

POLICY BRIEF

THE QUEST FOR RESTORATION OF CONSTITUTIONAL ORDER IN MALI

AMANI AFRICA

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SUMMARY

Following the ouster of President Ibrahim Keita on 18 August, both African and other international organizations condemned the acts of the army and called for restoration of constitutional order. The West African regional organization, Economic Community of West African States (ECOWAS) has taken the lead for achieving this end state. Yet, there remains uncertainty as to what form restoration of constitutional order would take in the context of Mali. In this policy brief, we seek to explain how the effort for restoring constitutional order may unfold and the form it could take.

BLOODLESS COUP

On 18 August 2020, social media and some media outlets reported gunfire and movement of army units in two military camps, Kati and N'Tominkorobougou, in the North and South of Mali's capital city Bamako. What was initially reported as mutiny involving the arrest of senior government officials escalated into full-fledged coup d'état when the military units that travelled to Bamako took custody of Mali's President together with his Prime Minister Boubou Cissé from the President's residence.

The President, who was taken to the Kati military camp, in a televised address announced his resignation and the dissolution of his government and the National Assembly.

This was followed by the televised announcement by the National Committee for the Salvation of the People (CNSP), the body that seized power from the government, its plan to hand over power to a civilian authority for preparing elections for forming a newly elected government. The move that was received warmly by members of the public in Bamako, who were seen cheering the army, was meant to signal, both to the domestic and international audience, the end of the government of President Keita.

The entire act took only less than a day. There was no fighting. No blood was also spilt. Although the President announced his resignation, the conditions under which the announcement was made betrayed that his resignation was not totally voluntary. As such, it could not give the seizure of power by the army the measure of legitimacy the CNSP sought from the announcement by the President of his resignation. Yet, despite rejecting the reversal of the coup, it is notable that the CNSP pledged to transfer power to a civilian authority. Obviously, part of the discussion about the process of restoration of constitutional order involves the question of the form the transitional civilian authority takes, the time it would take to have the transitional authority in place and the length of the transition.

Another notable feature of the coup is the political context in which it happened. The coup in Mali comes after over two months of political instability. A coalition of opposition and civil society groups known as the June 5 Movement-Rally of Patriotic Forces (M5-RFP) under the leadership of Imam Mahmoud Dicko organized several mass protests since 5 June.

Prompted by complaints about the outcome of the parliamentary election in March and April and the abduction of leading opposition leader Soumaila Cisse while campaigning ahead of the parliamentary election in March, protesters campaigned for the resignation of President Ibrahim Boubacar Keita. The discontents of protestors include continued insecurity, the struggling economy, corruption, and the Constitutional Court's decision that annulled 5.2 % of the disputed parliamentary votes cast, increasing the President's party representation by ten additional seats.

The early response of the public, at least from the reports coming out of Bamako, suggest that the coup has strong public support. The Friday prayer on 21 August that attracted large number of people at Independence Square turned into a strong show of public support for the army. The prayer, led by Imam Mahmoud Dicko, was also a statement by the M5-RFP of their support for the coup.

THE CONTINENTAL AND INTERNATIONAL UNANIMOUS CALL FOR RESTORATION OF CONSTITUTIONAL ORDER

Following the adoption of the Lomé Declaration on the framework for an OAU Response to Unconstitutional Changes of Government (UCG), the ban on UCG was entrenched in the Constitutive Act of the African Union (AU), the founding treaty of the AU. Over the years with the entrenchment of this norm into the Protocol Establishing the Peace and Security Council (PSC Protocol) in 2002 and the African Charter on Democracy Elections and

Governance in 2007, the AU, particularly through PSC, its highest standing peace and security decision-making body, has taken measures against coups.¹ Relevant to the situation in Mali is also the ECOWAS Protocol on Democracy and Good Governance, which similar to the AU, outlaws coups. Both the AU and ECOWAS norms lead to enforcement measures taken against the country in which unconstitutional changes of government is perpetrated. These measures include condemnation of the act, a demand for restoration of constitutional order and suspension of the country from participating in the activities of AU and ECOWAS.

