Revolutionary legality and the Burkinabè insurrection

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ABSTRACT

Coup leaders often claim insincerely to restore constitutional order. During Burkina Faso's 2014 'insurrection', however, Blaise Compaoré's opponents advanced detailed (international) legal arguments that significantly constrained their subsequent conduct. Theirs was to be a legal revolution. This article situates this stance within Burkina Faso's distinctive history of urban protest, whilst emphasising under-analysed international sources for the insurrection. 'Insurgent' lawyers, it argues, used international instruments to reinvigorate longstanding activist attempts to reconcile constitutional rights with a language of popular justice promoted by the revolutionary regime of Thomas Sankara (1983-7). After the insurrection, however, their emphasis on legality was used by Compaoré's supporters to expose the transitional authorities' double-standards. Meanwhile, insurgent lawyers working for the transition had to work hard to reconcile (international) legal justifications for the insurrection with the expedient politics needed to defend the new dispensation.

INTRODUCTION

Overview

On 31 October 2014 Blaise Compaoré was chased from power after 27 years as President of Burkina Faso. He had attempted to amend the constitution so that he could run for another term. Like elsewhere in Africa this 'constitutional coup' was criticised by some in the legal profession, and resisted by others in the streets. Unusually, however, mobilisation by lawyers was not simply an elite affair, wholly divorced from protean and popular struggles (contrast Branch and Mampilly 2015). Some constitutional scholars actually helped lead a new generation of social movements, and constitutional language suffused media debate. Some 'insurgents' would later narrate how eminent jurists - such as Luc Marius Ibriga and Augustin Loada - had walked through tear gas wearing t-shirts and trainers (O.M. Kambou and Somda 8.2.2018 and 7.8.2019 Int.; compare Hagberg 2015: 117). These lawyers asserted the legality of their revolution. The insurrection, that is, had come to fulfil the law not overthrow it. This apparently paradoxical argument was made possible by creative appeals to new international instruments. International law could now be deployed to revolutionary effect; with the spirit, but against the letter, of the national constitution.

This article analyses the political causes and consequences of this innovative legal strategy. Its first half begins by explaining the emergence of constitutional rights advocacy in Burkina Faso in the 1990s. I argue that this was more than simply a response to new donor priorities. It both borrowed from and reacted against the revolutionary brand of 'popular' justice endorsed by Thomas Sankara's National Council for the Revolution (1983-7). Two decades later, however, as other analyses have shown, Compaoré's extended dominance of law and politics had persuaded many of his critics that the constitution was no longer an effective weapon. It was by now too clearly a product of the incumbent regime. In this article I insist, however, that the insurrection did not abandon legal argument. I show how new mobilisation techniques inspired by other African responses to the Arab Spring had granted constitutional lawyers unusually prominent roles in a new generation of social movements. These insurgent lawyers then criticised Compaoré's efforts to amend the constitution on both legal and ethical grounds. They could do so because new international instruments - notably the African Charter on Democracy, Elections and Governance (2007) - allowed them to reconcile technical legal argument with a post-Sankarist language of popular justice. It was this reconciliation which ultimately justified the civil disobedience triggering Compaoré's downfall.

This article's second half examines the consequences of this

strategy for the insurrection's aftermath. It shows how the insurgents' insistence on international standards created serious difficulties for the transitional authorities and their supporters. Those claiming the mantle of the insurrection would be obliged to somehow square its legal justifications with the messy political trade-offs necessary to sustain it. Firstly, insurgent constitutionalists pushed for a strictly constitutional handover of power after Compaoré's sudden departure, in the face of severe countervailing political and practical pressures. Secondly, some of these same lawyers then advocated complying with a highly controversial regional court judgment - one which found that Burkina Faso's new electoral code contravened the same African Charter justifying the insurrection. And they have insisted that criminal trials for 'blood crimes' under Compaoré should be at least partially reconciled with demanding international standards: no easy task given the political salience of demands for more popular forms of justice. Such stances have led Compaoré's own supporters to constantly criticise the new authorities on legal grounds. Law was thus 'omnipresent' both before and after the insurrection (Fau-Nougaret 2015: 221-2). It did not merely rationalise political objectives.

Implications

Burkina Faso's 'culture of protest' has been the object of many studies (for an overview Harsch 2017). This will however be

the first to pay sustained attention to law. Much of this existing literature focuses on whether the insurrection really was a 'revolution' (Chouli 2015; Engels 2019).[i] Whilst some excellent detailed studies of the insurgents describe a clash between 'legal technicalities' - which was a weapon of the government - and 'morality and legitimacy' - which was a weapon of the opposition (Beucher 2018: 56; Moestrup 2019: 373; see also B. Ouédraogo 2014: 145-6). Francophone law journals have, however, published a rich literature analysing the insurrection, as yet neglected by political scientists (e.g. Soma 2015; Ouédraogo and Ouédraogo 2015; Fau-Nougaret 2016; Saidou 2017). And this socio-legal literature shows clearly how both government *and* opposition mobilised legality alongside moral and political legitimacy. As Ouédraogo and Ouédraogo (2015: 167), put it, 'the authors of the popular insurrection, with the aid of certain constitutionalists, [had] had built the discourse of resistance on the basis of the Constitution'.[ii]

These arguments have implications beyond Burkina Faso. Studies of contemporary African protest contrast its protean class character with the middle-class dominated democratisation movements of the 1990s (Branch and Mampilly 2015; Mueller 2018). This shift does not mean, however, that demands for rights and institutional reforms have been eclipsed by material grievances. On the contrary, as some recent accounts of the Arab Spring have

shown, would-be revolutionaries must now more than ever calculate in the shadow of the law (Brown and Waller 2016: 839-849; Sultany 2017). 'Law matters' even during conflict and revolution, when it might appear most insignificant (see Massoud 2013: 43). The point is not merely that protestors have confronted authoritarian regimes that repress using legal means, and thus incentivise opposition through legal channels (e.g. Moustafa 2011). A profoundly altered global context has also made regime transitions everywhere the subject of international legal concern (de Groof and Wiebusch 2020).[iii] Both the aims and outcomes of even the most popular of uprisings now reflect this increased premium on (international) legality (generally Lawson 2015).[iv]

RIGHTS, POPULAR JUSTICE AND INSURRECTION

Popular justice

The end of the Cold War saw all manner of African anti-government struggles cater to donor priorities by reframing themselves as demands for human rights, democracy and the rule of law. International languages only acquire popular salience, however, when they can be used to express ideas that already had some purchase in national political culture (Pommerolle 2006: 76-84; Larmer 2015: 83-5). I begin this section by explaining the relative power of mobilisation for constitutional rights in Burkina

Faso in terms of its relationship to Sankarism and 'popular justice'.

