM from the influence of the executive does not necessarily guarantee its independence. This requires a more multi-faceted approach. Consider the cases of the Democratic Republic of Congo (DRC) and Haiti, for instance, where the executive has been taken out of the CSM but political influence and abuses remain. On the DRC: Mutonwa Kalombe, J-M., *Organization, operation and competences of the judicial council in Democratic Republic of Congo*, Konrad Adenauer Stiftung African Law Study Library, vol. 8, 2011, 1-21. For Haiti: Flecher, J., 'Haiti : Le CSPJ sera enfin installé', *Le Matin*, 2 July 2012, <http://lematinhaiti.com/contenu.php?idtexte=31373&idtypetexte> (accessed 20 July 2015).

45 From Modibo Keita in 1960 to: 1) Moussa Traoré in 1968; 2) Amadou Toumani Touré (ATT) in 1991; 3) Alpha Oumar Konaré in 1992; and 4) again in 1997; 5) ATT in 2002; and 6) again in 2007; 7) Amadou Sanogo in 2012; and 8) Ibrahim Boubacar Keita in 2013. One could add Dioncounda Traoré as acting president in 2012–13.

power since 1992, especially if the presidential elections are taken as the yardstick to go by.⁴⁶ However, the continued existence of widespread discontent across the country, and violence in the north, suggests that these elites have not managed to govern Mali in a way that is considered equitable, just and effective.⁴⁷

In such an executive-dominated context it is difficult to conceive of, and provide, justice as an independent public service that can neutrally and effectively arbitrate in disputes between citizens, between citizens and the state or even between parts of the state itself. At present, the legacy effects of the subordination of Mali's state judiciary to the country's executive either linger or continue to be nurtured. Whichever the case, it is not just greater independence of the judiciary that is required to realise better justice, the prerogatives and practices of the executive must also be re-examined and, where appropriate, better balanced with those of other institutions of state. Deeper reflection on ways to foster genuine political competition and opposition might be one way to achieve this; greater support for free and independent media that can act as counterweight another.

In sum, the preceding analysis suggests that Mali does not have in place the unity of identity that is essential to generate a shared and legitimate concept of justice, and nor has it achieved the balance in governance that is required for the provision of justice as a neutral public service. With this finding in mind, the next section discusses structural constraints on, and popular expectations of, Mali's state and customary justice systems, with the aim of producing an historically grounded overview of the 'state of justice' in Mali.

46 For example: Chauzal, G., 'Comment on Bamako's new government: Implications for Mali and the North-South reconciliation process', *Clingendael opinion*, posted 16 February 2015a, online: <http://www.clingendael.nl/publication/commentary-bamako%E2%80%99s-new-government> (accessed 15 June 2015).

47 See, for example: Coulibaly (2014), *op. cit.*; ICG (2015b), *op. cit.*; Bengaly et al. (2015), *op. cit.*

2 Identifying systemic constraints on the provision of justice: a case of form over function

This section identifies the systemic constraints on the provision of justice in Mali, meaning the functional specifications of its state and customary justice mechanisms that determine what they are capable of in theory (the next section deals with how they operate). It starts with a brief discussion of why Mali retained an imported foreign legal system after independence, without appropriate customisation. It subsequently identifies and analyses four systemic constraints on state-provided justice in Mali, namely: the complexity of its legal system, the language it uses, its cost of access and use, and its cultural dissonance with customary mechanisms. It arrives at the conclusion that these systemic factors make the state judiciary inaccessible to the vast majority of Malians, by design.

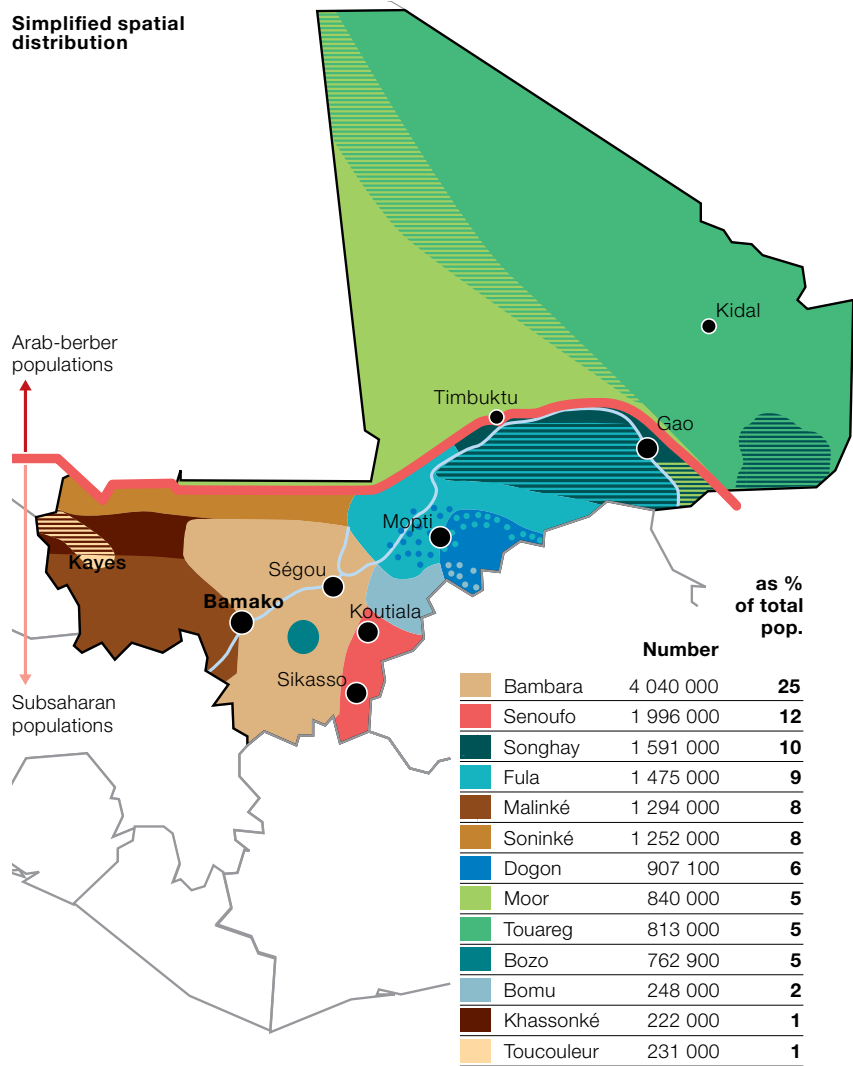
Why did Mali retain an imported judicial system after its independence?

At the time of independence, Mali's elites chose to adopt the European model of governance and justice that the French had introduced – in particular the French Civil Code system.⁴⁸ On the one hand, this provided the newly established country with a unified, state-of-the-art justice system that promised equal treatment for all on the basis of a shared set of rights and duties. This could have overcome the question of how to resolve disputes across communities belonging to different ethnic groups (their variety is depicted in figure 2 below). It could have also resolved the potential unequal treatment of similar cases in different customary justice systems.⁴⁹ In addition, the greater procedural formality of the French legal system also had the potential advantage of enhancing transparency and strengthening the social contract. In short, introduction of the French system could have improved the quality of legal process available to Mali's citizens in terms of its consistency, equality and predictability.

48 Winslow, R., 'Mali', in: *Crime and Society: A Comparative Criminology Tour of the World*, San Diego, undated, <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/mali.html> (accessed June 2015); personal interview, Goff, D., Bamako, 25 March 2015.

49 Personal interview, Goff, D., Bamako, 31 March 2015.

Figure 2 An overview of the diversity of Mali's different ethnic groups



OECD, *An Atlas of the Sahara-Sahel*, Paris, Sahel and West Africa Club, 2015

However, in reality the choice of the French legal system also reflected a simple calculation of power and privilege. Domestic elites associated with colonial rule and culture chose to keep its institutions in place to maintain their own advantages. This mirrored similar choices in other post-colonial states.⁵⁰ Despite an initial effort under President Keita to customise French law to suit Malian culture, the French system of the time was largely copied to the letter.⁵¹ Although some new laws have been adjusted since, colonial laws that have not been repealed or amended are generally still in force, resulting in a confusing mixture of colonial and post-colonial laws.⁵²

Four factors of systemic dysfunction: complexity, language, cost and culture

The key consequence of Mali's choice to retain the imported French legal system was the creation of permanent tension between the justice needs of the population and the type of justice that the state is able to provide. This tension is situated at the systemic level, meaning that it is inherent in the design of the state's judicial system and not primarily a function of how it operates (discussed at length in section 3). Its main effect is that it renders the state judiciary largely inaccessible for the majority of Malians. Because this tension is systemic, it cannot be resolved by increasing resource allocations to the state judiciary as some might argue. In short, even if one were to ignore the politics of identity and executive governance discussed in the previous section, upgrading the quality of justice that the Malian state provides is not achievable through resources alone. It requires a more fundamental rethink of the justice that Malians need and how the state can effectively provide this. Systemic tension is largely generated by four factors.

A first factor is the sheer complexity of the French legal system, which is characterised by a significant level of legal, educational and institutional sophistication, that the Malian state, not having gone through the stages of historic development that France has experienced, is unable to attain. Simply put, Mali did not have, and does not have, the required organisations, culture, capabilities or resources to operate the legal system it imported. For example, full implementation of the adopted French system requires an

50 Personal interview, Van Veen, E., Bamako, 28 March 2015; De Jorio, R., 'Mali', in: *Countries and their Cultures*, <http://www.everyculture.com/Ja-Ma/Mali.html> (accessed June 2015); Haugen, G.A. and Boutros, V. *The Locust Effect: Why the End of Poverty Requires the End of Violence*, New York, Oxford University Press, 2014; Bengaly (2015), *op. cit.*

51 Bengaly (2015), *op. cit.*

52 Chikwanha, A.B., *Traditional Policing in Mali: The Power of Shame*, Nairobi, Institute for Security Studies, 2008, <http://www.issafrica.org/iss-today/traditional-policing-in-mali-the-power-of-shame> (accessed June 2015); African Development Bank, 'Mali', *Law for Development Review*, vol. 1, 2006.

institutional ecology, and financial and training resources, that are not present and that a country like Mali could not accomplish on its own in its present circumstances. This is not to suggest that Malians require less justice or justice of a lower quality than anyone else, it merely amounts to saying that the French system as imported at the time is ill-suited to the level of development and type of society that Mali currently has (see also box 2 below).⁵³

A practical manifestation of this complexity is the fact that the officers of the judicial police, for example, often do not understand how the judicial system works, are insufficiently trained to apply due process in criminal investigations, or, in some cases, are illiterate.⁵⁴ Another practical manifestation of this complexity is that litigants often need to engage intermediaries to help them navigate the state's judicial system. This is a consequence of the existence of conflicting laws, the procedural sophistication of the French legal system, high rates of illiteracy and the small proportion of the population who speak French, as mentioned below.⁵⁵ Such intermediaries, however, increase the cost of using the state judiciary because of the fees payable to them, and they can also easily trick litigants into making additional – excessive – payments. For example, lawyers are known to ask for a 'judge fee' as a regular part of their payment, which is in reality an illegal bribe.⁵⁶ This, in turn, increases distrust of the system and encourages corruption.

A second factor that generates systemic tension is that the language of the justice system is French, despite the fact that Mali is the least Francophone country in West Africa.⁵⁷ Only about one-third of the population, referred to as the educated elites, speak it, with only 10% being fluent in it.⁵⁸ In contrast, roughly 80% of Malians speak or understand

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- 53 Personal interview, Goff, D., The Hague, 10 March 2015. See: ABA, *Access to Justice Assessment for Mali*, Washington DC, American Bar Association, 2012 for a discussion on how Mali's legal institutions as they exist on paper are not fully operational in reality. For a more general discussion on the dynamics of institutional reform in developmental environments: Andrews, M., *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions*, Cambridge, Cambridge University Press, 2013.
- 54 Personal interview, Goff, D., Bamako, 27 March 2015; *Suivi de la Conférence des donateurs pour le Mali: La Communauté internationale adhère à la politique du ministre Bathily*, Maliweb, Bamako, <http://mali-web.org/societe/justice/suivi-de-la-conference-des-donateurs-pour-le-mali-la-communaute-internationale-adhere-la-politique-du-ministre-bathily> (accessed 23 July 2015).
- 55 See also: Pringle, R., *Democratization in Mali: Putting History to Work*, Washington, DC, United States Institute for Peace, 2006. In a number of legal areas Mali has codified conflicting laws from the colonial and post-colonial era, which makes an already foreign system even more confusing.
- 56 Personal interviews, Goff, D., Bamako, 25 March, 30 March and 1 April 2015.
- 57 Remane, P., *Le Mali, le pays le moins francophone d'Afrique*, Bamako, 2010, <http://www.swissinfo.ch/fre/le-mali--le-pays-le-moins-francophone-d-afrique/28515390> (accessed 25 June 2015); personal interview, Goff, D., Bamako, 25 March 2015.
- 58 De Jorio (2015), *op cit.*; Remane, P. (2010), *op cit.*; personal interview, Goff, D., Bamako, 25 March 2015; personal interview, Van Veen, E., Bamako, 28 March 2015.