Not surprisingly, ECOWAS was the first to react and flatly reject the coup. In the statement the ECOWAS Commission issued on 18 August, ECOWAS noted with grave concern the seizure of power by Malian military putschists. It also announced 'the suspension of Mali from all ECOWAS decision-making bodies with immediate effect, as per the Additional Protocol on Democracy and Good Governance, until effective reinstatement of the constitutional order.' Going further, it also decided 'to close all land and air borders, trade and financial flows and transactions between ECOWAS member states and Mali'.

In a statement issued on 18 August expressing strong condemnation of 'the forced detention' of the President and other government officials, the AU Commission Chairperson, Moussa Faki Mahamat, stated his rejection of 'any attempt at the unconstitutional change of government in Mali and calls on the mutineers to cease all recourse to violence, and calls for the respect of the country's institutions.' (emphasis added) Unlike the ECOWAS Commission statement

¹ Between 2000 and 2020, there have been 15 incidents of unconstitutional changes of government.

which left the meaning of restoration of constitutional order open, this statement calling for respect of the Country's institutions can be seen as a reference to reinstatement of the government of President Kieta. Similarly, a statement from the UN Secretary-General echoed the position of both ECOWAS and the AU Commission in condemning the military mutiny that culminated in the arrest of President Keita and members of his Government and calling for 'immediate restoration of constitutional order and rule of law.'

In a sign of the unanimity of views across African and international actors, the following day, the AU Chairperson for 2020 South Africa's President Cyril Ramaphosa condemned what he deemed to be 'unconstitutional change of government'. He also demanded the release of the President and members of his government and called for 'an immediate return to civilian rule and for the military to return to their barracks.' In an emergency session it convened on 19 August, the PSC expressed its strong condemnation of 'the unconstitutional change of government in Mali'. It is interesting to note that the PSC communique did not clarify the nature of the unconstitutional change of government as coup. Deciding 'the immediate suspension of Mali from participation in the activities of the African Union until restoration of constitutional order,' it underscored the need for rapid resolution of the current crisis based on both 'respect for constitutional order and reflecting the aspirations of the people of Mali.' It further called for the unconditional return of the military to their barracks and for them 'to ensure creation of a conducive environment for an unimpeded return to civilian rule.'

On 20 August, the ECOWAS Authority made up of the leaders of the 15 member states of the regional body convened an emergency virtual session. In a clear departure from the general position for restoration of constitutional order, the ECOWAS Authority specified the form restoration of constitutional order takes. Following their deliberations, Niger President Mahamadou Issoufou, the acting ECOWAS president, issued a statement expressing the demand of the ECOWAS Authority for reversal of the coup and President Keita's return to power.

It is clear from the foregoing that despite the usage of various formulations such as 'return of civilian rule' or 'restoration of constitutional order', there is unanimity among continental and international actors on the need for speedy end of the seizure of power by the military. Other than the ECOWAS Authority which is explicit in its demand on the form that return to constitutional order should take, the statements from all other bodies has left the form that restoration of constitutional order takes open.

ECOWAS MEDIATION FOR RESTORATION OF CONSTITUTIONAL ORDER

On 22 August 2020, a delegation of the West African regional body ECOWAS, headed by Nigeria's former President Goodluck Johnathan, traveled to Mali to discuss with the members of the CNSP about the speedy restoration of constitutional order in Mali. This visit by the ECOWAS delegation came two days after an emergency meeting of the leaders of the 15 member states of the regional body.

The fact that ECOWAS called for reinstatement of President Keita is not totally surprising. As some diplomats quoted in a press report pointed out, it is a pragmatic move on the part of the leaders for some of whom it is a matter of avoiding the precedent that President Keita's removal sets. Of course, this move is not without foundation in existing ECOWAS and AU norms that ban unconstitutional changes of government. These norms aim at shielding democratically elected governments from military coups or other forms of unconstitutional changes of government. This aims at avoiding the political instability that arises from trying to remove a democratically elected government through a means other than the ballot box. President Keita came to power by election. He was re-elected in 2018. Under normal circumstances, the preferred option is to vote him out of power or do so through a negotiated process.

ECOWAS delegation sought to execute its mandate as tasked by the leaders of the regional body. At the same time given the context in which the removal of President Keita took place, the specific demand of ECOWAS for reversing the coup and reinstating Keita is an almost impossible mission to accomplish by President Johnathan and his delegation. Indeed, insisting on reversing the coup in Mali carries serious risks. As happened in Mauritania in 2008, it unnecessarily drags the process for return to civilian rule by creating disagreement on the form of restoration of constitutional order and hence the speedy transfer of power from the CNSP to a civilian authority. This, in the current context of Mali, can itself lead to uncertainties that can further undermine the security situation in Mali and may even precipitate political instability in the transitional process.