After taking power in 1983, the young military officer Thomas Sankara symbolically broke with France and sought to drastically extend the authority of one of Africa's weakest states. Upper Volta (a name modelled on French *départements*) was re-baptised Burkina Faso (a genuinely national name, with elements from three major language groups). The legal profession was one of many organised interests that Sankara's National Council for the Revolution (CNR) then identified as a local agent of neo-colonialism (e.g. Loada 1999: 138). It created new courts beyond lawyers' control: the People's Revolutionary Tribunals (TPRs). Their overriding objective was pedagogical: to 'moralise public life' and stigmatise corruption (Beucher 2010: 184; Harsch 2017: 58). Procedural safeguards were dispensed with. Cases were heard by seven judges, with only one professional magistrate. The other six positions were soon allocated to Committees of the Defence of the Revolution: openly elected mass membership organisations that operated throughout society (Harsch 2017: 56-7). Defendants had to prove their innocence in free-flowing oral debate before packed galleries. Sankara (1984) inaugurated proceedings by attacking 'formalists dazzled by procedures and protocols'. 'Conformity with the bourgeois legality of the minority', he declared, 'is pointless if not wholly consistent with the uncodified morality of the people'.

This form of 'popular justice', emphasising exemplary punishment, nonetheless had to co-exist somehow with existing popular traditions emphasising reconciliation (generally Hagberg 2007). The CNR tacitly acknowledged this. At village level it created People's Conciliation Tribunals (TPCs), intended to replace 'feudal' customary law institutions. From August 1985 these TPCs were applied 'moral pressure' instead of punishment (Yonaba 1997: 26). After the 2014 insurrection, as we shall see, a similar balance between justice and reconciliation would have to be struck, but this was greatly complicated by new pressures for (international) legality.

From 'democratic freedoms' to constitutional rights

For all of Sankara's charisma and personal integrity his revolution created inevitable discontents. Causes for dissatisfaction included draconian anti-union measures. Public service unions, in particular - some affiliated with the clandestine Voltaic Revolutionary Communist Party (PCRV) - were hard to ignore politically (Engels 2019). As early as 1966 they had joined soldiers and students in the streets to oust first President Maurice Yaméogo. Sankara was soon impatient with their dogged defence of their particular interests. They became his 'primary target' (Loada 1999: 138). By January 1985 unions were pleading publicly for 'democratic freedoms' (Martens 1989: 32). (The language of

individual rights was ideologically anathema under the CNR, and not yet a gateway to donor assistance (Harsch 2017: 63; Bayala 2018).)

Blaise Compaoré (allegedly) organised Sankara's assassination in October 1987. He then capitalised on these discontents. Claiming to merely 'rectify' the revolution, his government nonetheless swiftly eased even its more popular disciplines (Otayek 1989). This tentative 'reconciliation with civil society' facilitated the birth of the country's leading human rights organisation: The Burkinabè Movement for Human and People's Rights (MBDHP) (Martens 1989: 269-270; Loada 1999: 138). Founded in February 1989, with the Berlin Wall intact, its name reflected its local origins - at the time 'peoples' rights' designated an African alternative to liberal individualism (e.g. Bayala 2018: 32-5). Its leaders, meanwhile, who had all had difficulties with the CNR, nonetheless displayed varying attitudes towards 'popular justice'.

The most important of these leaders were Titinga Frédéric Pacere and Halidou Ouédraogo - both would help draft the 1991 constitution (Ouattara 2006: 54-5).[v] Pacere was Burkina Faso's first qualified advocate, an archetypical 'formalist' derided by Sankara. Inspired by his difficulties under the revolution he helped found *Avocats Sans Frontières* in 1992 (Pacere 2009: 29-36). Ouédraogo,

by contrast, shared many of Sankara's radical objectives. President of the Court of Appeal in Ouagadougou, he led an association of 'revolutionary judges' that predated the CNR and was even suspected of PCRV sympathies (Harsch 2017: 62-3; Kiendrebeogo 2018: 130). Sankara asked him to help design the TPRs and to chair their first session. Ouédraogo's design reconciled 'popular justice' with elements of legal procedure. For instance, legal means for reversing the presumption of innocence were found by observing mechanisms for investigating financial crimes (Foka 2018a). Such lingering attachments to legality irritated the CNR. Ouédraogo's himself was doubly suspect as Secretary-General of the outspoken Autonomous Union of Burkinabè Magistrates (SEMAB). In 1985 he was forced underground (Harsch 2017: 62-3). Although SEMAB celebrated the return of 'democratic freedoms' after 1987 it never denounced the ideology of 'popular justice'. On the contrary it first criticised the TPRs as too lenient (Martens 1989: 267-8; compare Kiendrebeogo 2018: 127).