Bambara and/or speak one of Mali's 12 additional national languages.⁵⁹ In addition to these communication difficulties, the 2011 adult literacy rate stood at about 33% (see also box 2 below).⁶⁰

Box 2 Situating the provision of justice in Mali in its socio-economic context

Poverty level

Around 86% of Mali's population of about 17 million inhabitants live in multidimensional poverty, and 77% earn less than USD 2 a day (2015). Mali is also one of the least developed countries in the world: it ranked 176 out of 187 in UNDP's Human Development Index (HDI) in 2014. This suggests that the state justice system is financially out of reach for two-thirds or more of the Malian population since no effective and simple mechanisms for legal financial aid are in place nationwide.

Population spread

Some 90% of Mali's population live in the southern one-third of the country's territory (2014). In contrast, only 10% live in the remaining two-thirds, which is considered to be the north of the country (see figure 1). Of these 10%, 90% live along the Niger bend. This suggests that if access to justice is a priority in terms of size of population served, efforts need to focus on the south and perhaps the Niger bend. In addition, about 60% of the Malian population is rural while around 40% is urban (2013). This suggests that the cost and time associated with visiting the courts of the state justice system are prohibitive for about half the population.

Literacy rate

A literacy rate of 33% suggests that efforts at raising Malians' awareness of their rights, duties and the legal process will need to be carried out in oral form for the next decade or more. More specifically, given negligible internet penetration rates (2.7% in 2013) and low penetration rates for written media (5% to 11% read a daily or a weekly), this would have to be in person, by mobile phone (close to 100%) or by radio broadcast (70% listen to radio at least once a week).

This box is based on: CIA World Fact Book; World Bank Database; Internet World Stats; BuddeComm; CommsMEA (all consulted 8 March 2015); ABA (2012), *op.cit.*; UNDP Development Report (2014), *op.cit.*; OECD (2015), *op.cit.*; Maliweb.net (accessed 29 April 2015).

59 'Mali: Ancient Crossroads of Africa', in: *Language* (2002), http://mali.pwnet.org/history/history_language.htm (accessed 25 June 2015); Central Intelligence Agency, *The World Factbook*, online, undated: <https://www.cia.gov/library/publications/the-world-factbook/fields/2098.html> (accessed 25 June 2015).

60 The World Bank, 'Literacy Rate, Adult Total (% of people ages 15 and above)', online, 2015: <http://data.worldbank.org/indicator/SE.ADT.LITR.ZS> (accessed 25 June 2015).

A third factor is that Mali is one of the world's 25 poorest countries,⁶¹ which means that the filing fees associated with using the justice system are not easily absorbed by the average citizen in a country where half the population earns less than USD 1.25 per day, and where there is not a widespread functioning legal aid system.⁶² In addition, as justice infrastructure is lacking throughout the country (especially in rural areas and the north), a litigant may need to travel over 200 km to reach the nearest court.⁶³ The costs of doing so are neither affordable nor justifiable for most, given the unreliability of the state justice system to produce fair justice outcomes (see sections 1 and 3).⁶⁴

A fourth factor that generates systemic tension is that popular expectations of the form and purpose of justice differ from what the state has on offer.⁶⁵ In terms of general social expectations of, and preferences for justice, Malians see the state justice system as a last resort, and would rather deal with things 'in the family' where possible (see box 3 below).⁶⁶ Taking someone to court is socially not seen in a positive light.⁶⁷

61 BBC, *Mali country profile-overview*, 2015, <http://www.bbc.com/news/world-africa-13881370> (accessed 21 April 2015).

62 ABA (2012), *op.cit.* It should be noted that various civil society groups have trained individuals in communities in need as paralegals to bridge the gap. As of 2015 there were 123 community-based paralegals working in seven regions in Mali; in 2012 these organisations had worked with the National Institution of Judicial Training in Mali to develop a unified national training curriculum for them. These services are popular for divorce or land disputes. See, for example: Association DEME SO/Cadre National de Pilotage du Curriculum de formation des Parajuristes (CNPCP) au Mali, *Rapport annuel 2014 sur le travail des parajuristes du Mali*, Bamako, December 2014, http://www.humanrights.dk/files/media/dokumenter/nyheder/rapport_2014_parajuristes_web.pdf; Wijeyaratne, S., *Hopes for the new Malian government*, Oxfam, 5 February 2014, <http://policy-practice.oxfam.org.uk/blog/2014/02/hopes-for-the-new-malian-government>; Wijeyaratne, S., *Wat willen de mensen in Mali [What do the people in Mali want]*, Oxfam Novib, 10 February 2014, <http://praatmee.oxfamnovib.nl/praat-mee/praat-mee/mensenrechten/2014/2/wat-willen-de-mensen-in-mali.aspx>; CNPCP Mali, *A propos du CNPCP*, <http://www.cnpcpmali.org/pages/cnpcp.html> (all accessed on 23 July 2015).

63 ABA (2012), *op. cit.*; Bengaly et al. (2015), *op. cit.*

64 Feiertag, S., *Guide to Legal Research in Mali*, New York, GlobalLex, New York University, 2008, <http://www.nyulawglobal.org/globallex/Mali1.htm> (accessed 28 July 2015).

65 ICTJ, *Internationally-led Justice Efforts in Mali Must Consider National Context, Adapt to Local Needs*, 2014, <https://www.ictj.org/news/internationally-led-justice-efforts-mali> (accessed 25 June 2015); De Vries, J. et al., *Synthèse des Etudes sur le Renforcement de la Justice Pénale au Mali*, The Hague, Center for International Legal Cooperation, 2014, <http://www.cilc.nl/cms/wp-content/uploads/2015/04/Synthese-des-etudes.pdf>, (accessed 28 June 2015).

66 For example, one interviewee whose husband allegedly attempted to murder her when she threatened to leave him, first approached the witnesses to their marriage for help, and they sent her and her husband for mediation with an Imam. It was only after these measures had failed that she turned to the criminal justice system. Personal interview, Goff, D., Bamako, 1 April 2015. See also: Bengaly (2015), *op.cit* and Bengaly et al. (2015), *op. cit.*

67 Personal interviews, Goff, D., Bamako, 10 March in The Hague; 27 and 30 March 2015 in Bamako.

A popular French proverb adopted by Malians that encapsulates this sentiment is “a bad arrangement is better than a good trial”.⁶⁸ The desire of Malians to find a resolution that benefits all can also be seen in the procedures of the Mediator of the Republic, whose goal is to persuade the winning parties in disputes between the state and its citizens to renounce some of their gains for the benefit of the losing party.⁶⁹

More specifically, many describe Malian traditions and culture as tolerant, conflict-avoiding, and consensus-seeking,⁷⁰ which contrasts with the more procedural and punitive character of Mali’s positive law.⁷¹ If one takes the long view, the first set of descriptors arguably symbolises the true nature of Mali’s popular culture of justice, which has been submerged by its colonial period and the successive crises in the north. Quite diverse ethnic groups that live together in present day Mali also lived together peacefully under the Ghana, Malinke, and Songhai empires,⁷² where a culture of tolerance was deliberately cultivated by their rulers through conflict-prevention customs. One of the best-known of these customs is ‘cousinage’, also referred to as ‘joking relationships’ (sanankouya), which prescribes that specific ethnic groups or occupation-based castes must not fight each other, encouraging them instead to address each other with insults in a humorous way. These jokes are usually historically rooted, for example having one ethnic group remind another that they enslaved the other’s ancestors. These customs have been described as a daily therapy that lightens the atmosphere and allows people to trust one another.⁷³

68 Notably, this saying was coined during the emergence of state justice systems in Europe, when people preferred to use private mediation through religious or community leaders or paid professional mediators. This mirrors the early stage of development of the Malian system where people also turn to the same types of private mediators to circumvent a state system that is not yet functioning at a level sufficient to make it the preferred option for conflict resolution. Ruff, J., *Violence in Early Modern Europe 1500-1800*, Cambridge, Cambridge University Press, 2001; personal interview, Goff, D., Bamako, 30 March 2015.

69 Personal interview, Goff, D., Bamako, 25 March 2015.

70 See, for example: Hiil, Hague Institute for the Internationalisation of Law, *Les besoins des Maliens en matière de justice : vers plus d'équité*, The Hague, Hiil, 2014; Morgan, A., *Music, Conflict and Culture in Mali*, Copenhagen, Freemuse, 2013; Bengaly (2015), *op. cit.*

71 For example, in 2013 about half of all prisoners in Mali were pre-trial detainees. Moreover, as far back as 2003 there have been reports of significant numbers of individuals waiting in prison for 10 years for a judgment in their case. UN Department of Peacekeeping Operations, *Justice & Corrections Update*, New York, DPKO, 2014; Best, S. et al. (eds), *The Global Industrial Complex: Systems of Domination*, Lanham, Lexington Books, 2011.

72 Winslow (undated), *op. cit.*; Pringle, R. (2006), *op. cit.*

73 Pringle (2006), *op. cit.*; Traore, M., *Médiation et Facilitation Dans L'Espace Francophone: Théorie et Pratique*, Bruylant, Brussels, 2010; Straus, S., *Mali and its Sahelian Neighbors*, Washington, DC, World Bank, 2011, http://web.worldbank.org/archive/website01306/web/pdf/wdr_2011_case_study_mali.pdf (accessed 22 June 2015); Chikwanha (2008), *op. cit.*; De Jorio (undated), *op. cit.*; Konate, D., *Les Fondements Endogènes d'une Culture de Paix au Mali: Les mécanismes traditionnels de prévention et de résolution des conflits*, UNESCO, undated, <http://www.unesco.org/cpp/publications/mecanismes/edkonate.htm> (accessed 23 June 2015).

Box 3 Keeping it in the family: popular preferences for dispute resolution

In Mali, the basis of a legal action rarely starts with the victim or aggrieved party approaching the state justice system, especially in rural areas. Indeed, a 2009 survey of 1,000 Malian citizens found that only 10% of them would contact the police in the case of a crime; in a 2010 survey, 65% of Malians stated they were dissatisfied or highly dissatisfied with the management of the police and gendarmerie, and 66% of all of those who responded were also dissatisfied with the justice system. In addition to these perceptions, Malians are also likely to avoid the court system for more socio-cultural reasons because bringing a case to court is seen as 'declaring war' on the other party. Moreover, the inefficiencies in the court system mean that the case could take years, with possible episodes of violence between the parties erupting during this time. Finally, people are well aware of the corruption problems in the system. Instead, when a legal dispute or a crime takes place the parties are likely to first try to resolve it within their families and communities in a customary mediation context, and will see the state justice system as a last resort. An unsatisfactory informal agreement will tend to be preferred over a formal judgment.

This box is based on: Personal interviews, Goff, D., Bamako, 27 March – 2 April 2015; personal interviews, Van Veen, E., Bamako, 27-28 March 2015; Freedom House, *Mali*, 2011, <https://freedomhouse.org/report/countries-crossroads/2011/mali> (accessed 8 March 2015); Pringle, R. (2006), *op. cit.*; HiiL (2014), *op. cit.*

Another such conflict-prevention custom that seeks to short-circuit conflicts hinges on members of castes that have historically been viewed as being neutral mediators because they could not marry ruling elites and/or because they were perceived to have magical powers. At least one such caste, the *griots* (bards), is still regularly called on to solve disputes today.⁷⁴ *Griots* are known to use shame as a way to punish because it has the effect of banishing or marginalising a perpetrator. There is also another group of customary justice providers called 'jokers' who use another set of joking relationships

74 Pringle (2006), *op. cit.*; Chikwanha (2008); *op. cit.*; personal interview, Van Veen, E., Bamako, 28 March 2015. Other groups known to play this role include the *Numu* (blacksmiths) and *Garanke* (shoemakers). Konate (undated), *op. cit.* The female descendants of the founders of the Segou monarchy, known as the 'female kings' and regarded as having occult powers, are yet another group of traditional mediators. Pringle (2006), *op. cit.*

(anankun) and shame to compel parties to apologise and to come to an informal resolution.⁷⁵ These 'jokers' are utilised primarily in cases of assault.⁷⁶

Collective punishment, where a customary justice leader sanctions an entire clan in order to press them into punishing the wrongdoer in their family, is yet another traditional way of resolving a conflict without state involvement. Such methods, along with cousinage, have been identified as the reason behind Mali's comparatively low crime rate and prison population,⁷⁷ as evidenced in a 2007 survey, which showed that Mali had the second-lowest prison population in Africa.⁷⁸ More importantly, these methods are much more flexible and informal than the formulaic and complex rules of procedure and legal protections characteristic of the state justice system. The consequence is that the legal proceedings and phraseology of the state judiciary are alien to the reality of many Malians, as they have little in common with centuries-old customary justice systems.⁷⁹ The argument – as sometimes advanced – that legal awareness-raising and civic education can remedy this situation misses the point because it takes the superiority of the state's legal system as a given by assuming that making it better understood will stimulate litigants to avail themselves of it in greater numbers. However, many Malians might in fact continue to prefer the customary justice systems at their disposal for the resolution of particular types of disputes.