Not surprisingly the ECOWAS delegation headed by President Jonathan ended its mission without agreement with the CNSP on 24 August. It is reported that President Keita himself informed the delegation that he stepped down on his own accord. This actually offers ECOWAS a good way out of its current position for reinstating President Keita back to power and opt for other options for restoring constitutional order in Mali. Under these conditions, ECOWAS, drawing on the experience of the ouster in 2008 of an elected government in Mauritania, may instead work on securing the dignified retirement of President Keita as a statesman with full benefits of a former president of a country similar to what was adopted in Mauritania after the 2008 coup. It is also possible to push for the participation of President Keita in the national dialogue for formation of transitional civilian authority, again along the lines of what took place in Mauritania. It is to be recalled that in the case of Mauritania, the AU and others demanded the cooperation of the de facto authorities with the AU and other regional and international actors in the search for a political and consensual solution to the current crisis, 'based on the unconditional release of President Sidi Ould Cheikh Abdallahi and his contribution, inherent in his status of legitimately elected President, to the determination of a solution to the crisis, the involvement of all stakeholders, the respect for the Mauritanian Constitution and international legality.'

OPTIONS FOR RESTORATION OF CONSTITUTIONAL ORDER

Neither the AU nor the ECOWAS norms specify the form restoration of constitutional order takes after an unconstitutional change of government takes place in a member state. This lack of specificity creates a lot of uncertainty and divergent policy positions on the part of regional and international actors. At the same time, it allows flexibility for dealing with each case of unconstitutional change of government on a case by case basis. Even then, it is possible to discern from the practice in implementing the norm on UCG the various forms that restoration of constitutional order takes.

Reinstatement of the deposed government is one avenue that have been tried in few cases, although success of such an approach is generally limited to a specific set of circumstances unique to each case. The details of instances where such an avenue has been attempted is contained in the table below.

Cases of reinstatement of deposed government as a means of restoration of constitutional order

Following the coup of 15 March 2003 in Central African Republic, the Central Organ of the AU at its 90th session called upon 'the perpetrators of the coup in that country to take immediate steps to reinstate the democratically elected government of the country.' This did not work out.

| Country | Date of UCG | AU/RECs decision | Success of reinstatement | Restoration of constitutional order | End of suspension |
|---------------------|---------------|--|--------------------------|---|--|
| Sierra Leone | 1997 | Reinstatement | Successful | Reinstatement of the deposed government | |
| CAR | 15 March 2003 | 17 March 2003 Reinstatement of the deposed government and suspension of CAR | Unsuccessful | Formation of a new government after elections in May 2005 | June 2005 33rd meeting of the PSC |
| São Tomé & Príncipe | 16 July | Reinstatement of the deposed government | Successful | Successful Reinstatement of the deposed government | 93rd meeting of the Central Organ 24th July 2003 |
| Mauritania | August 2008 | Condemnation, suspension and demanding reinstatement of the deposed government | Unsuccessful | July 2009 | 196th meeting of the PSC held at Ministerial level on 29 June 2009 |

In its decision, the Executive Council at its 3rd ordinary session requested 'the authorities of the Central African Republic to take the necessary measures to expeditiously restore constitutional legality'. In São Tome and Principe,² AU member states were unanimous in calling for restoration of constitutional order, with a number of countries including the AU Chairperson in 2003 President Chisano of Mozambique demanding the reinstatement of the deposed democratically elected president.³ The Central Organ, the predecessor to the PSC, at its 93rd session welcomed 'the successful resolution of the crisis, through the restoration of constitutional order and the return of the elected President'.⁴ This was the only successful restoration of constitutional order through reinstatement of the deposed government since the establishment of the AU.

In the 2008 coup in Mauritania, the PSC demanded the restoration of constitutional order through the unconditional reinstatement of Mr. Sidi Ould Cheikh Abdoulaye, President of the Islamic Republic of Mauritania, in his functions, by 6 October 2008 at the latest, and warned the perpetrators of the coup d'état and their civilian supporters against the risk of sanctions and isolation in case they did not respond positively to that demand. Subsequently, as the situation persisted the position was moderated to that of demanding an 'inclusive and consensual resolution of the coup.' It was only after an agreement was reached for a transitional process leading to the convening of elections that the suspension of Mauritania was lifted.