The unusual mobilising power of the new MBDHP, under Ouédraogo's leadership, would depend on close connections with SEMAB and the largest communist union federation, rather than on abstract appeals to human rights or Pacere's international links (cf. Engels 2019: 115-6). In the 1990s it built a broad anti-regime coalition using the language of 'rule of law and defence of constitutional rights', concepts that now 'penetrated Burkinabè

society' (Harsch 2017: 179). One explanation for the success of this strategy was rapid disillusion with electoral politics. As soon as the Berlin Wall fell Compaoré had mastered the exploitation of incumbency for democratic divide-and-rule. Minority parties became fragmented and demoralised (Hilgers and Mazzocchetti 2006: 10-12). The 1991 constitution briefly promised to be a more effective weapon. This strategy's high point followed the brutal assassination of investigative journalist Norbert Zongo in 1998 by Compaoré's own Regiment of Presidential Security (RSP). Unions and new civil organisations then sought to channel a wave of popular discontent into a campaign for constitutional rights against impunity: 'enough is enough!' as the slogan had it (Hagberg 2002). Stay-away strikes paralysed 'practically the entire country' (Harsch 2017: 179). The MBDHP now had 40,000 members and Halidou Ouédraogo became spokesman for the body loosely co-ordinating the protests (Hagberg 2002: 229; Harsch 2017: 179).

Compaoré responded using the language of reconciliation, centered on a Church-led 'National Day of Forgiveness' (see Hagberg 2007). He also created a *Collège des Sages* [the Wise] that in turn instituted a Commission on Political Reform. This recommended numerous constitutional revisions, which did indeed strengthen many democratic institutions (Santiso and Loada 2003). Term limits, however, soon emerged as the most significant shift. In 1997 Compaoré had become the first African leader since the end

of the Cold War to remove these from the constitution. A revised Article 37 now restored them, making the President only 're-electable once', and for five not seven years (Loada 2003: 161-3). This apparent success, however, only exposed the limits of the constitution as a vehicle for popular justice. In the run up to the 2005 election the governing majority declared that the revised Article did not apply retrospectively, thus paving the way for another Presidential run in 2010. The majority's interpretation was vigorously denounced by a demoralised opposition, but validated by judges on the Constitutional Council (see Winter 2018: 156-8). Compaoré would ultimately win both polls with a score of 80%. The embrace of orthodox constitutionalism by left unions and opposition forces, and the downplaying of popular justice - in the interests of unity with some civil society organisations - had now limited their space for critique. As Hagberg (2002: 243) wrote of the protests following Zongo's assassination, 'while political discourse is morally loaded and focuses on the behaviour of key political actors, structural causes of the crisis are rarely addressed. […] In other words, the rule of law must be respected, but the law itself is not questioned'.

From constitutional rights to revolutionary legality

These disappointments with constitutional strategies help explain why existing accounts of the insurrection pay little attention

to the law. Even before his victory in 2010 Compaoré's own Congress for Democracy and Progress (CDP) had supported amending the constitution to allow another run in 2015 (Moestrup 2019: 371). But their efforts to do so were all defeated in the streets over the next four years. These efforts included a 2013 proposal to create a Senate, which could approve constitutional modification. This had to be suspended after demonstrations of up to 50,000 people in Place de le Nation ('Ouagadougou's Tahrir Square'). Whilst a subsequent attempt to organise a popular referendum aroused even more determined opposition (Harsch 2017: 196-203). The wide range of constitutional rights demanded after Zongo's assassination was not, however, central to these protests. Civil society organisations certainly did continue to campaign on issues such as press freedoms. But it was justice questions, and in particular the protection of Article 37, that resonated most widely. This Article became a lightning rod for urban grievances (generally Hilgers and Loada 2013: 190). In 2013 Almamy KJ, a reggae artist who now heads the national musicians' union, released 'Article 37':

Intro

Highly sensitive article of the constitution […] never to be added to

Chorus:

Article 37, don't touch it.

Power for life, that's not for us [*chez nous*].

[...]

The schoolchildren are saying 'bye', the students are saying 'bye'.
The teachers are saying 'bye' [...] The drivers are saying 'bye'.
The unemployed are saying 'bye', the people as a whole is saying 'bye, bye, bye'.[vi]

As the sociologist Boureïma Ouédraogo (2014: 146) wrote on the eve of the insurrection: 'many do not pose the question of the revision of Article 37 in terms of law, but in terms of ethics: “if Blaise Compaoré loves his country he won't touch Article 37”, you can hear people say in the streets of Ouagadougou'. Reworking the martyred memory of Thomas Sankara for a democratic age, these protestors forged an 'imaginary of morality and legitimacy usable against a President who had nonetheless been legally (re)elected' (Beucher 2018: 56). Even late in 2014 some opposition politicians still argued that modifying Article 37 was constitutionally permissible, even if morally reprehensible given the promises made when it was created (e.g. Traoré 2014). The proposed amendment was widely denounced as a 'constitutional coup'. 'Ultimately', Moestrup (2019: 373) writes, 'legitimacy prevailed over legal technicalities'. In some ways, indeed, this language of protest resembled Sankarist 'popular justice' as much as it did the constitutional activism of the intervening years. Hagberg et al

(2018: 61) thus describe the insurrection as a victory for one of two opposed Burkinabè traditions: formalist 'political legalism', on the one hand, 'where the law is instrumentalised for political ends', and broader popular struggles for justice and against impunity on the other:

> [e]ven though the popular tribunals of the Sankarist revolution did not resemble what an independent judiciary should look like under the rule of law – the accused, for instance, had to prove their innocence rather than relying upon a presumption of innocence – questions of justice have for a long time been integral to Burkinabe political culture.

What all these impressive accounts lack, however, is recognition of how 'insurgent' constitutionalists actually insisted upon legality. They deployed technical legal argument to serve a popular uprising, finding the necessary resources in international law. To understand how they could do this, however, we must account for the prominence of these lawyers in a new generation of social movements - one with loosened ties to unions and established NGOs.