A final important consideration in respect of the culture and provision of justice in Mali is that more than 90% of its population is Muslim. Malians are known for practising a 'tolerant' version of Islam, which allows for democratic governance and rejects harsh eye-for-an-eye sharia law punishments.⁸⁰ Over the centuries this has given rise to a rich set of customary Islamic legal practices, centred on Timbuktu, that are characterised by

75 Chikwanha (2008); *op. cit.*; Nalla, M. and Newman G. in: Stamatel, J. et al., *Crime and Punishment around the World*, Vol. 1 – Africa and the Middle East, Santa Barbara, ABC-Clio, 2010: <https://iuristebi.files.wordpress.com/2011/07/crime-and-punishment-around-the-world-volume-1-africa-and-the-middle-east.pdf> (accessed 28 July 2015).

76 Chikwanha (2008); *op. cit.*;

77 Chikwanha (2008); *op. cit.*; personal interview, Goff, D., The Hague, 10 March 2015.

78 Walmsley, R., 'Trends in World Prison Population', in: Harrendorf, S. et al. (eds), *International Statistics on Crime and Justice*, Helsinki, Heuni, 2010.

79 Personal interviews, Goff, D., Bamako, 25 March 2015 and 2 April 2015. Personal interviews Van Veen, E., Bamako, 27 March 2015.

80 Zouber, M. et al., *Scholars of Peace – The Islamic Tradition and Historical Conflict Resolution in Timbuktu*, Special Conflict Research Group, <http://run.edu.ng/media/1274441773152.pdf> (accessed 24 June 2015); personal interview, Van Veen, E., Bamako, 27-28 March 2015; personal interview, Goff, D., Bamako, 30 March 2015.

appreciable sophistication and good functionality.⁸¹ Such religious dispute-settlement mechanisms have continued to operate and not only enjoy significant credibility among much of the population, but also tend to generate justice outcomes aimed at reconciliation and based on mutual respect. The story of how resourceful Malians and their international supporters were able to save many of the manuscripts that testified to the progressive and tolerant nature of Islamic thought and rule that prevailed in Mali, continues to provide a stark counter-narrative to the dogmatic strictures of Salafism and radical Islamic fundamentalism.⁸²

While there is the usual range of political beliefs among Malian Muslim organisations and their leadership, there are no significant tensions or divisions between adherents to the different denominations of the Islamic faith in Mali, such as Sunni, Sufi or Wahhabis.⁸³ Even its more conservative elements do not identify with the jihadists that invaded and have taken up residence in the north, or with their use of the harsher forms of sharia law as a basis for providing justice.⁸⁴ Malian Muslims identify strongly with the tolerant version of Islam that they said their ancestors developed, and which works with

81 For example, at the height of Timbuktu's power in the mid-fifteenth century its mosques were known as centres of mediation and arbitration not only between warring groups but also for family and private conflicts. The imams, scholars and judges associated with these mosques travelled throughout the region to promote the Koranic ideal of peaceful dispute resolution. In Mali's more recent past, nineteenth-century writings of Al hadj Umar Tall, ibn Sa'id al Futi, a scholar and leader in the Timbuktu region, also show that passages in the Koran encouraging peaceful conflict resolution were used as guides when intervening in conflicts throughout the region. Zouber et al. (undated), *op. cit.*

82 Raghavan, S., 'How Timbuktu's manuscripts were saved from jihadists,' *Washington Post*, 26 May 2013, http://www.washingtonpost.com/world/how-timbuktus-manuscripts-were-saved-from-jihadists/2013/05/26/299e26f6-bbd5-11e2-b537-ab47f0325f7c_story.html (accessed 28 June 2015); Hammer, J., 'The Treasures of Timbuktu', *Smithsonian Magazine*, December 2006, <http://www.smithsonianmag.com/making-a-difference/the-treasures-of-timbuktu-138566090/?no-ist> (accessed 28 June 2015).

83 Bell, D., 'Understanding Currents of Islam in Mali', *Cultural Anthropology*, March 2012, <http://www.culanth.org/fieldsights/312-understanding-currents-of-islam-in-mali> (accessed 23 June 2015).

84 What is described as the 'harsh' application of sharia law had become at least a semi-regular occurrence following the Islamist takeover in the spring of 2012, including in Gao and Anguelhok. Trials were often rudimentary, consisting of a dozen or so jihadists sitting in a circle and pronouncing a judgment. The hearing, judgment and sentence are usually carried out on the same day in closed session. Nossier, A., 'Islamists' Harsh Justice Is on the Rise in North Mali', *New York Times*, 27 December 2012, http://www.nytimes.com/2012/12/28/world/africa/islamists-harsh-justice-on-rise-in-northern-mali.html?pagewanted=all&_r=0 (accessed 9 March 2015); Mben, P., 'A Trip Through Hell: Daily Life in Islamist Northern Mali', *Der Spiegel*, 29 October 2012, <http://www.spiegel.de/international/world/a-trip-through-hell-daily-life-in-islamist-controlled-north-mali-a-864014.html> (accessed 29 July 2015).

their local realities.⁸⁵ Moreover, there were formerly no significant political movements pushing to change the status of the state from secular to that of being based on sharia law, which has been cited as further evidence of Mali's moderation in this respect.⁸⁶ An indicator to watch in this regard, however, is the growing political engagement of religious leaders (such as the Wahhabi Imam Mahmoud Dicko) and Islamic associations (such as Sabati 2012), which was noticeable, for example, during the last presidential and parliamentary election campaigns, and to what extent this phenomenon will translate into greater prominence of religion on the political agenda.⁸⁷

This is not to say, of course, that there are no cultural or legal issues associated with Islamic political thought and Islamic elements in Mali's customary justice systems. For instance, in 2009 President ATT sought to bring the Malian family code more in line with international standards of women's rights. Although the law was adopted by the National Assembly, it was ultimately withdrawn, following mass protests led by conservative religious leaders. A new version of the law, which some argue is actually more conservative in its treatment of women than the original, was finally adopted in 2012.⁸⁸ This offers an example of codification of religion-based rules that clash with the secular principles of the Malian state that stipulate equality before the law.

However, to avoid painting such religion-inspired resistance against modern and secular conceptions of rights with too much of a conservative brush, it should also be noted that a number of Mali's imams agreed to be trained and educated in the universal instruments regarding gender violence and for the promotion of women's rights, and tend to be more receptive to promoting the rights of women as a result.⁸⁹ In further reflection of the diversity of customary practices and Islamic thought in Mali, it is also worth noting that some cultures in Mali are more liberal than these protests against the modernised family code would suggest. For example, women are exalted within the northern Tuareg tribes, which is a matrilineal society, as opposed to that of the southern-based Bambara culture. In contrast with the state laws and customs of

85 Personal interviews, Goff, D., Bamako, 30 March 2015; Polgreen, L., 'Timbuktu Endured Terror Under Harsh Sharia Law,' *New York Times*, 31 January 2015, <http://www.nytimes.com/2013/02/01/world/africa/timbuktu-endured-terror-under-harsh-shariah-law.html> (accessed 23 June 2015).

86 Pringle (2006), *op. cit.*

87 *Le Monde*, 'Au Mali, les wahhabites de Sabati veulent peser sur la présidentielle', 27 juillet 2013, online: http://www.lemonde.fr/afrique/article/2013/07/27/au-mali-les-wahhabites-de-sabati-veulent-peser-sur-la-presidentielle_3454516_3212.html; Chauzal, G., 'A snapshot of Mali three years after the 2012 crisis', *Clingendael Opinion*, 2015b.

88 Diarra, S.T., 'Women's rights in Mali "set back 50 years" by new "Family Code" law', 1 May 2012, <http://www.theguardian.com/global-development/2012/may/01/womens-rights-mali-50-years> (accessed 23 June 2015); African Development Bank (2006), *op. cit.*; personal interview Van Veen, E., Bamako, 27 March 2015.

89 Personal interviews, Goff, D., Bamako, 31 March and 1 April 2015.

the south, Tuareg customary law allows women to independently inherit property and ask for divorce. If a divorce occurs, women have the power to keep the marital home, property and custody of the children.⁹⁰

In sum, this section has argued that Mali's state justice system features an in-built tendency towards dysfunction that results from several systemic factors inherent in its design. This explains in part why Mali's state judiciary hovers between poor performance and irrelevance for a large part of the country's population. In contrast, Mali also features a range of customary systems that are grounded in the country's rich legal history from before colonial times. Although these systems face their own challenges (see next section), they are much less complex, linguistically more accessible, and more affordable, and they enjoy continued cultural resonance with the Malian population.⁹¹ They also contain points of orientation that can support the development of the country's legal system(s) in a direction that is more aligned with its socio-cultural attitudes and preferences.

90 'Tuareg', *Countries and their Cultures*, <http://www.everyculture.com/wc/Mauritania-to-Nigeria/Tuareg.html> (accessed 24 June 2015); Drury, F., 'Sex and the Sahara: Striking photographs of the mysterious Islamic tribe where women embrace sexual freedoms, dictate who gets what in the divorce and don't wear the veil because men "want to see their beautiful faces"', *Mailonline*, 24 June 2015, <http://nation.com.pk/international/24-Jun-2015/muslim-tuareg-tribe-women-have-more-freedom-than-men#.VYsMWNyisSE.twitter> (accessed 24 June 2015).

91 For example: African Development Bank (2006), *op. cit.* This is further explored in the next section.

3 Examining operations: performance and change in Mali's justice systems

This section looks at the performance of Mali's customary and state justice systems. It discusses the prevalence and popularity of customary justice systems as providers of choice for most Malians despite their challenges of social conservatism, small scale and fragmentation, as well as their lack of transparency and consistency. The section also analyses problems in the state judiciary that take the form of widespread corruption as well as the inadequate allocation, varied use and profound shortage of resources. It goes on to examine the transitional justice initiatives that Mali has undertaken in the wake of the 2012 crisis as another aspect of judicial performance and suggest that these initiatives are currently too state-centred and institution-heavy to deliver on popular expectations. Finally, it briefly assesses previous initiatives to improve the state judiciary in Mali, because past experiences offer important cues for future efforts.

Customary justice: challenges of equality, transparency and fragmentation

As has become clear by now, justice in Mali is best characterised as 'legal pluralism', meaning that several legal systems exist in parallel that deal with both civil and criminal cases.⁹² The state justice system is only one piece of a colourful mosaic and it is by no means the most relevant. For example, it is estimated that over 80% of family and

92 The different systems that constitute Mali's legal pluralism should not be regarded, however, as entirely separate. They link and interact, irrespective of formal laws and official positions. As a consequence, it would be useful to examine their points of interaction in greater detail – in addition to the characteristics of each system by itself. The scope of this study was too limited to do so. On this topic, see: Isser, D. (ed.), *Customary Justice and the Rule of Law in War-Torn Societies*, Washington, DC, United States Institute for Peace Press, 2011.

land disputes in poor and rural communities in Mali are handled by customary justice systems.⁹³

Mali's customary systems are popular because they are easily accessible to the average citizen in the broadest possible sense.⁹⁴ Specifically, they are convenient, with all of the parties usually located near to each other; cheaper, as no court fees or travel costs are incurred; and familiar, as the mediators involved in dispute settlements are usually known by the community, speak their language, and share the same culture and religion. Customary systems are more active in areas where the state is not present, and in these areas the chief of the village tends to be the only real authority. In places such as these, cases are not taken to the formal justice system because there is a sense that it does not exist.⁹⁵

Despite their popularity, Mali's customary judicial systems face challenges that are common to many such systems.⁹⁶ To start with, some aspects of customary law and its enforcement are incompatible with the rights conferred on each Malian under the Constitution. This is in part because they mostly reflect rural, patriarchal value systems that are more conservative than Mali's relatively progressive Constitution and, for the most part, positive laws. For example, marriage customs in the Buwa community amount to the man abducting the girl/woman he wants to marry.⁹⁷ Also, the generally lower status of women in the Malian family and community affects their ability to negotiate on an equal footing with their adversaries in law, especially their husbands. Notably in rural areas, women and children often have no recognised status at all, and therefore are vulnerable in customary justice processes.⁹⁸ In addition, customary justice also suffers from the same corruption and politicisation that diminishes the legitimacy and authority of state courts, albeit to a lesser extent.⁹⁹ Moreover, customary justice

93 Land disputes are one of the most common sources of tension between Mali's different socio-professional categories (fishermen, farmers, livestock-rearers, etc.) and communities. Sources: Social Films, *Delivery of Justice in Mali*, online: http://socialfilms.org/?page_id=472 (accessed 8 March 2015); Hiil (2014), *op. cit.* However, customary justice providers handle both civil and criminal matters, with a blurred line existing between the two. Personal interviews, Goff, D., Bamako, 25-30 March 2015 and 1-2 April 2015, Van Veen, E., Bamako, 28 March 2015, Goff, D., The Hague, 10 March 2015; Hiil (2014), *op. cit.*

94 See, for example: Bengaly (2015), *op. cit.*; Bengaly et al. (2015), *op. cit.*; Hiil (2014), *op. cit.*

95 Personal interview, Goff, D., Bamako, 1 April 2015.

96 See, for example: Isser (2011), *op. cit.*

97 Dakouo, A., Koné, Y. and I. Sanogo, *La cohabitation des légitimités au niveau local*, Bamako, Alliance Malienne pour refonder la gouvernance en Afrique (ARGA/Mali), 2009.