Similarly, when the 2009 coup in Madagascar took place, SADC called for return to constitutional order through the reinstatement of the deposed President Ravalomanana. At their meeting of 31 March, SADC member states deciding the suspension of Madagascar from all community institutions and organs 'urged the former mayor of Antananarivo, Mr. Andry Rajoelina, to vacate the office of the president as a matter of urgency paving the way for unconditional reinstatement of President Ravalomanana.'

As the crisis in Madagascar deepened for the following years, SADC abandoned the initial position of the reinstatement of the deposed president as a mark of restoration of constitutional order. As in many other instances, what ultimately marked the end of the UCG and return to constitutional order was the establishment of a new government on the basis of free and fair elections by the end of 2013.

It is clear from these experiences that the route of reinstatement of the deposed government is not most common. Its success is also rare and limited to set of circumstances specific to the situation in São Tome and Principe, namely the unity of voice of AU member states and the willingness of Nigeria to deploy troops.

The second option is to follow the succession rule of the constitution of the country for a transitional administration. This option is possible where the constitution of the country remains in force and the procedure for interim administration in the event of resignation or incapacity of the president can be implemented culminating ultimately in the convening of elections as per the timeline set in the constitution in the event of the incapacity or resignation of the president.

² <https://www.files.ethz.ch/isn/12153/PAPER81.PDF>

³ http://en.people.cn/200307/17/eng20030717_120405.shtml

⁴ Central Organ/MEC/AMB/COMM.(XCIII)

When Togo's President passed away in 2005 and the army sought to seize power outside of the process prescribed in the Constitution of Togo, the PSC demanded for respect of the constitutional provisions on succession of power in the event of the passing away of the President.

That was the basis on which constitutional order was eventually restored after election was held based on the procedures laid down in the country's constitution, although this did not totally avoid the coming to power of the person favored by the military.

Following the March 2012 coup in Mali, the military handed over power to civilian transitional authority headed by the chair of the National Assembly. In the current context of Mali, this option of using the constitutional order of succession for transferring power to a transitional civilian authority is unlikely to work. It is to be recalled that the dispute over the parliamentary election was one of the drivers of the June 5 protest movement. Additionally, President Keita at the time of announcing his resignation also proclaimed the dissolution of both his government and the Assembly.

THE VIABLE OPTION FOR MALI

The other and most common option is accordingly to negotiate an agreement among all stakeholders on the formation of a new transitional civilian authority. This ordinarily involves the convening of national consultation among various civilian and political forces and the army for deciding on the form and composition of the transitional civilian authority.

It can also involve drafting of transitional constitutional charter establishing and defining the role of the transitional executive and legislative authorities as well as the transitional tasks and the timeline and roadmap for convening of national elections. While the specific details of each case varies, such a transitional process has been the case in CAR in 2003, in Mali in 2012, in Burkina Faso in 2014, and most recently in Sudan in 2019.

In terms of restoration of constitutional order in Mali, this appears to be the most viable option. Taking advantage of the commitment of the CNSP for handing power to civilian authority and the popular demand for reform ECOWAS, the AU and UN can help Malian actors to engage in an inclusive national dialogue to agree on the modalities and timeline of the transitional process as well as conditions of eligibility for the national elections of those involved in the transitional process. An instructive experience from which the transitional process in Mali can take inspiration is the transitional process instituted in the Burkina Faso in 2014.

After Burkina Faso's longtime leader was forced to flee the country under pressure from widespread mass protests against his attempt at standing for a third term, the army seized power. Unlike the situation in Mali where the army is cheered by the public, the seizure of power by the army in Burkina Faso did not receive the backing of the public. Indeed, people protested against it. This helped in putting pressure on the army to hand over power to a transitional civilian authority. The AU PSC at its meeting on 3 November 2014 gave the army a two-week timeline for transferring power to a civilian authority or face punitive measures.

On 9 November 2014, political parties, civil society organizations and religious leaders adopted a plan for a return to civilian rule. They subsequently signed a transitional charter setting the framework for a civilian-led transition tasked with the responsibility of organising free, fair and credible elections.