The immediate aftermath of the Arab Spring in Burkina Faso had seen widespread demonstrations against impunity and the cost of living. These protests, however, had local roots, and followed from food and fuel prices riots in 2007-8 (Engels 2015; Harsch 2017: 185; generally Branch and Mampilly 2015). Perhaps

more worryingly for the government, an army mutiny spread for the first time to the elite RSP (Dwyer 2017). From a civil society perspective, however, these disparate movements had failed to unite sufficiently against the regime (Hilgers and Loada 2013: 187-191). To channel their demands NGO leaders borrowed organisational forms from other African responses to the Arab Spring. Perhaps most important was *Y'en a Marre* [We've Had Enough]: the Senegalese social movement founded in January 2011 to oppose President Wade's own efforts to amend the constitution for a third term. *Le Balai Citoyen* [The Citizens' Broom], founded in August 2013, formally adopted *Y'en a Marre'*s horizontal 'acephalous' structure, and also used hip-hop/reggae musicians for (social media) campaigns mobilising youth (de Heredia 2015; Frère and Englebert 2015: 301-3). The core of its (unavowed) leadership comprised the rapper Smockey, the reggae singer Sams'K Le Jah, and Guy Hervé Kam: a judge who had initiated a parliamentary petition opposing the removal of term limits (Harsch 2017: 166-9; Saidou 2018: 42-3).

Other lawyers formed and led similar new organisations that mobilised against Compaoré's constitutional engineering (generally Saidou 2018: 43). The largest organisations campaigning against the Senate, for example, constituted themselves as the Citizens Resistance Front (CRF). Their spokesman was constitutional law professor Luc Marius Ibriga (see Lefaso.net, 29 April 2014). Like

Halidou Ouédraogo before him, Ibriga was someone who had sympathised with Sankara's revolution but nonetheless had personal reasons to regret the CNR's hostility towards legality. His family had spent 15 years seeking compensation for urban property expropriated by the regime (Foka 2018b). The CRF's leaders also included the constitutionalist and scholar Augustin Loada.

The argument for revolutionary legality emerged when these constitutionalists began using their positions in these movements to diffuse an international legal argument originally developed by internationally-connected NGOs (see CGD 2009: 7).[vii] Previously, the most popular legal argument against amending Article 37 had emphasised Article 165, prohibiting any amendment 'putting in question the republican nature and form of the state' (see e.g. SYNAF 2014). Over the course of 2014, however, certain provisions of the African Charter on Democracy, Elections and Governance (2007) - which came into force in 2012 - gradually acquired prominence.[viii] Although the African Union's Malabo Protocol now treated 'unconstitutional changes of government' as a 'core' international crime - equivalent to genocide and crimes against humanity - it had still never sanctioned an incumbent for a 'constitutional coup' (Wiebusch et al. 2019: 19-20). Now opposition lawyers sought to use the few anti-incumbent provisions in the Charter for exactly this purpose. Two points became central in public debate: Article 10's requirement for 'national consensus' on

any modification, and (more importantly) Article 23's prohibition of '[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government' (e.g. Bancé 2014; Yaméogo 2014). On 21 October it became known that in secret talks the parliamentary majority had finally obtained the numbers to amend the constitution directly without referendum. The French response was simply that such a move was incompatible with the African Charter (RFI 2014a). *Le Balai Citoyen* devoted a large chunk of its press conference on 27 October, on the eve of the insurrection, to a detailed discussion of Articles 10-2 and 23.5 of the Charter. They did so 'forcefully' underscoring their 'constant efforts to abide by the law [*demeurer légalistes*] requiring in turn that the authorities respect the same republican values' (Le Balai Citoyen 2014). International law had briefly taken centre stage.

On the streets, meanwhile, *Le Balai* were among those arguing for civil disobedience. A National Assembly vote on amendment was due for 30 October. A massive march was called for 28 October, with eventual estimates as high as a million participants. Civil disobedience began shading into revolution (for this paragraph Frère and Englebert 2015: 296-7; Hagberg et al. 2018: 21-24). MPs from the majority were holed-up near a side entrance to the Assembly. But protestors stormed the building on the morning before the vote. Compaoré promised to withdraw his

bill, but it was too late. Numerous symbolic locations went up in flames. Protesters burned the National television station, the Assembly itself, and the houses of parliamentarians. Amidst this conflagration the President resigned and escaped by road towards Ghana. On 31 October he was airlifted to Abidjan in a French helicopter.

REVOLUTIONARY LEGALITY

In the turbulent months that followed those lawyers who had defended Article 37 became central to the post-Compaoré transition. They would regularly insisted upon the legality of their revolution. These were, after all, professionals who had long defended the rule of law under the old regime. Sankarist 'popular justice' was thus never on the cards. That said, some of their criticisms of 'technicians" legal thinking - which they blamed for the culture of constitutional 'manipulation' - echoed Sankara's attacks on 'formalists dazzled by procedures and protocols'.[ix] As Loada argued in May 2015:

'The insurrection … has undoubtedly shown the limits of a certain conception of constitutional law, and beyond that of law in general; that which consists in only understanding law in an instrumental manner, and without reflecting upon law's underlying values and finalities. The Burkinabè people rose up against this conception of law which does not serve democratic values' (Loada 2015).

But this new conception did not license the endlessly flexible interpretation of legal texts for (democratic) political objectives. As Loada went on to say, for example, even the text of the African Charter itself - which civil society had 'reappropriated as part of its strategy to defend constitutionalism' - was not yet clear enough in distinguishing 'popular insurrections' from 'constitutional changes of government'. It thus needed modifying in light of the insurrection and 'Arab Spring' (see also Soma 2016; Dersso 2019). Politics was still constrained, in other words, by such textual details. Throughout the transition, indeed, some insurgent constitutionalists - Ibriga most conspicuously - continually argued for elements of legality, even when it risked endangering the messy political trade-offs necessary to sustain the new dispensation.