98 Davis, J., *Supporting Peaceful Social, Political, Cultural and Economic Change in Mali*, London, International Alert, 2014.

99 *Ibid.* Part of the explanation of the lower incidence of corruption in customary justice mechanisms might be that opportunities are fewer because cases (and the associated financial stakes) are smaller. However, social control and proximity are bound to play a role as well. This is a matter for further research.

proceedings are generally only carried out orally, and there is no accountability or codification, so customary 'judges' can ignore precedents and create new ones if they wish.¹⁰⁰ Finally, the enforcement of customary 'judgments' depends, in large part, on the willingness of the parties to carry them out. However, because the main actors in the informal systems have such a high level of authority within the community, there is a certain moral pressure on the parties to respect agreements sanctioned by informal institutions. If a party reneges, he or she is considered as 'recalcitrant' and 'looked down on' by society.¹⁰¹ Nevertheless, agreements are not always respected, and past disputes frequently resurface. In this context, it is important to note that respect for informal authorities is declining as Malian society modernises, something that is especially true in urban areas where "concepts of family and cultural relationships have less and less value".¹⁰² In consequence, the use of customary justice mechanisms, as well as implementation rates of the judgments they render, may see a relative decline in the future while remaining prominent overall.

As noted, a challenge of a different nature lies in the fact that there are many different types of customary justice mechanisms and providers in Mali, including family or community heads, religious leaders, and specific caste members (see box 4). There is significant variation by region, ethnicity and religion that seems to be poorly researched and understood.¹⁰³ As these actors do not necessarily use a common customary or legal basis for their judgments, the situation is one of true legal pluralism. This means that legal outcomes in similar cases can vary considerably and precedence and jurisprudence may not be obvious, although such flexibility can also be viewed as an advantage because it enables decision-making to be more context-specific.¹⁰⁴ People in a dispute may also come from different customary traditions, and in that case they may need to choose a third customary tradition to resolve their dispute in order to place both of them on neutral ground.¹⁰⁵

100 Personal interview, Goff, D., Bamako, 1 April 2015.

101 Personal interviews, Goff, D., Bamako, 30 March 2015 and 1-2 April 2015, Van Veen, E., Bamako, 28 March 2015.

102 ABA (2012), *op. cit.*; Feiertag (2008), *op. cit.*; personal interview, Van Veen, E., Bamako, 28 March 2015.

103 At least one project to map these systems was initiated by the French in a project known as "The Great Customary Laws"; however, it was never finished (Pringle, R. [2006], *op. cit.*). As it was not possible to map the approaches and mechanisms of different customary justice systems for this project, its treatment of customary justice mechanisms remains somewhat general.

104 Pringle, R. (2006), *op. cit.*

105 Personal interview, Goff, D., Bamako, 1 April 2015. Further research is required to establish the mechanisms or rules by which such a third party or tradition is identified.

Box 4 Various providers of customary justice in Mali

Family elders

As the basic building block of Malian society, the family represents the first level for resolving disputes. Conflicts are generally mediated at the initiative of the head of the family (normally the eldest male in the extended family) or on the request of another family member.

Religious leaders

Religious leaders help resolve disputes between members of their congregation. When a conflict occurs, the parties are called before a committee of elders – responsible for overseeing the institution’s activities in the community – which attempts to mediate the dispute. In the north of Mali, Cadi’s (religious judges) usually settle disputes.

Traditional communicators

Traditional communicators, known as *griots* in the south, are individuals invested by tradition and custom with the responsibility for recording and communicating the tradition and history of a family or community. The role of traditional communicators varies across communities, but they can be involved in mediating conflicts.

Local government actors

Neighbourhood, village and fraction heads are given authority by law to mediate civil or commercial disputes among citizens. Conflicts are usually referred to these authorities when they cannot be resolved within the family or when they threaten the stability of the community.

This box is based on: Dakouo et al. (2009), *op. cit*; ABA (2012), *op. cit*; personal interview, Van Veen, E., Bamako, 28 March 2015

Despite the challenges they face, it is clear that the relevance of customary justice providers points to a need to help such providers improve the way in which they render justice, and not to marginalise them in favour of the state judiciary. One way in which improvements can occur is to connect customary providers of justice with state providers of justice, to stimulate mutual learning and practical collaboration. However, this is likely to meet with at least two obstacles. The first is a general lack of recognition by administrative authorities of the decisions taken by religious and customary authorities. Formally, their judgments have little or no legal basis (the recent peace

agreement offers a nudge in the direction of addressing this situation).¹⁰⁶ The second is that administrative authorities do not have great regard for customary and religious rules.¹⁰⁷ Predictably, there are two dominant schools of thought among representatives of the state justice system concerning the value and role of customary justice providers. Those who are more legally conservative point to the texts of Mali's state laws to support their case that there is little or no role for customary justice providers in the process of justice, especially the penal process, whereas those who favour legal realism pragmatically acknowledge the gap between the reality of legal practice and the text of the law.¹⁰⁸ This suggests that creating greater regard for customary justice providers among state judicial personnel, and greater trust among customary providers of state judicial personnel, needs to be an integral part of efforts to improve their connectivity.

State justice: corruption and resource challenges

Mali's modern state justice system was revamped at the introduction of a multi-party democratic government in 1992, but remains closely modelled on a former version of the French legal system (see box 5 below). While acknowledging that a number of judicial officials try to do a good job and to stimulate reform from within, and that courageous efforts at change have been attempted, it is nevertheless fair to say that the Malian state justice system is rife with corruption and suffers from massive competence and capacity shortages.¹⁰⁹ These problems have the effect of further reducing the quality of the limited amount of state justice that is supplied to Malians. They are examined in further detail below.

106 Practical arrangements of course exist. For example, decisions of the Cadi, a leading religious justice figure in the north and especially prominent in Timbuktu, can be informally acknowledged by a state judge when they meet certain minimum standards and do not conflict with positive law. Sources: several personal interviews, Goff, D., Bamako, 25-27 March 2015; Title V, chapter 14, article 46 of the 'Accord pour la Paix et la Réconciliation au Mali: Issue du Processus d'Alger' (projet d'accord version 25 février 2015 à 19h30).

107 Dakouo et al. (2009), *op cit.*; personal interview, Goff, D., Bamako, 2 April 2015.

108 This divide was witnessed first-hand by one of the authors of the report during a workshop with 32 representatives of the different institutional stakeholders in Mali's penal process that took place in Mopti on 30 and 31 March 2015. See also: Pringle, R. (2006), *op. cit.*

109 For a deeper analysis of these issues: Moulaye et al. (2007), *op. cit.*; ABA (2012), *op. cit.*; De Vries et al. (2014), *op. cit.*

Chronic corruption

Many Malians view the state judiciary as one of the most corrupt government institutions.¹¹⁰ This observation was echoed by a leaked report from the United States' Embassy in Bamako in 2009 which stated that "the judicial system is highly corrupt, with under-the-table payoffs an accepted manner of influencing the outcome of a case".¹¹¹ Illustrating this analysis, a Malian lawyer recently remarked: "Justice in Mali is independent except for the influence of dirty money."¹¹² However, corruption is common among Malian officialdom and not limited to the judiciary. There are strong indications that corruption is in fact so widespread that it has become an ingrained element of daily life, has severely corroded the morality and integrity of public service and has ceased to generate much public indignation when exposed.¹¹³ One interviewer provided the powerful example of driving around with his eight-year-old son when it occurred to him he did not have his driving licence with him, upon which his son commented: "Don't worry dad, just give the police 100 francs when they stop you and you will be fine."¹¹⁴

Box 5 Key institutions of Mali's state justice system

Justices of the peace (Justices de paix à compétence étendue – JPCE)

Mali's JPCEs combine the functions of a judge, prosecutor and investigator in an effort to make state-provided justice available in rural areas. They have been widely criticised for concentrating too much power in one pair of hands. Predictably, appeals are few. JPCEs are currently being phased out.

Courts of first instance (Tribunaux d'instance – TI)

The TIs are meant to replace the JPCEs, and have a separate judge, examining magistrate and prosecutor.

110 For example: Afrobaromètre (2013), *op. cit.*; Bengaly (2015), *op. cit.*; Bleck, J., 'Mali', in: *Countries at the Crossroads*, Freedom House, 2011, https://freedomhouse.org/report/countries-crossroads/2011/mali#_VP2_Mo4UNjs (accessed 8 March 2015).

111 Wikileaks (2009), *op. cit.* See also: Business Anti-Corruption Portal, *Mali Country Profile*, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/mali/corruption-levels/judicial-system.aspx> (accessed 6 March 2015).

112 Maître Fanta Sylla in Maliactu, 21 August 2015, online: <http://maliactu.net/mali-consulat-general-du-mali-en-france-mangal-traore-sen-va/> (accessed 27 July 2015).

113 For basic data: Bleck (2011), *op. cit.*; World Bank, *Worldwide Governance Indicators: Country report for Mali 1996-2013*, Washington, DC, 2013. Online: <http://info.worldbank.org/governance/wgi/index.aspx#home> (accessed 9 September 2015).

114 Personal interview, Van Veen, E., Bamako, 28 March 2015.

Courts of first instance (Tribunaux de première instance – TPI)

Divided into ordinary or specialised courts, TPIs examine cases through the use of a sole judge, an examining magistrate and a prosecutor. These courts have jurisdiction over first instance civil cases, appeals where the value are below a certain threshold, and minor infractions and misdemeanours. They are also being phased out.

Higher courts (Tribunaux de grande instance – TGI)

The TGIs are meant to replace the TPIs, the difference being that the TGIs will decide cases in panels of three judges, rather than through a sole judge.

Courts of appeal (Cours d'appel)

Disputed decisions at the trial level can be brought to three courts of appeal, which are allocated in Bamako, Kayes, and Mopti. Appellate court judges review both the law and the facts again, and sit in a three-judge panel. At the appellate level there are also criminal courts (cours d'assises) with sole jurisdiction over felonies. The criminal courts are presided over by a three-judge panel drawn from the courts of appeal, as well as a jury of four citizens.

The Supreme Court (Cour suprême)

Its main duty is to hear appeals from the lower courts through its judicial section. In the judicial section the Supreme Court is only meant to look at whether the law is applied correctly and not the facts. However it has been observed that in practice the judges do carry out a third-level review of the facts. Only the Supreme Court has the competency to hear appeals from the criminal courts.

The Constitutional Court (Cour constitutionnelle)

This is charged with balancing the branches of government by upholding the constitutionality of the laws, guaranteeing the fundamental laws of the individual and public liberties, regulating the functioning of state institutions and arbitrating conflicts between them. It is also tasked with establishing the validity of elections.

The High Court of Justice (Haute cour de justice)

It tries cases of high treason, crimes committed in the capacity of exercising state functions, or of complicity in a conspiracy contrary to national security. Its members are chosen by the National Assembly. In practice, this court is seen as a weak institution that has not fulfilled its mandate.

The Malian government launched a major restructuring of the judiciary in 2011 in which, for example, the JPCs would be replaced by TIs and TPIs by TGIs. This change process remains incomplete to date, partly because of the extremely modest portion of the national budget that is allocated to justice – typically less than 1%. The result is co-existence of an old and new state justice system.

This box is based on: Constitution of Mali; Moulaye et al. (2007), *op. cit.*; Feiertag (2008), *op. cit.*; ABA (2012), *op. cit.*; Weis, P. et al., *Période de démarrage du Programme d'appui au secteur de la justice au Mali (PAJM)*, Rapport final et annexes, European Union, 2014; personal interview, Goff, D., 20 February 2015, The Hague.