The Transitional Charter established a 90-member transitional council that will serve as the country's parliament, while the prime minister will head a 25-member cabinet which included representatives from the army. Reflecting the spirit of the AU norm on unconstitutional changes of government, it further envisaged that the interim president and ministers in the transitional government (which included those who led the military seizure of power) are barred from standing in elections expected to be held a year from the time of the establishment of the transitional civilian authorities.

Following the agreement reached for the army to transfer power to the civilian authority established on the basis of the Charter on 21 November, the PSC at its meeting held on 18 November welcomed the progress made and decided, 'in anticipation of the transfer of power to the newly-designated transitional president, scheduled to take place on 21 November 2014, not to take the measures that were envisaged in paragraphs 9 (iii) and 14 of communiqué PSC/PR/COMM.(CDLXV), including the suspension of the participation of Burkina Faso in the activities of the AU'. This was the first time ever in which the PSC, after concluded the occurrence of unconstitutional change of government, did not apply the measures envisaged in the various AU instruments including the Lomé Declaration of 2000.

There is a much better chance of achieving a similar transitional process in Mali. Unlike in Burkina Faso, where there was public opposition against the army's seizure of power, there is apparent support for the CNSP in Mali. There are also indications that the June 5 Movement and the CNSP are coordinating as well. This presents an opportunity for ECOWAS, working with the AU and the UN, to persist with the demand for speedy establishment of a transitional civilian administration. The role of this civilian authority could include a) to implement, based on agreed transitional roadmap, relevant policy and institutional reforms, b) build national consensus and agreed process and timeline on the implementation of the 2015 peace agreement and the outcome of December 2019 national dialogue, and c) to prepare the conditions for convening free and fair parliamentary and presidential elections within an agreed time.

While the military intervention is certainly a setback for peacefully resolving the situation in Mali, the current situation also presents unique opportunity for correcting the governance and democratic failures that precipitated the political tumult in Mali. The challenges that Mali experienced since 2013 show that deliberate efforts should also be made to ensure representation of political actors from Northern Mali in the transitional process. This transition can also be used for creating stronger conditions for successful implementation of the peace process as well as the various peace and security operations currently active, most notably the UN mission in Mali. All of these may take a time longer than the one-year transitional period of Burkina Faso, which itself faced a setback on army members of the old regime attempted to orchestrate a coup in September 2015.

CONCLUSION

Despite the strong popular support that the coup attracted, there is consensus across African and international actors that constitutional order should be restored. Nearly all of them demand that civilian rule is restored rapidly. But the mediation effort needs to be recalibrated. First, the focus of the mediation should be on the establishment of inclusive and consensual transitional civilian authority. Now that the reinstatement of President Keita seems to be irreversible as can be gathered from the conclusion without agreement of President Jonathan's mission on 22-24 August 2020, the decision of the ECOWAS Authority on that should not delay the discussion on transfer of power to a civilian authority. That decision needs to be quickly revised. This paves the way for aligning the position of ECOWAS with those of other continental and international bodies including the AU. Second, the mediation should be restructured to bring on board the representatives of the AU, the UN and the G5 Sahel.

Third, in lending support for Malian actors in negotiating the form, main responsibilities and timeline of the transitional civilian authority, the example of Burkina Faso's transition can be a source of inspiration, including in particular in having a speedy transfer of power from the army to the civilian transitional authority.

What remains unclear thus far is the implication of the coup for the peace process and the reaction of political groups and forces in the North of the country. At least in the short term, there does not seem to be negative reaction or significant deterioration of the security situation. It is not clear how long this apparent continuity of the peace and security status quo of the country in general and the north of the country in particular will last. While the assurance of the CNSP to uphold the 2015 peace agreement and to continue collaborating with the security and peacekeeping operations of international actors is critical for stability, the litmus test for continuity of the peace and security status quo will be the composition of the transitional civilian government, which may give rise to questions of representation.



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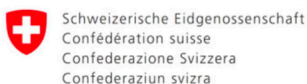
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Amani Africa is an independent African based policy research; training and consulting think tank with a specialization and primary focus on African multilateral policy processes, particularly those relating to the African union.

We support the pan-African dream of peaceful, prosperous and integrated Africa through research, training, strategic communications, technical advisory services, and convening and facilitation.

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