Transfer of power

The first clash between legal rectitude and political reality took place whilst Compaoré was still fleeing the country. His sudden departure had left a power vacuum. Constitutionally speaking, power should have reverted to the President of the National Assembly, but he too had fled. Recent critics of the transition have argued that he could have been replaced by the Assembly's Vice-Presidents (even though most of them had voted for the constitutional amendment), or that a new President of the

Assembly could have quickly been elected (Oulon 2018: Preface, 56-7; Lefaso.net, 2019). But the streets would never have tolerated this. The head of the official opposition, meanwhile - Zépherin Diabré - frustrated his supporters by refusing to contemplate taking power without constitutional authority (Ouédraogo and Ouédraogo 2015: 7). And other parliamentarians were either unwilling to put themselves forward or lacked support (e.g. Zida 2018: 129-131). On 31 October General Traoré, head of the regular army, took power. But civil society leaders thought him too close to Compaoré (e.g. Harsch 2017: 212). Their preferred candidate - temporarily, to avoid 'a bloodbath' - was Yacouba Isaac Zida, second-in-command of the hated RSP. *Some* constitutionalists, however, were unwilling to trade law so easily for expediency. Both the army's usurpation of the insurrection, and the neglect of military hierarchy, proved internally controversial (cf. Oulon 2018). Zida's (2018, 127-8) own account is as follows:

> I found Professor Ibriga, on that morning of the 31st October at the Chief of Defence Staff's Headquarters, accompanied by other civil society actors, who were asking the army to assume its responsibility to save a nation in danger, I realised that he really must have had to outdo himself to take this step. I knew how legalistic he was, and from what I knew no regulation authorised the army to interfere in the political sphere … [but] the will of the people had to come first. The technical opinion of Professor Ibriga by itself was not enough to determine what had to be done.

Ibriga argued strongly that 'it was not for civil society to bring the military to power', but was opposed by Guy Hervé Kam, who advocated Zida as a temporary measure (see the corroborating account in Ar. Ouédraogo 2014). General Traoré accepted this *fait accompli* after only one day. Zida took power distancing himself from the RSP, and identifying as a Sankarist (Frère and Englebert 2015: 298; cf. Chouli 2015: 331).

International designation

For some close to the public service unions this was simply 'yet another military coup d'état' (Hagberg et al. 2018: 25). But the insurrection's insistence on its (international) legality did in fact distinguish it from Burkina Faso's previous coups. Zida, for one thing, had initially contemplated a purely military-led transition, on the model of Niger 2010 (Zida 2018: 135-6). But this triggered demonstrations and deadly clashes with police. The protesters' position was supported by international agencies, and Zida abandoned his plan (Harsch 2017: 212). Constitutionalists then protested strongly on legal grounds against the international designation of the insurrection as an unconstitutional change of government. On 4 November, as Economic Community of West African States (ECOWAS) mediators discussed the question, youth outside forcibly prevented civil society actors from entering the

room. They made an exception, however, for those like Ibriga and Loada who had proved their activist credentials (Saidou 2018: 45-7; but cf. Hagberg 2015: 117). In the end ECOWAS ignored calls to insist that power passed to the President of the National Assembly (e.g. Baye 2014). And in strong contrast to its stern attitude towards the Malian protests and coup of 2020 – where legalistic justifications have been much less prominent - ECOWAS refused to apply sanctions (RFI 2014b).[x] For the first time the AU suspended its own sanctions for two weeks (Dersso 2014). By then Zida had yielded to internal pressure to restore the same constitution he had suspended: another unprecedented development (Ouédraogo and Ouédraogo 2015: 17). Burkina Faso's constitutionalists had obtained the first tacit recognition in (African) international law that a popular uprising could be distinguished from an unconstitutional change of government.[xi] They had carved out space for revolutionary legality.

Transitional constitutionalism

The two weeks leading up to the 16 November were devoted to drafting a Charter of the Transition. This document was the fruit of delicate compromise, intended to co-exist with rather than replace the (soon-to-be-restored) constitution. Its most immediate objective was to create a new succession mechanism for the Head of State. A new civilian President would be chosen by a

72 Member committee made up of political, religious and military figures. The man eventually chosen was the military's nominee, retired diplomat Michel Kafando (cf. Chouli 2015: 327-8). Zida would become Prime Minister. These men would be answerable to a 90-member National Transitional Council (NTC) that allocated 30 seats to the former opposition, 10 seats to the ex-majority, and divided the remaining 50 between civil society and the security services (see Harsch 2017: 213). Civil society activists insisted that this body have legislative power (despite strong objections from 'the international community') and be given time for root-and-branch reform (Moyenga and Somda 7.8.2019 Int). In the end they obtained a one year transition: the upper limit of what international agencies had then been generally willing to accept (Saidou 2017: 8; 2018: 46). Many of them publicly juggled democratic commitments with a Sankarist contempt for the political class (Harsch 2017: 213-4; Sy 2017). Activists in the NTC defeated politicians' demands that the transition do little more than prepare elections (generally Saidou 2017).[xii]

Now, however, these hard political bargains had to be somehow squared with a constitution sanctified by the insurrection. Even constitutionalists who had helped draft the Charter described the result as 'juridical disorder' and 'generalised illegality' (Soma 2015: 8; Ouédraogo and Ouédraogo 2015: 26-7). Responsibility for organising this mess fell to the Constitutional Council. Strikingly,

Zida had been persuaded not to dissolve this body, as the military authorities had in Niger. Despite having validated Compaoré's candidature in 2005, and (allegedly) having delivered a technical opinion in favour of the legality of modifying Article 37, the Council's quiescent judges became the insurrection's surprise winners (Ouédraogo and Ouédraogo 2015: 24; Winter 2018; compare Sultany 2017, 152-3). In its first hearings after the constitution was restored (on 16 November), the Council affirmed the legality of the new political order. It did so with (tendentious) reference to the decrees of early November, when the constitution which the Council was interpreting was not even in force. Once again insurgent constitutionalists criticised this sacrifice of legak values for political expediency. They accused the Council's judges as acting the 'armed wing' of the new authorities (Ouédraogo and Ouédraogo 2015: 25).