For analytical and operational purposes it is useful to differentiate between two types of corruption in the judiciary, namely the corrupt practices that a number of legal professionals engage in on an individual basis, and the more systemic corruption that results from collusion between, for example, elements of the executive, former politicians and officials and elements of the judiciary. Having made this distinction, an important research finding is that the understanding of more systemic corruption in Mali seems to be fairly shallow. It has not been well researched. Interviews gave a strong impression – and some evidence – of systemic corruption by and through Mali's state justice system, but it was not possible to properly map these dynamics as part of this research.

Individual corruption largely takes the form of having to make significant payments on the side in order to achieve a favourable outcome in Mali's state courts. Every level of the judiciary is considered to be corrupt, with decisions available for sale.¹¹⁵ For example, one interviewee described a case where the examining judge issued a court order not to prosecute someone in exchange for CFA 1 million, without even having jurisdiction over the case.¹¹⁶ Since the average Malian cannot afford such payments, which come on top of regular filing fees and transport costs to reach the state judiciary, they further reduce access to state-provided justice.

Such individual corruption is generally attributed to two factors. The first is the comparatively low salaries of judges compared with those of private attorneys.¹¹⁷ For example, when the state justice system was still present in the north, lawyers used to ask for a 'judge fee' as part of their payment, in effect an illegal supplement to a judge's salary. In consequence, for a judge to remain uncorrupted, it is thought that he or she will need to make a personal choice to also remain poor.¹¹⁸ It is easy for Malians to identify which actors are corrupt, especially if they are living a lifestyle that they would not be able to afford within their official salaries. The second factor is the social pressure on actors in the justice system to grant favours to their family or people in their communities. It is normal for them to constantly be approached for these purposes at events such as weddings and neighbourhood gatherings.¹¹⁹ Although many anti-corruption measures have been put in place, they have not had a significant effect because of a lack of top-level support for their implementation and because they are

115 Personal interview, Goff, D., The Hague, 20 February 2015.

116 Personal interview, Van Veen, E., Bamako, 27 March 2015.

117 See, for example Afrobaromètre (2013), *op. cit.*; personal interview, Goff, D., The Hague, 20 February 2015.

The minimum monthly salary for a judge is USD 67 (ABA, 2012). According to one interviewee, the national judicial reform programme (PRODEJ-I) included an initiative to increase judges' salaries in a bid to reduce corruption, which was, however not successful, personal interview, Van Veen, E., Bamako, 27 March 2015.

118 Personal interview, Goff, D., Bamako, 30 March 2015.

119 *Ibid.* See also Pringle (2006), *op. cit.*; Bengaly (2015), *op. cit.*

not backed up with sufficient resources.¹²⁰ Positions in monitoring institutions that have been created for the justice sector are not considered prestigious; but rather, being given a job in one of these institutions is considered a sign of disfavour.¹²¹

Systemic corruption occurs when the judicial system becomes a vehicle through which larger-scale corruption is organised. For example, one interviewee narrated how Malitel initiated proceedings in a commercial dispute with Orange (90% of its shares are state-owned), claiming damages in the order of CFA 5 billion. He reported that the lawyer who represented Malitel used to be a minister and still had good political connections at the time of the litigation. In the view of the interviewee, the lawyer 'worked the system' to ensure damages were awarded, appropriating a substantial part of them by way of commission. Orange subsequently simply wrote off the damages, adding them to the general debt of the Malian state. The interviewee asserted that a number of state officials tacitly supported the scheme, as in the end the state incurred the debt while the associated kickbacks and patronage ensured individual benefits for all involved.¹²² Additional, albeit more modest, examples of systemic corruption include the widespread incidence of law degrees being purchased and of professional advancement in the justice sector being dependent on an individual's financial resources and connections.¹²³

To make matters worse, the state justice system largely fails to prevent and punish abuse of public office – within and outside of the judiciary. The obvious consequence is that it does not serve as an effective deterrent against corruption by high-level officials. Even when such cases are clearly identified, they largely go unpunished. For example, the Office of the Auditor General (OAG), an independent agency created in 2004 to monitor public spending, uncovered USD 100 million in embezzled funds in 2011 and presented its findings to the President, Prime Minister and the President of the National Assembly. The President subsequently referred 100 cases that were cited in government audits to the Ministry of Justice for prosecution. Of those 100 cases, it appears that only a small number of officials have been arrested and jailed, while the majority have seen no legal action taken.¹²⁴ In another example, the minister for infrastructure and

120 Several personal interviews, Goff, D., The Hague/Bamako, 20 February, 27/28 March and 2 April 2015; Business Anti-Corruption Portal, *Mali Country Profile* (undated), <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/mali/initiatives/public-anti-corruption-initiatives.aspx> (accessed 26 June 2015).

121 Personal interview, Goff, D., The Hague, 10 March 2015.

122 Personal interview, Van Veen, E., Bamako, 28 March 2015.

123 Personal interview, Goff, D., The Hague, 10 March 2015; personal interview, Van Veen, E., Bamako, 27 March 2015; author's email exchange with an expert on criminal justice in Mali, The Hague, 2 September 2015.

124 Bureau of Economic and Business Affairs, *2014 Investment Climate Statement – Mali*, US Department of State, 2014, <http://www.state.gov/e/eb/rls/othr/ics/2014/227927.htm> (accessed 7 March 2015).

equipment was said to have utilised CFA 11 million of state funds to purchase tea in 2011, presumably for resale. Despite this being well known, he was allowed to remain in his post until the 2012 crisis. Although limited restitution of embezzled funds occasionally occurs when large-scale corruption is discovered, it is not unusual for this to happen 'under the table' without transparency or prosecution.¹²⁵ This contributes to maintaining a culture of impunity in which public office is routinely used for private gain and in which this is in fact considered the norm.¹²⁶

There are tentative indications, however, that the Ministry of Justice has been doing more to prosecute corrupt judges since the 2012 crisis. For example, in December 2013, six judges and officers were charged with forgery, fraud and extortion, and it was announced in the news that cases against other 'unscrupulous' judges were being investigated. President IBK, who was said to have launched this investigation, also made a statement around the same time that he had referred about 100 cases of corruption and financial crimes to the courts.¹²⁷ The research was unfortunately unable to establish where these investigations and referrals have led. However, the combination of being exposed to little or no peer and/or performance review, patronage politics and the near-absence of sanctions for inappropriate behaviour suggest that the enabling environment for corruption within the judiciary is unlikely to change much.¹²⁸

Allocation, use and shortfalls of tangible and intangible resources

In terms of the resources that the state judiciary has at its disposal, it is tempting to focus on the undeniably significant qualitative and quantitative shortages of personnel, finances and facilities that it faces. This emphasis is understandable, especially since the problem extends well beyond the confines of the state-run part of the legal process to include the private and not-for-profit functions associated with the provision of justice, such as attorneys and paralegals. Such a focus is bound to generate a predictable

125 Personal interview, Van Veen, E., Bamako, 27 March 2015.

126 On this matter see: Briscoe (2014), *op. cit.*; De Vries et al. (2014), *op. cit.*. To be fair, this is also a problem in more advanced criminal justice systems. See: Stewart, J., 'In Corporate Crimes, Individual Accountability is Elusive', *New York Times*, 19 February 2015. Investigation of the US justice system found that high-level employees of corporations suspected of financial crimes are rarely prosecuted.

127 News 24, *Mali charges six judges with corruption*, 12 December 2013, <http://www.news24.com/Africa/News/Mali-charges-judges-with-corruption-20131211-2> (accessed 7 March 2015).

128 Menocal notes that the combination of a high degree of professional autonomy with defunct controls is a major incentive for corruption (Menocal, A., *Why corruption matters: understanding causes, effects and how to address them*, Evidence paper on corruption, London, DFID, 2015. See also: Bengaly (2015), *op. cit.* for a more detailed treatment of corruption issues and a number of suggestions for dealing with them.

lity of shortages.¹²⁹ While these shortages are relevant, concentrating on them means overlooking the question of how existing resources are allocated and utilised.

Only a brief look at this question reveals that the part of the budget that the Malian government allocates to justice is minimal in the extreme. More precisely, in 2014 it amounted to about EUR 12.5 million, which represented 0.44% of the government's national budget. To put this in perspective, in 2008 the allocation of funds to the justice budget as a percentage of the national budget amounted to 0.61% and the average annual allocation over the period 2008–14 was 0.63%.¹³⁰ What this means in practice is clearly shown by, for example, the 2009 report of the Malian auditor-general who observed that the annual budget of one of the courts of first instance in Bamako (see box 5) amounted to about EUR 1,500. He also estimated that the court handled about 3,500 cases per year.¹³¹ No analysis is needed to understand that such sums are inadequate for the fair and effective provision of justice. The more interesting question, however, is why the Malian government allocates so little funding to the state justice system. The report cannot provide an answer as it has not conducted a proper investigation into this matter, but it surmises that providing adequate justice to its citizens has so far not been a priority for the Malian government.

The resource puzzle becomes even more interesting when one notes that the limited resources allocated to justice do go a long way in some places where apparently judicial officials take their job seriously and execute it to the best of their abilities and often with significant ingenuity, while in other places representatives of the state judicial system argue that a lack of funds fatally impairs their performance.¹³² In short, before the argument is accepted that the paucity of funds is one of the major obstacles to improvement of the state judiciary, and hence that greater donor funding is both desirable and effective, a fuller investigation is needed into how the limited available financial resources are utilised at the operational level, taking into account non-financial factors such as attitude and integrity.

Having expressed these reservations on the basis of the limited evidence available, the fact remains that the tangible and intangible resources required for making the state justice work as it was intended are significant, and outstrip the ability of the Malian state to provide them. Even a much greater government budget allocation paired with improvements in resource utilisation, work ethic and professional attitudes to

129 As can be found here: De Vries et al. (2014), *op. cit.*; Weiss, P. et al., *Période de démarrage du Programme d'appui au secteur de la justice au Mali (PAJM)*, Rapport final et annexes, European Union, 2014.

130 Ministère de la Justice et des Droits de l'Homme, *Document de Projet de Reforme de la Justice, de l'Administration Pénitentiaire et de l'Education Surveillée au Mali*, Bamako, MINUSMA et PNUD, 2014.

131 Le Vérificateur Général du Mali, *Rapport Annuel*, Bamako, Bureau du Vérificateur Général, 2009.

132 Author's email exchange with an expert on criminal justice in Mali, The Hague, 2 September 2015.

performance would in all likelihood fall a long way short. Three ‘gap areas’ stand out in particular because simple increases in resources cannot solve them in the short run.

A first key resource gap is a shortage of competent professionals, in particular judges and lawyers. For example, in 2008 Mali had 630 judges for a population of about 13 million.¹³³ This equates to 4.8 judges per 100,000 inhabitants, which is well below both the North Africa average of 9.8 per 100,000 and the global average of 11.5 per 100,000.¹³⁴ It contributes to the slow progress of many cases. Also, those accused of a crime are likely to need the help of an attorney. However, they are in desperate supply. According to a 2014 report by the Ministry of Justice, there were 335 lawyers in Mali at that time, for a population of about 16 million.¹³⁵ This can be contrasted with a 2011 study done by the American Bar Association, which found that there were only 270 lawyers at that time for a population of then 15 million people, and most were located in Bamako. As of 2014, Mopti, which has a population of 2 million, had fewer than 10 lawyers.¹³⁶ Most rural areas have no lawyers at all, as there is very little monetary incentive to set up a legal practice in such places. One way of compensating for this lack of presence of any legal support is through the creation of legal assistance offices, but so far these have been set up only in the first instance courts of the Kayes region. This is despite the fact that Malian law already created an enabling regime in 2001 and that such offices are meant to be present at each court of appeal, trial court and with each justice of the peace.¹³⁷

A second key resource gap is the absence of adequate legal professional education and training. This has numerous aspects, including the absence of good-quality legal studies, professional training opportunities, on-the-job refresher courses (for instance on legal developments and jurisprudence), a lack of access to legal reference works and inadequate access to the internet. As a consequence, many legal professionals – court registrars in particular – do not and cannot perform adequately as they lack sufficient knowledge of the law.¹³⁸

A third resource gap is the absence of means and channels to raise the low level of awareness among Mali’s citizens of their rights and obligations under the country’s

133 Réseau Francophone de Diffusion du Droit, online: <http://www.rf2d.org/informations-generales-mali/> (accessed 31 July 2015).

134 Harrendorf et al. (eds), *International Statistics on Crime and Justice*, Helsinki, Heuni and UNODC, 2010.

135 Ministère de la Justice et des Droits de l’Homme (2014), *op. cit.*

136 ABA (2012), *op. cit.*; Wijeyaratne, S. and Vercken, N., *What Next for Mali: Four Priorities for Better Governance*, Oxfam Briefing Note, February 2014, <http://www.oxfamnovib.nl/Redactie/Pdf/bn-mali-four-priorities-governance-100214-en.pdf> (accessed 8 March 2015).