Transitional government

During the transition insurgent constitutionalists found themselves at the heart of the government. Of the four who had helped draft the Charter of the Transition, Ibriga became head of the state's principal anti-corruption body, Loada became Minister of Labour, Abdoulaye Soma (who had worked on the military's draft) became Zida's special advisor, and Séni Ouédraogo - then Director of the National School for Administration and Magistracy - would

later become Minister for the Civil Service. Their administration legislated at speed, passing reforms including a 'developmental' revision of the Mining Code, and an Emergency Transition Socioeconomic Plan aimed at women's and youth unemployment (Saidou 2018: 47). Judicial appointments were insulated from political interference, and Article 37 finally rendered unamendable (Sailou 2018).

Perhaps inevitably, though, these reforms still struggled to satisfy economic demands. The transition thus focused on drawing symbolic, martyrological distinctions between it and the old criminal regime (Gabriel 2017: 701-6).[xiii] It also re-opened an enquiry into Sankara's death, and eagerly complied with a judgement of the African Court on Human and People's Rights ordering Burkina Faso to investigate Norbert Zongo's murder (Brett and Gissel 2020: 110). At the same time it began publicly discussing plans to disband the notorious RSP, citing justice for Zongo's relatives. This provoked open threats from the Regiment's leaders (Banégas 2015: 149). A 'willingness to satisfy the demands of the 'insurgents'' had led the transition to adopt other 'populist policies with a doubtful juridical basis', including asset freezes, that were then struck down by the courts (Saidou 2017: 31). So it took particular care with legality when protecting itself from the return of the *système Compaoré*. In April 2015, with elections due in six months, the National Council for the Transition voted to amend the

electoral code in order to create a new category of persons ineligible for election: namely all those 'having supported anticonstitutional changes which are an infringement on the principles of democratic change of government, notably to the principle of limited presidential term limits and have led to an insurrection or to any other form of uprising'. This wording was of course the fruit of careful drafting by some of the transition's constitutionalists, and was taken directly from Articles 23-25 of the African Charter (Y. Ouédraogo 2016, 198, 230; Witt 2019: 115; Anonymous NTC member, 13.4.2016 Int.).[xiv]

Compaoré's supporters now seized on this opportunity to expose militant democracy as mere hypocrisy. They accused the NTC of acting like 'World War II Nazis'. At the ECOWAS level Ivorian President Ouattara started arguing that this 'exclusion' was illegal, whilst donor agencies (usually behind-the-scenes) pushed for 'inclusive elections' (Witt 2019: 115-6; Brett and Gissel 2020: 111; Anonymous ex-majority parliamentarian 15.4.2020 Int.; Anonymous EU diplomat 20.4.2020 Int.). Within a month potentially excluded members of Compaoré's old presidential majority had challenged the new code at the ECOWAS Community Court of Justice (ECCJ), citing various international guarantees of civil and political rights.[xv] Burkina Faso's legal team was headed by the Bar President and Guy Hervé Kam of *Le Balai Citoyen*. In court they did not merely raise procedural objections, as states

usually do at the ECCJ (Brett and Gissel 2020: 84-114). Instead they justified the new electoral code by reference to an "anti-constitutional' … project' pursued by late converts to rule of law values.[xvi]

On 13 July 2015 the ECOWAS Court sensationally ordered Burkina Faso to remove 'all obstacles' to 'free participation' in elections. President Kafando almost immediately declared that Burkina Faso would comply as a 'civilised nation … respectful … of its international engagements'. His government, however, only promised to 'examine' the judgement with the 'greatest attention' (Y. Ouédraogo 2016: 217, n. 72). Amongst sympathetic constitutionalists Séni Ouédraogo argued that the ruling was potentially incompatible with the African Charter, and so interpretive clarification should be obtained from the African Court on Human and People's Rights (in Paré 2015). Luc Marius Ibriga and Abdoulaye Soma, however, disagreed, arguing that 'exclusion' should now be removed altogether (Zouré 2015; Moyenga and Somda 7.8.2019 Int.). Such legal technicalities were publicly debated with unusual intensity. The Constitutional Council became caught between (muted) international pressures to implement the ECCJ judgement and popular pressures to uphold electoral exclusion. In August the government adopted Ouédraogo's position, arguing that exclusion was actually legal according to the ECCJ's reasoning (if not its order).[xvii] The Council itself was more direct.

Noting that the state 'has 'not implemented' the ECCJ decision, it barred those most involved with attempting to amend Article 37 from running in October.[xviii] Since February 2015 the Council's President had been Kassoum Kambou. A highly symbolic appointment by the transition, Kambou had once been a member of Sankara's TPRs, and soon thereafter a close associate of Halidou Ouédraogo's in the MBDHP.[xix] He would later defend resistance to the ECCJ by arguing that legal technicalities must eventually give way to natural justice (Kambou 21.2.2016 Int.).

'The dumbest coup in the world'[xx]

On the eve of the election campaign, however, pressures to implement the ECCJ judgement suddenly evaporated. The trigger was an abortive coup, led by RSP soldiers close to 'excluded' politicians (see Banégas 2015: 150). The self-proclaimed Head of State was General Gilbert Diendéré: a linchpin of transnational counterinsurgency in the Sahel, ex-head of the RSP, Compaoré's closest associate, and (by his own admission) commander of those who had shot Sankara. Zida, Loada, Kafando and René Bagoro (an activist judge turned Housing Minister) were kidnapped and imprisoned. The putschists' primary justification was of course legalistic: that constitutional order needed to be restored following the illegal exclusion of the ex-majority from the upcoming elections (CND 2015). The transition, in response, demanded that

ECOWAS - which had effectively ignored Compaoré's 'constitutional coup' - should 'for once' enforce international law and its prohibition on unconstitutional changes of government (see Kam in Sy 2017: chapter 2). It successfully persuaded the AU to announce harsh sanctions and even declare the putschists 'terrorist elements' (Witt 2019: 117). But the putschists managed to negotiate a draft political agreement with ECOWAS' mediators. This granted them amnesty and annulled the Constitutional Council's decision to ignore the ECCJ judgement (Saidou 2018: 49-50; Witt 2019: 117-8).