137 Wijeyaratne and Vercken (2014), *op. cit.*; ABA (2012), *op. cit.*

138 For a somewhat more detailed analysis of these issues: Vérificateur Générale du Mali (2009), *op. cit.*; Ministère de la Justice et des Droits de l’Homme (2014), *op. cit.*

positive laws and of the state's legal processes. Since language and illiteracy play an important role, raising legal awareness is not just a matter of transferring knowledge but requires advances on a broad front ranging from increasing literacy to improving (civic) education. To compensate for the general lack of legal awareness of most Malians (insofar as state law is concerned), a range of civil society groups have trained individuals in communities to serve as paralegals. As of 2015, there were 123 community-based paralegals working in seven out of eight regions in Mali.¹³⁹ While these services are popular for divorce or land disputes, and there is an indication that donors wish to intensify and extend this project, a recent justice survey by the Hague Institute for the Internationalization of Law (2014) revealed percentage numbers in the low single digits for how often paralegals were sought out to assist with justice problems.¹⁴⁰ The cause of this infrequent usage is unclear, but further investigation through, for example, focus groups, should be carried out before any programming is extended. An early assumption is that the low numbers of paralegals play a role.

On a final and perhaps superfluous note, although resource shortages such as those discussed above are significant, other parts of this report make clear that focusing only on these gaps is tantamount to pouring water into a leaking bucket. Nevertheless, this seems to be precisely what major justice improvement efforts have largely done so far. This matter is examined in greater detail after the next subsection on transitional justice.

Transitional justice: going beyond a blueprint solution?

A brief analysis of the transitional justice efforts that the Malian government has undertaken to address the atrocities committed during the 2012 crisis is useful because it offers another opportunity to test the central contention of this report, namely that greater mutual recognition and combined use of Mali's customary and state judicial

139 Wijeyaratne and Vercken (2014), *op. cit.*; Oxfam, *op. cit.*; CNPCP-Mali, *A propos du CNPCP, 2006-2007*, online: <http://www.cnpcpmali.org/pages/cnpcp.html> (accessed 7 March 2015); Danish Embassy in Bamako et al., *Concept Note: Transition to Country Programming in Mali 2015-2016*, Bamako, March 2014, online: http://um.dk/en/~/_/media/UM/English-site/Documents/Danida/About-Danida/Danida%20transparency/Consultations/2014/mali.pdf (accessed 8 March 2015).

140 Wijeyaratne (2014), Oxfam, *op. cit.*; Danish Embassy in Bamako et al (2014) *op. cit.*; Hiil (2014), *op. cit.*

systems – as more or less equal parts of the country’s ‘justice ecology’ – is necessary to improve justice outcomes in the short-to-medium term.¹⁴¹

It is well established that during the 2012 crisis all sides committed serious human rights violations, against combatants, civilians and communities alike, including torture, summary executions, rape, collective punishments and plunder.¹⁴² This unprecedented level of violence had a devastating impact on the lives of thousands, ruptured already fragile social fabric and further destabilised many communities.¹⁴³ In response, Malians have expressed a desire to see the truth of what happened established through a process of transitional justice, with strong elements of accountability.¹⁴⁴ The challenge of meeting this popular demand is at least twofold.

First, given the prevalence and strength of customary justice mechanisms in the north, one is inclined to think that they should play a key role in any transitional justice initiative from the perspective of community reconciliation and to restore confidence.¹⁴⁵ However, the limited scale and modest nature of the cases that customary justice systems are typically best equipped to handle means that they are unlikely to be able to deal with the complexity, scope and duration of the physical and psychological damage that has

141 Although there is no universally shared definition of transitional justice, the authoritative phrasing from the UN is: “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” Source: UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, New York, United Nations, 2004.

142 As, for example, recorded in: Human Rights Watch (HRW), *Mali: War Crimes by Northern Rebels*, 30 April 2012, <https://www.hrw.org/news/2012/04/30/mali-war-crimes-northern-rebels> (accessed 15 July 2015).

143 See, for instance: Allegrozzi and Ford (2013), *op. cit.*

144 One survey found that 49% of respondents want the truth established, 46% want wrongdoers held accountable, 41% want the leadership put on trial, and 37% want to find the roots of the conflict. Forgiveness, peace and victim compensation were identified as lower priorities. Northern Malians overwhelmingly believe it is important to prosecute the perpetrators of the crimes. Source: HiiL (2014), *op. cit.* Another survey noted that 73% of people want to find the truth of what happened, versus 26% who prefer to move on; 90% wanted perpetrators of political crimes found guilty. Malians also want prosecution at all levels and for human rights violators to be barred from public office. Source: Afrobaromètre (2013), *op. cit.* In general, a significant proportion of the individuals and communities of the north demand a combination of restorative and punitive justice. See also: Coulibaly (2014), *op. cit.*; Allegrozzi and Ford (2013), *op. cit.*

145 The transitional justice measures laid out in Title V, chapter 14, article 46 of the peace agreement (version of 25 February 2015) should be considered in this light.

come to pass, in particular where agents of the state are implicated.¹⁴⁶ Hence, there is tension between the need and limitations of involving customary justice mechanisms in supporting transitional justice efforts.

Second, the Malian government has initiated an ambitious, state-dominated and institution-heavy transitional justice agenda that includes an International Criminal Court (ICC) investigation,¹⁴⁷ a Truth, Justice & Reconciliation Commission, an International Commission of Inquiry, government-sponsored listening stations, an anti-corruption commission, domestic prosecutions, a human rights commission, and a strategy of dropping some prosecutions, which is akin to providing amnesties.¹⁴⁸ However, while such an array of activities looks laudable and suggests commitment to addressing past injustices, several notes of caution are in order. To start with, rapid and wholesale re-introduction of the state judiciary to the north must proceed carefully and slowly. It is obvious that the discriminatory and corrupt practices from before the crisis should not be brought back, but also, trust among the local population will need to be slowly restored.¹⁴⁹ Additionally, for the foreseeable future the state is unlikely to have the ability to implement the decentralised justice system that exists on paper. Combined with the deteriorating security situation that suggests it may actually be too early for a transitional justice effort, as Mali alternates between being in-conflict and post-conflict, this will significantly limit how positively transitional justice efforts will be perceived, as well as how effective they can hope to be (for example, in terms of the ability to collect evidence from the conflict-affected north).¹⁵⁰

146 A similar argument can be made for the inability of customary justice mechanisms to address organised crime. However, because it slowly degrades the social norms and value systems of the communities of northern Mali that make their long-standing customary justice systems accepted and effective, this particular aspect of the negative influence of organised crime in fact deserves greater attention, especially as customary justice mechanisms play an important role in maintaining residual stability. See: Bengaly et al. (2015), *op. cit.*; see also: Briscoe, *op. cit.*; Lacher, W., *Organized Crime and Conflict in the Sahel-Sahara*, Washington, DC, The Carnegie Papers Middle East, 2012; Chauzal and Van Damme (2015), *op. cit.*

147 After the Malian government had requested this investigation, it was naturally conducted independently.

148 For more information on these processes: ICTJ (2014), *op. cit.*; ABA ROLI, *A Transitional Justice Strategy for Mali*, Washington, DC, ABA Rule of Law Initiative, 2015.

149 Bengaly et al. (2015), *op. cit.*

150 On the security situation: Al Jazeera, *UN Peacekeeper killed in shooting in Mali capital*, 26 May 2015, <http://www.aljazeera.com/news/2015/05/peacekeeper-killed-shooting-mali-capital-150526050405490.html> (accessed 29 July 2015); BBC News, *Mali bar attack kills five in Bamako*, 7 March 2015, <http://www.bbc.com/news/world-africa-31775679> (accessed 29 July 2015). On limitations of the state judiciary in the north: ABA ROLI (2015) *op. cit.*; ICTJ (2014), *op. cit.*; personal interview, Goff, D., The Hague, 10 April 2015.

The reality is that some of the government's initiatives have already run into trouble. When the government created a Dialogue and Reconciliation Commission (DRC) in 2013, it was dissolved quite soon, owing to pressure from national and international groups who criticised it for not consulting adequately with civil society and victims' groups, and for moving too slowly.¹⁵¹ Moreover, its two-year mandate to identify stakeholders in the dialogue and reconciliation process, log cases of human rights violations committed between 2012 and the country's stabilisation, and suggest how victims of traumatic experiences could overcome them was regarded as insufficiently broad in scope.¹⁵² Further, as the DRC was created by the transitional government prior to the election of President IBK, it suffered from a lack of ownership and political backing afterwards.¹⁵³ In response, the government created the Truth, Justice and Reconciliation Commission (TJRC) in 2014 as a replacement. This institution, however, is not yet operational and, in contrast, has an overly broad mandate (crimes committed in the north between 1960 and 2013) as well as seven disparate thematic areas. Its hierarchical positioning, under the Ministry of Reconciliation, is problematic, as this keeps open the option of maintaining executive control over its findings.¹⁵⁴

151 ICTJ, *Internationally-led Justice Efforts in Mali Must Consider National Context, Adapt to Local Needs*, 10 June 2014, <https://www.ictj.org/news/internationally-led-justice-efforts-mali> (accessed 29 July 2015); Ladisch, V., *Possibilities and Challenges for Transitional Justice in Mali: Assessment Report*, September 2014, <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Mali-Assessment-2014.pdf> (accessed 29 July 2015); Look, A., 'Mali Assembly to Discuss Truth Commission', 12 March 2014, <http://allafrica.com/stories/201403130050.html> (accessed 29 July 2015).

152 Ladisch (2014), *op. cit.*

153 Stockholm International Peace Research Institute, *Chronology of key events in Mali, 1891-present*, 2014, <http://www.sipri.org/research/security/mali/chronology> (accessed 29 July 2015).

154 Simpson, C., 'Mali's Kidal still waits for resolution', *IRIN*, 17, February 2014, <http://www.irinnews.org/report/99649/mali-apos-s-kidal-still-waits-for-resolution> (accessed July 29, 2015); Ladisch (2014), *op. cit.*; FIDH, *A consensual roadmap for the truth, justice and reconciliation process in Mali*, 14 November 2014, <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/mali/16471-a-consensual-roadmap-for-the-truth-justice-and-reconciliation-process-in> (accessed 29 July 2014).

Box 6 Experiences with transitional justice and international responses

The definition of transitional justice as offered by the United Nations Security Council (2004) contains two important lessons that reflect over a decade of experience with transitional justice processes:

- The pragmatic recognition that pursuing prosecutions according to conventional methods alone may actually prevent or complicate peace processes. In some cases, alternative justice approaches may be better suited to help populations address deeply rooted problems while also fostering reconciliation.
- The knowledge that the combination of widespread public participation, a desire to confront root causes, more general efforts to improve the quality of the state judiciary and integrated approaches, i.e. a blending of different methods of reckoning that range from reconciliation to retribution, are essential for 'success' in post-conflict settings.

This box is based on: Ambos, K., Large, J. and Wierda, M., *Building a Future on Peace and Justice*, Berlin, Springer (2009), *op. cit.*; UN Security Council (2004), *op. cit.*

In reflection of these difficulties, a recent assessment recommended that the Malian government classify the crimes related to the 2012 crisis and then assign them to different transitional justice mechanisms depending on their gravity. For example, high-level crimes where actionable evidence has been collected could go to the state justice system, with others being assigned to customary or other processes.¹⁵⁵ This mirrors how some interviewees described delegation of domestic crimes generally, with heavy cases going to the state when possible, and lighter issues being dealt with through customary providers.¹⁵⁶ In short, a mixed and pragmatic approach on the basis of what is feasible, echoing the lessons articulated in box 6.

In sum, the deep distrust and continued insecurity in the north, and the lack of capacity in justice mechanisms across the country, suggest that the government's institution-heavy and state-dominated approach is likely to flounder. This is not only a clear reason for concern, but also suggests that a more creative approach is needed that reflects realities across the various justice systems in the country in a more thoughtful manner.

155 ABA ROLI (2015), *op. cit.*, <http://www.americanbar.org/content/dam/aba/directories/roli/mali/mali-transitional-justice-strategy-0215.authcheckdam.pdf> (accessed 23 July 2015).

156 Personal interview, Goff, D., The Hague, 10 April 2015; personal interviews, Goff, D., Bamako, 30 March 2015 and 1 April 2015.

Improving the state judiciary: the limitations of the ‘classic’ approach to reform

Reform efforts were initiated within the first decade of Mali’s turn to democracy in 1991 to address the strategic parameters and operational performance issues discussed above. The question as to whether these efforts had been effective grew more salient with the 2012 crisis, since it made the need for a functioning judiciary even more urgent. This section takes a brief look at such past efforts with the aim of extracting lessons as to why they did, or did not, succeed. Since this assessment has already largely been done elsewhere, the following is best read as a brief synthesis.

Two major reform efforts stand out for review. The first are two broad, consecutive judicial reform programmes that are known under the name Programme Décennal de Développement de la Justice (PRODEJ I and II). Together, they span the period 2000 to 2014. The second is the roadmap for judicial reorganisation (carte judiciaire) that was launched in 2011. Table 1 provides a brief summary of the key objectives of these reform efforts.

Table 1 Key objectives of major improvement efforts of Mali's state judiciary

PRODEJ – I and II	Judicial roadmap ('carte judiciaire')
2000–14	2011
Increase the quantity and quality of human resources in the judiciary	Replace the judges of the peace ('justices de paix à compétence étendue') by chambers with several judges
Improve the quality of legal documentation and the availability of legal texts and jurisprudence	Replace chambers with a single judge at courts of first instance (tribunaux de première instance) with chambers with several judges
Review the existing body of positive laws to ensure they are fit-for-purpose, intelligible and without redundancies	Create new jurisdictions and expand the legal infrastructure correspondingly
Improve the ability of the judiciary to combat corruption	Execute a range of smaller legislative changes and organisational innovations
Raise the quantity and quality of legal education, legal awareness and communication about legal proceedings/judgments	
Improve legal infrastructure and required equipment	

This table is based on various articles on the judicial roadmap, <http://www.justicemali.org/> (accessed 21 July 2015); Ministère de la Justice et des Droits de l'Homme (2014), *op. cit.* www.Maliweb.net (accessed 20 July 2015)

PRODEJ I and II: 2000–14

Both PRODEJ I and II followed a classic approach to improving the performance of the Malian state judiciary through top-down, resource-focused operational interventions. Reviews and evaluations conducted at several points during 14 years of programmatic effort suggest, however, that it is doubtful whether either programme has yielded much by way of large-scale, meaningful improvement in the quality of justice as provided by the state judiciary. On the contrary, some observers have suggested that the programme was primarily used instead as a vehicle to attract donor funds, which were then diverted for private use. Both programmes have also been criticised for being slow, being non-impactful, featuring serious management problems and enjoying weak political support, leading international partners to abandon them once the difficulties of actually improving the justice system had accumulated and became more apparent.¹⁵⁷

Moreover, a joint study carried out by the CILC and the NHC in 2013–14 found that at three different points of evaluation of the justice system, in 2001, 2007 and 2014,

157 Otis, L. and S. Feiertag, *Réforme de la Justice du Mali/PRODEJ, Rapport prospectif*, Bamako, 2007; Feiertag (2008), *op. cit.*; personal interviews, Goff, D., The Hague, 10 March 2015; Pringle, R. (2006), *op. cit.*; Wing (2008), *op. cit.*;

the nature of the problems and the conclusions drawn were consistently similar in nature.¹⁵⁸ These findings do not just suggest that the major problems plaguing the state judicial system persist, they also point to an entrenched resistance to change among Mali's political and judicial elites and/or the inability of more change-oriented individuals to instigate reform from within.¹⁵⁹ Finally, they indicate that the problems in the state justice sector pre-date the 2012 crisis by a long stretch.¹⁶⁰

The judicial roadmap: 2011

The judicial roadmap was a governmental initiative to reorganise the Malian state judiciary, which superseded a previous effort that was thwarted by Parliament in 2009.¹⁶¹ One of its main objectives was to abolish the justices of the peace (Justices de Paix à Compétence Étendue – JCPE; see box 5) as they combine(d) investigative, prosecutorial and judgment functions in the hands of one person. While intended as an affordable method of bringing state justice to Mali's more remote corners, this arrangement was criticised as resulting in 'unjust' judges who terrorised their litigants.¹⁶² Another major change foreseen by the roadmap was a significant increase in the number of courts throughout the country to improve access to justice. It was projected that the roadmap's realisation would cost CFA 6.5 billion (c. EUR 10 million).¹⁶³ However, with less than 1% of the national budget being allocated to the justice sector, the initiative was entirely dependent on donor support. Unsurprisingly, the transition towards the intended new structure of the state judiciary has advanced at a glacial

158 De Vries et al. (2014), *op. cit.*

159 Potentially powerful change agents do of course exist. For instance, the Constitutional Court recently elected Manassa Danioko as President in February 2015. She was a member of the Constitutional Court prior to her election. However, when she served as the Chairman of the 1st District Court in Bamako she was suspended and removed as a judge in 1988 on the personal request of then-president Moussa Traore for being too firm and too honest. She was re-installed in 1991 after Mali's turn to democracy, and is credited for initiating the PRODEJ project as well as for writing an incisive note on the status of the Malian judiciary. See Mali Actu, *Mali: Mme Manassa Danioko à la tête de la Cour constitutionnelle: Le Couronnement d'un parcours exceptionnel*, 2 March 2015, <http://maliactu.net/mali-mme-manassa-danioko-a-la-tete-de-la-cour-constitutionnelle-le-couronnement-dun-parcours-exceptionnel/> (accessed 6 March 2015); Conference of Constitutional Jurisdictions of Africa, *Constitutional Court of Mali: Mrs Danioko Manassa, new president*, 28 February 2015, <http://www.cjca-conf.org/blog/constitutional-court-mali-mrs-danioko-manassa-new-president/> (accessed 6 March 2015).

160 Personal interview, Goff, D., The Hague, 10 March 2015; Pringle, R. (2006), *op. cit.*

161 See for example: Weiss et al. (2014), *op. cit.*

162 Fall, B., 'Pleins feux sur la nouvelle carte judiciaire du Mali', Maliweb, 24 February 2011, <http://www.maliweb.net/non-classe/pleins-feux-sur-la-nouvelle-carte-judiciaire-du-mali-18142.html> (accessed 30 June 2015).

163 ORTM, 'Processus de réforme de la justice au Mali: A la découverte de la nouvelle carte judiciaire', Maliweb, 2011, <http://www.maliweb.net/non-classe/processus-de-rforme-de-la-justice-au-mali-a-la-dcouverte-de-la-nouvelle-carte-judiciaire-25937.html> (accessed 7 February 2015).

pace and remains largely incomplete today. Progress is reportedly marginal in the north, but also in the south it seems to be only modest and gradual in nature.¹⁶⁴ The result is the co-existence of the old and new state justice systems, which further increases complexity and lowers performance.

It should come as no great surprise that both PRODEJ and the judicial roadmap have not (yet) created significant change in how state justice is provided in Mali. Both programmes largely seem to have assumed that the operational performance of the state judiciary can be improved by addressing tangible and intangible resource shortfalls. They have focused their efforts and funds correspondingly. However, this was done in a context in which the question of identity remains unsettled in Mali, its government (and judiciary) are strongly dominated by the same executive that was the main interlocutor – or even source – of both initiatives, and in which the state judiciary is structurally inaccessible to most of the population. Combined with what we know today about general challenges to effective reform in developmental settings, such as their sensitive political nature, the phenomenon of ‘isomorphic mimicry’ (superficial institutional adaptation to templates promoted by external actors) and obstacles to collective action, it becomes clear that the assumptions about how change happens that underpinned these initiatives were deeply flawed.¹⁶⁵

The remaining question to address is whether the space for improving the Malian state judiciary has opened up since 2012. On the upside, the previous minister of justice has discarded the justice and prison administration reform plan for 2015–19 that his predecessor produced.¹⁶⁶ This plan, if continued, might have increased the independence of the Superior Council for the Magistracy and the Truth, Justice and Reconciliation Commission, but it also featured assumptions regarding change similar to those in PRODEJ I and II in terms of its top-down approach and resource-oriented nature.¹⁶⁷ Instead, the previous minister of justice conducted a series of workshops that aimed at enabling judges and judicial officials working in the ‘front offices’ of justice provision – that is, the courts – to suggest priorities for reform, and he intended to develop action plans and budgets on the basis of their proposals.¹⁶⁸ It is too early for any

164 Based on email exchanges between the research team and various legal experts in Mali in mid-June 2015.

165 Van Veen, E. (2015), *More Politics, Better Change Management: Improving International Support for Security and Justice Development Programming in Fragile Situations*, Paris, OECD Publishing, forthcoming; Andrews (2013), *op. cit.*; Booth (2012), *op. cit.*

166 On 25 September 2015 Sanogo Aminata Mallé replaced Mahamadou Diarra as minister of justice. The reference here is to Mahamadou Diarra. See: <http://maliactu.net/mali-remaniement-ministeriel-marque-par-le-depart-des-ministres-de-la-securite-et-de-la-justice/> (accessed 28 September 2015).

167 Ministère de la Justice et des Droits de l'Homme (2014), *op. cit.*

168 Based on email exchanges between one of the authors and a source close to the Malian Ministry of Justice in early September 2015.

sort of review of this initiative – if it is continued under the present minister of justice – but the approach holds promise as it is more bottom-up in nature, while, nevertheless, remaining firmly within the confines of the state judiciary.

On the downside, the initial hope for change that accompanied the election of Ibrahim Boubacar Keïta as president seems to have largely dissipated two years into his term in office. Mali's political elite, including the President, does not seem to be seized by a particular sense of urgency that change in how Mali is governed is necessary in the wake of the 2012 crisis. The security-first prism through which donors have chosen to identify their priorities in Mali contributes to this sentiment because it has led the international community to continue working with the Malian government as its key partner in the fight against terrorism and organised crime – in spite of the existential crisis of the Malian state that occurred only three years ago. In consequence, many of the dysfunctional and self-serving practices of the preceding period continue, popular discontent is rising and accusations of embezzlement and mismanagement of funds have been made against the President's entourage.¹⁶⁹

Despite this mixed picture, there are more donors involved in the justice sector in 2015 than there were prior to the crisis, and they recognise the need for a coordinated approach. This creates the possibility of stronger advocacy that may in turn enlarge the space for efforts to improve the performance of the state of justice in Mali, if a shared strategy can be developed that helps bring together currently fragmented international initiatives.¹⁷⁰

169 On the continuation of 'old' practices: Chauzal (2015a), *op.cit.*; personal interview, Van Veen, E., Bamako, 27 March 2015; Konate, O., 'Campagnes présidentielles de 2013 : IBK trahit toutes ses promesses', *Mali24info*, 15 April 2015, <http://www.mali24.info/actualites/politique/1478-campagnes-presidentielles-de-2013-ibk-trahit-toutes-ses-promesses> (accessed 3 May 2015); Baudais, V., 'Instantané politique malien, trois ans après la crise de 2012', *Mediapart*, 4 May 2015, <http://blogs.mediapart.fr/blog/virginie-baudais-etienne-darles/040515/instantane-politique-malien-trois-ans-apres-la-crise-de-2012> (accessed 4 May 2015); Hugeux, V., 'Nord du Mali : le va-tout d'IBK', *L'Express*, 22 November 2013, http://www.lexpress.fr/actualite/monde/afrique/nord-du-mali-le-va-tout-d-ibk_1301616.html (accessed 5 May 2015); on mismanagement of funds: *Jeune Afrique*, 'Le FMI critique ouvertement l'achat du nouveau jet présidentiel', 20 May 2014, <http://www.jeuneafrique.com/9816/economie/mali-le-fmi-critique-ouvertement-l-achat-du-nouveau-jet-pr-sidentiel/> (accessed 4 May 2015).

170 Personal interview, Goff, D., Bamako, 2 April 2015. Independently of each other, a UNDP-commissioned consultant and the Dutch embassy started mapping the dozens of donor efforts currently under way to support Mali's judiciary. Although these initiatives had not necessarily been completed at the time of writing this report, they already suggested significant fragmentation, a lack of joint strategic thinking and coordination, and in places even duplication.

Conclusion: innovating a legal hybrid as the way forward?

The historic predecessors of contemporary Mali were plural societies in the cultural, ethnic and linguistic sense. This was true for colonial Mali, as it still is for Mali as an independent state. A core challenge in any effort aimed at safeguarding the country's future stability and development is how to ensure that this plurality is better reflected in the way the country is governed. The inadequate alignment between the country's social ecology and its political power structures helps explain the coups, rebellions and other incidents of violence that have occurred over the past 55 years. This lack of alignment is particularly pronounced in the area of justice that features a mixture of customary and state justice mechanisms.

The preceding examination of state-provided justice at the political level has made it clear that Mali's unsettled ordering of identities undermines the creation of a shared and legitimate concept of justice for the entire Malian polity. In addition, the dominance of the Malian executive over the country's governance impedes the state from supporting the provision of justice as an impartial public service. At the systemic level, the state judiciary is difficult to operate effectively from an administrative point of view because of the advanced institutional architecture this requires. Furthermore, the state judiciary's general use of the French language and the costs of both reaching and using it also make it inaccessible to most Malians. The more procedural and punitive character of Mali's state law also creates a measure of cultural dissonance, given that the country's customary justice systems are informal and more oriented towards reconciliation. At the operational level, the performance of the state judiciary suffers from endemic corruption, as well as a general shortage of tangible and intangible resources. This shortage is compounded by limited allocation and poor utilisation of the resources that do exist. Nevertheless, because of its national scope, the state's justice system also holds potential for achieving greater equality in the treatment of Malians as citizens before the law and for offering a legal framework that can deal with the exigencies of the 21st century (such as resolving civil law disputes under conditions of urbanisation, or commercial disputes in a context of globalisation). For now, this potential is largely hypothetical as state justice in Mali is rather a matter 'of its elites, by its elites and for its elites'.