ECOWAS' compromises scandalised defenders of the transition and insurrection. Within a week the coup had been reversed thanks to a combination of (selective) international pressures, mobilisation by junior army officers, and popular resistance facilitated by trade unions (Harsch 2017: 218-220; Sy 2017). International agencies stopped trying to enforce the ECCJ decision, and 'excluded' deputies lost their diplomatic support (Anonymous EU diplomat 20.4.2020 Int.). Elections were held successfully in November without those candidates invalidated by the Constitutional Council.

In summary, then, the insurgents' claim to revolutionary legality had suffused a turbulent transition with legal contestation. Even the October 2015 putschists found themselves posing as

defenders of the constitutional order. Their private conversations reflect the law's political premium. In an (in)famous secret recording Guillaume Soro - President of the Ivorian National Assembly - appears to advise one of Compaoré's most prominent 'excluded' supporters to press ahead with the putsch without expecting court cases to delay elections: '[t]he Transition was there for ten months to organise elections. But if ten months arrives and there is no election … they go beyond illegitimacy into illegality' (Ouaga Flash Info 2019). As in North Africa after the Arab Spring, therefore, even those least committed to the rule of law nonetheless constantly calculated in its shadow (Brown and Waller 2016).

The transition on trial

This contestation did not end with the transition. A military tribunal recently sentenced Diendéré to 20 years imprisonment: the culmination of a prolonged and much-publicised 'trial of the putsch'. Diendéré and his co-accused used all manner of procedural manoeuvres to delay proceedings (see Bassolé 2018). Yet generally speaking they did not treat them as sham justice, or stop arguing the case on its merits. They did, however, ferociously contest the transition and insurrection's claims to revolutionary legality. They highlighted Zida's unconstitutional accession to power ahead of the (absent) President of the National Assembly, the transition's refusal to implement the ECOWAS Court judgement, and the 'secret deals'

and 'compromises' (*compromissions*) behind the negotiation of its Charter. Taken together these charges could be used to prove the legality of the 2015 putsch, since the authorities in place were themselves illegally constituted (Lefaso.net 2019; Laoundiki 2019)!

AFTERMATH: JUSTICE, RECONCILIATION, LEGALITY

The prosecution's case against the putschists was led by Guy Hervé Kam. He concluded by asking the judges to 'apply the law and leave reconciliation to the politicians' (Sawadogo 2019). As this indicates, demands for justice have increasingly competed with demands for forgiveness.[xxi] Amnesties, and 'turning the page on the insurrection', have support in national opinion polls (Loada and Kaboré 2018). Such demands are more insistent now that Burkina Faso, long sheltered from jihadi militancy, has become one of its primary targets (cf. Moestrup 2019: 377). The case for more immediate political priorities is readily made.

Of course embattled (post-)revolutionary governments often confront such tensions between justice and political stability. Sankara's CNR navigated these difficulties using parallel 'revolutionary' and 'conciliation' tribunals (see above). But today any balance struck between justice and reconciliation must also be squared with (international) legality. And this has only become harder with time. The People's Movement for Progress (MPP)

government, elected in November 2015, began life claiming to inherit the mantle of the insurrection. It hoped that a small number of trials for 'blood crimes' under Compaoré would satiate popular pressures to avenge the martyred dead without implicating too many of the political class. It even formally abolished the death penalty in order to demand that France extradite François Compaoré: Blaise's widely hated brother, anointed successor, and prime suspect in the Zongo affair (A. Diallo 2018).[xxii] As of October 2020, however - three years after his arrest - extradition remains delayed by legal challenges in France (see RFI 2020). Legal formalities have also delayed justice in Burkina Faso itself. The transition, for example, created a special jurisdiction - a High Court of Justice - to try political crimes. This new institution charged members of the last Compaoré government with 'complicity in voluntary homicide' for authorising the use of live ammunition against protestors during the insurrection. In 2017 proceedings were held up when the Constitutional Council judged some of the High Court's rules, including the lack of an appeal mechanism, to be unconstitutional (O. Ouédraogo 2017). Legislation remedying these defects also allowed foreign lawyers to represent defendants, after the ECOWAS Court had judged regulations excluding them contrary to international law (M. Diallo 2017).[xxiii] Delays were then compounded, however, when defence counsel became otherwise engaged in the 'trial of the putsch' (RTB Télé 2019). Proceedings remain suspended in October 2020.

Such continued postponements have angered victims' representatives and their supporters. Jurists have struggled to assuage demands for Sankara-style expeditious justice. Séni Ouédraogo, for example - insurgent constitutionalist turned government minister - has continued to insist on strict legality, even criticising the Constitutional Council for not holding the High Court of Justice to higher international standards. Law, he argued, 'demands patience'. Citizens should recall the sizeable compensation awarded those unjustly convicted by Sankara's TPRs (O. Ouédraogo 2017). The High Court's President, meanwhile, has called for 'serenity', simultaneously answering the transition's critics by associating the insurrection with popular justice: '[Is this] victors' justice? Who was the victor? It was the population, it was the people' (RTB Télé 2019). Unsurprisingly, however, such rhetorical moves have not defused discontent. In September 2019 a coalition including MBDHP and left unions organised a protest against 'unpunished blood crimes', insecurity and economic injustice. It was violently repressed (Kindo 2019). Embracing legal constraints has, in short, aggravated difficulties in meeting the demands of urban protest whilst simultaneously responding to diffuse pressures for 'reconciliation'.