On the other side of the coin, Mali has highly regarded customary justice mechanisms, including religious ones, which have deep historic roots, work well and are generally much used by the Malian population. At the political level, they are based on a strong sense of shared identity that is, however, limited by the extent of the particular ethnic

group to which they apply. Since customary justice can be dispensed by customary authorities that are not necessarily legal specialists, these systems also feature a measure of political or executive influence on judicial decisions. Abuse of such influence, however, is reduced by the visibility and proximity of executive power holders to the communities they serve; that is, lines of accountability are shorter. Customary justice mechanisms do, however, reflect conservative social values that are not necessarily respectful of the rights Malians have under their constitution. At the systemic level, such systems are accessible, affordable and have good coverage. In contrast, their fragmentation also creates a lack of transparency and predictability in the legal decisions they generate. Operationally, customary authorities have little power to enforce judgments and customary systems also feature a certain level of corruption, albeit lower than that in the state judiciary.

In short, Mali features a colourful mosaic of legal pluralism in which the state does not have, will not have and should not aspire to have, a monopoly on the provision of justice for the next decades. In consequence, better justice outcomes realistically can only be achieved in the short-to-medium term (~10 to 20 years)¹⁷¹ by stimulating greater mutual recognition and combined use of Mali's customary and state judicial systems as more or less equal components of the country's 'justice ecology'. The preceding analysis suggests three principles on which a strategy could be built to realise such outcomes:

First, there is a need for intellectual flexibility, which amounts to recognising Mali's legal reality and looking for pragmatic ways to improve the quality of justice that is being delivered on the basis of what already exists. Tenuously holding on to the fictional notion that the state is the only possible source of positive law and that the state judiciary has a sufficiently substantial presence throughout the country to be both accessible and functional belongs in the realm of wishful thinking. Blanket rejections of the state judiciary because of its lack of independence, corruption and poor operational performance are equally unhelpful.

Second, there is a need to consider Mali's various justice systems on the basis of relative equality. If the purpose of the law is to enable an orderly society and to serve the people through the fair adjudication of their differences, there is no reason why the state's legal system should be considered as inherently superior to other legal systems that co-exist on the same territory. The state may, of course, provide the law of last resort for disputes that Mali's customary justice mechanisms are not able to settle effectively. This, though, is superiority in the sense of subsidiarity, not in the sense of dominance. It is encouraging that the recently concluded peace treaty cautiously acknowledges the

171 The World Bank calculated that it took the fastest 20 reforming countries of the 20th century around 40 years to accomplish basic governance transformations in the rule of law area. See: World Bank, *Conflict, Security and Development*, World Development Report, Washington D.C., World Bank, 2011.

principle of equality by emphasising the need to strengthen the role of customary justice systems (in particular that of the Cadi).¹⁷²

Third, there is a need to prioritise legal innovation as a key method for identifying ways to progress justice in Mali. More advanced legal systems have gone through many useless reforms and dead ends of their own that are better not repeated, such as holding non-violent suspects in prolonged pre-trial detention for failure to provide bail, imposing mandatory minimum sentences that do not allow for judicial discretion, and making incarceration an almost purely punitive experience. Unfortunately, most efforts at judicial reform in Mali have so far been state-centred, top-down and reflect the classic legal reform strategies described above. As the results of this approach have been limited and because it risks repeating mistakes made elsewhere, it should be largely abandoned without, however, abandoning the state judiciary. An obvious asset is Mali's rich legal heritage, such as Timbuktu's long-standing practice of mediation and legal review on the basis of Islamic law, or the practice of carrying out customary justice in the 'Toguna' in Dogon society,¹⁷³ which could be built on more strongly to innovate justice in line with the socio-cultural disposition and stage of development of Malian society.¹⁷⁴

If these principles are adopted to improve the state of justice in Mali through a hybrid approach, two questions arise. First, what sort of strategy can turn the inevitable political hesitancy and resistance into support? Second, how can practical ways be identified to create greater recognition of, and better synergy between, state and customary systems of justice in Mali? Since these are evidently questions to which answers need to be developed organically as a result of genuine deliberation between Malian stakeholders over time, this report is not the place to suggest a prescriptive set of recommendations. Instead, it offers a five-step process that can gradually generate insights that might lead to answers. Each step is briefly laid out below.

172 *Accord pour la paix et la réconciliation au Mali*, Issu du processus d'Alger, Project d'Accord version 25 février 015 à 19h30.

173 Huts with a very low roof that only allow for seated conversation. The philosophy being that anyone who rises to his or her feet in anger will hit his or her head, which should return them to a peaceful state. Virginia Friends of Mali, *Dogon Culture in Eastern Mali and Malian Religion*, undated, <http://vafriendsofmali.org/education/teaching-timbuktu/teaching-the-community/dogon-culture-and-malian-religion> (accessed 8 September 2015).

174 As recognised in, for example: *Statement by His Excellency Mr Amadou Toumani Touré*, President of the Republic of Mali, Institute of Social Sciences, The Hague, 30 November 2011.

(1) Map the nature and legitimacy of Mali's customary justice systems in detail

As the first step of a process to develop ideas that may lead to greater recognition and better synergy between Mali's justice systems, a mapping of the existing range of customary justice systems would be helpful.¹⁷⁵ This mapping should focus on criteria that enable assessment of both the performance and the development of such systems, for example, their: a) transparency; b) impartiality; c) rate of judgment implementation; d) ability to innovate; and e) (potential for) linkage with the state judiciary or with other customary mechanisms. Such a mapping has the advantage of being relatively neutral in character and focused on knowledge generation. It can be organised in ways that create political buy-in, for example as part of an effort to bring justice closer to the Malian people. An innovative way to implement it would be to field teams of politicians, representatives of the state judiciary, researchers and customary justice peers for a few months to travel through the country and to exchange with, and learn from, representatives of different customary justice systems and the communities they serve.

(2) Organise 'Justice Summits' throughout Mali

The knowledge and insight generated through such a mapping would provide the basis for a broad-based and extended series of conferences, bringing together representatives of the various providers and stakeholders of Mali's legal pluralism to discuss the current justice challenges that Malian citizens face, how these can be creatively resolved and what their own role might be in making this happen. The purpose of holding summits throughout Mali is to allow different regions an opportunity to host each other and to share their good practices. It would be best to not automatically hold such a summit only in Bamako, which would probably lead to the state's legal system dominating discussions. A more open and reflective dialogue is needed that explores ideas and options beyond the confines of currently prevailing positive law and its representatives. These justice summits could be a visible demonstration of the government's commitment to implementing the recently concluded peace agreement, especially if they were coupled at the local level with a programmatic mechanism (and modest funds) that could enact practical ideas emerging from their deliberations. It is quite conceivable that such an initiative would be embraced and supported by the international community.

(3) Make greater use of customary justice leaders as legal officials of the state

Because the ability to cooperate benefits from mutual exposure and shared experience, a practical initiative of the sort referred to under point 2 above could be to make it easier for customary leaders to act as mediators in civil and criminal cases, as well as to increase their use as assessors by the state judiciary. At present, Mali's positive laws enable some of this on paper, but they either prescribe criteria that few customary

¹⁷⁵ One would expect such systems to have been mapped in detail already, for example in the form of anthropological works that study the nature and effects of customary justice systems within the boundaries of the Malian state. We have not been able to find any, however.

justice leaders meet, or stipulate appointment procedures that are overly centralised. Instead of reducing the possibilities for using the expertise of customary justice leaders in the state's judicial processes (as some have proposed), the relevant laws should rather be reviewed with the aim of facilitating it since this creates greater exposure of customary justice practices to the state judiciary and vice versa.¹⁷⁶ For example, the recruitment of assessors up to the level of the Courts of Appeal could be decentralized. Also, creating peer learning networks for assessors could help them increase their familiarity with the state's legal system. Conversely, alternative dispute resolution methods and customary justice mechanisms could feature much more prominently in the training curriculum for state legal professionals. Such initiatives would, if applied at scale, have the potential advantages of reducing the caseload of state courts, increasing the enforceability of customary judgments and increasing awareness of the state's legal professionals of the existing variety of customary justice practices.

(4) Work towards recognition of those customary justice mechanisms in positive law that enjoy adequate levels of popular legitimacy and are open to development

The accumulation of experience that might result from points 1 to 3 above can gradually produce better insight into how the quality of customary justice mechanisms can be improved and their status enhanced. At present, the customary mechanisms that serve the justice needs of most Malians enjoy very little by way of formal status. This is problematic on two counts. First, if Malians seek to have their justice needs resolved via a customary mechanism and this fails, they face a choice of starting proceedings entirely anew through the state system or dropping the case, which is neither an effective nor a financially attractive proposition. Second, it means that customary mechanisms are underutilised as useful assets for providing better justice by pushing them into the twilight area of popular legitimacy and state sanction where it is more difficult to grow and develop. In short, a conversation should be started on how customary mechanisms and leaders are best formally recognised as sources of positive law and how, at the same time, their transparency can be increased and their orientation modernised where

176 Although dated, a 2001 study noted the following performance issues: 1) a cumbersome selection procedure for assessors; 2) inadequate articulation of formal selection criteria leading to a lack of transparency in the nomination of assessors; 3) a lack of familiarity with, and influence on, the legal procedures of the state on the part of assessors; and 4) the non-obligatory use of assessors once engaged on a legal file leading to their underutilisation. Note that these issues were largely related to the role of assessors in support of judges of the peace (in theory, these are now abolished). See: De Langen, M., *Les assesseurs et la justice: Configuration du droit et de la coutume dans les conflits fonciers à Douentza, Mali*, Rapport d'une recherche de terrain, The Hague, Van Vollenhoveninstituut, 2001; Bengaly et al. (2015), *op. cit.*

necessary. It is important, however, that such efforts largely take place on the basis of the social parameters of the customary justice mechanisms themselves.¹⁷⁷

(5) Imagine what the next iteration of Malian justice could look like based on the results of these completed steps

Assuming that each of the steps above were to be completed, Malians would have a much firmer grasp of the state of both their national and customary justice systems, and of how they can better work together. From here, Malians would also be well placed to create a new iteration of their justice system that draws on the strengths of each, that is modernised and that also fits in organically with their culture. If this process were to be successfully carried out, and such a new system could demonstrate a positive effect on the quality of justice outcomes it generated, Mali could become a source of inspiration for justice development for other fragile post-colonial states.

177 Experiences from, for example, Afghanistan suggest that codification of decisions by customary justice actors undermines one of their sources of strength and imposes state-like parameters that create resistance because they suggest superiority. See: Gaston, E. et al., *Lessons Learned on Traditional Dispute Resolution in Afghanistan*, Washington, DC, United States Institute for Peace, 2013.

Annex 1 Methodology

The analysis and observations in this report are based on a methodology that combined desk research with in-country expert interviews and external research that the authors commissioned. The purpose and use of each of these methods is briefly described below.

(1) Desk research was carried out between mid-January and mid-June 2015 and covered both French and English academic literature, think tank reports, policy documents and programme evaluations. Its purpose was to take stock of existing work pertaining to the state of justice in Mali. The desk research also highlighted major gaps in existing research in the sense that there seems to be a paucity of works seeking to understand in greater detail Mali's political economy, drivers of corruption and its variegated customary justice mechanisms.

(2) In-country expert interviews were carried out between 24 March and 3 April 2015 in Bamako and Mopti by the authors. These interviews served to fill part of the gaps discussed above and to test hypotheses developed during the desk research phase. The 24 extended interviews included 7 interviews with civil society representatives and/or journalists, 8 interviews with representatives of the state justice system, 4 interviews with customary justice providers, 3 interviews with members of the international community and 2 interviews with 'politicians'. In addition, one of the researchers had the opportunity to participate in a two-day workshop in which over 30 Malian stakeholders discussed how the country's state-run penal process can be improved.

(3) Commissioned research on the state of justice in northern Mali that was carried out by the *Observatoire des Droits Humains et de la Paix* (ODHP). It focused on the nature of justice provision in the north of Mali before, during and after the 2012 crisis, and on what initiatives might be considered to improve access and quality of justice in the north. To this end, a team of three Malian researchers conducted 61 interviews in April 2015 with local administrators, customary (justice) leaders, members of the state judiciary, members of civil society and ordinary citizens from (or based in) Gao (30), Timbuktu (19) and Kidal (12), using a qualitative, semi-structured interview protocol. Their work was guided by Dr Bengaly and fed into this report. It is cited as an unpublished work in the references.

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