In practical terms, finally, losing control over large swathes of territory to jihadi militants has made some legal obligations

nearly impossible to fulfil. In August 2020 the government and official opposition agreed to modify the electoral code in order to allow the upcoming November presidential elections to be decided on the basis of votes cast in constituencies not affected by these 'exceptional circumstances'. A legal challenge now before the courts claims this violates the principle of universal suffrage and contravenes international instruments prohibiting the modification of electoral law immediately before elections, including some instruments used to oppose the modification of Article 37 in 2014 (Lefaso.net 2020).[xxiv] Abdoulaye Soma, an insurgent constitutionalist who now heads his own political party, agrees. Citing the African Charter on Democracy, Elections and Governance he has labelled the new electoral code an 'unconstitutional change of government', and called for it to be opposed 'with the same vigour that the people fought the unconstitutional change of government in 2014' (Soma 2020). Here, as during the power vacuum that followed Compaoré's departure, the insurrection's claims to international legality have become the enemy of political necessity in its aftermath.

CONCLUSION

The insurrection emerged from Burkina Faso's distinctive urban 'culture of protest'. Like all revolutions, however, it was nonetheless a thoroughly international affair (Lawson 2015). The

transition and its aftermath were saturated in legal and international legal argument. Constitutionalists repeatedly sought to insist on elements of legality - in the face, at times, of political expediency and even necessity. Understanding why they did so requires attending to some under-appreciated legal justifications for the insurrection, most notably an innovative deployment of the African Charter on Democracy, Elections and Governance to justify civil disobedience. Sultany (2017: 147) has argued, with reference to the Arab Spring, that representing 'the revolution as the closure of the gap between already existing commitments and their enforcement … presupposes the legitimacy of the existing social-political order'. Insurgent constitutionalists did use the African Charter to represent their revolution this way, as a fulfilment of the law. They did not, however, seek to leave the existing order intact. Their creative appropriation of international instruments, I have argued, forms part of a longer history of radical juristic thought in Burkina Faso, one that seeks to reconcile law and rights with broader languages of (popular) justice.

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[i] I will understand revolutionary struggles broadly: 'constestations over state power sustained by mass mobilisation, an ideology of social justice, and an attempt to enact forceful institutional change' (from Lawson 2015: 300, n. 1).

[ii] All translations from French are my own.

[iii] For legality's particular importance in West Africa see Brett and Gissel (2020: 92).

[iv] Only Witt (2019) has analysed the importance of the African Charter for Burkina Faso. Her story, however, only begins after the insurrection, emphasising its uses to contest the legality of the transition. But as I demonstrate, the Charter only became so important for the insurrection's critics because it had been central to its initial justification.

[v] The other original leaders were the lawyer Jean-Marie Apiou and academic Larba Yarga (Martens 1989: 271). Yarga soon joined a splinter group - widely considered an Executive creation - before becoming Minister of Justice (1994-9) (e.g. Yonaba 1997: 51; Loada 1999: 138-9).

[vi] At: <https://www.youtube.com/watch?v=dRH2Sa36s4M> accessed 27.3.2020.

[vii] Augustin Loada (2003: 139), Director of the Centre for Democratic Governance (CGD), had argued in 2003 that inviolable term limits were already a 'cornerstone' of West African 'neo-constitutionalism'.

[viii] Other prohibitions on unconstitutional changes of government that were invoked included the AU Constitutive Act (2000) and ECOWAS Protocol on Democracy and Good Governance (2001) - Parliamentary Group: Turnover, Democracy and Justice [AJD] (2014).

[ix] See Fau-Nougaret (2016: 17). Compare the 'republican' approach favoured by some Egyptian judges after 2011, and commended in Sultany (2017: 70, 200).

[x] I write these lines whilst revising this article in early October 2020. The situation in Mali remains fluid.

[xi] When the AU has been eager to embrace coups against pariah regimes - such as in Egypt (2014), or Zimbabwe (2017) - it has resorted to dubious expedients (respectively: deciding according to domestic legal procedures rather than its own, and simply refusing to acknowledge that a coup had taken place). A 2014 High-Level panel on Egypt defined a legitimate popular uprising in absurdly restrictive terms (Dersso 2019: 120-5).

[xii] But they accepted NTC members' ineligibility as candidates (an important point highlighted for me by Eloïse Bertrand).

[xiii] This was not without its ironies. In January 2014 three CDP heavyweights resigned. Known collectively as 'RSS' these were Roch Marc Christian Kaboré, Salif Diallo and Simon Compaoré (no relation). Their (rural) patronage networks provided the urban opposition with vital financial muscle (see Wienkoop and Bertrand 2018). Both the transition and some of the most militant protestors then in turn overlooked Diallo's complicity, in particular, with some of the old regime's worst acts (see Hagberg et al 2018: 29-30). Kaboré was elected President in November 2015.

[xiv] This interviewee, who helped amend the electoral code, still prefers anonymity. An earlier suspension of former majority parties, in December 2014, was justified with national law alone (see Zouré 2014).

[xv] See paragraph 8 of <http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_16_15.pdf> accessed 3.4.2020.

[xvi] Paragraphs 9-12 of the ruling cited above.

[xvii] See <https://burkina24.com/wp-content/uploads/2015/08/D%C3%A9cision-du-Conseil-constitutionnel.pdf> accessed 1.4.2020.

[xviii] See p. 5 of the ruling cited in the previous note.

[xix] For a full CV <http://www.aouaga.com/qui/profil.asp?id=31> accessed 2.10.2020. Kambou also helped draft the 1991 constitution and presided the Independent Commission of Inquiry into Norbert Zongo's death.

[xx] Words attributed to President Alpha Condé of Guinea.

[xxi] The two are not irrevocably opposed in Burkinabè politics. Hagberg (2007) describes how criminal accountability can be presented as a means of truth telling that enables forgiveness.

[xxii] Pressures to 'normalise' relations with Côte d'Ivoïre have helped complicate

campaigns to extradite Blaise Compaoré himself.

[xxiii] See p. 10 of the 2016 ruling <http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_21_16.pdf> 2.10.2020.

[xxiv] See note viii above.