

## Judicial Review and Democratization in Francophone West Africa: The Case of Burkina Faso

By *Anne Winter*<sup>1</sup>

**Abstract:** The Constitutional Council of Burkina Faso has exclusive jurisdiction in constitutional matters. Since 2000 Burkina Faso has a model of centralized review by a specialized Constitutional Council, dispensed separately from, and outside the regular judiciary. It has taken the place of the former Constitutional Chamber of the Supreme Court within a unified court system. The Council, based largely on the French model, is composed of nine counselors, each appointed for a nine-year, non-renewable term, as well as a president. According to Title XIV of the Constitution, the Council reviews exclusively the constitutionality of bills, interprets the Constitution, regulates constitutional limitations of competence and stands as an electoral tribunal. In 2012 a series of constitutional amendments was passed in Burkina Faso, changing key features and reforming the Council in theory. Nevertheless, there has been a real doubt about the question whether the Constitutional Council is the key institution of the rule of law for Burkinabé and a contributor to the consolidation of the democratization in the country in the last decade. The existence of the ultra-majority political party of the former president Compaoré detaining the influence on appointing members of the Council, the imbalance of the repartition of competences and the citizens' powerlessness, because the procedure of referring to the Council is only open to political forces, are some reasons. The Council was often considered a plaything of different interests within the political forces in the country and less as an institutional counterweight to arbitrary political power. When attempts to change the constitution to allow for another presidential re-election caused a popular uprising in October 2014, which removed the former president from power, the Constitutional Council played only a marginal role.

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## A. Historical and political context

### I. The historical and political background of the country

The territory of today's Burkina Faso became a French protectorate in 1896. It first constituted part of the French colony Upper Senegal-Niger, and then featured as a new colony under the name of Upper Volta before being divided among the colonies Ivory Coast, Niger and French Sudan in 1932, due to financial and economic reasons.<sup>2</sup> In line with demands by the Mossi<sup>3</sup>, the original borders of Upper Volta were reestablished in 1947 as a territory within French West Africa. In 1958, the Republic of Upper Volta was founded as an autonomous part of the French-African community, and the country gained full independence in 1960.<sup>4</sup> The postcolonial era up to the late 1980s stood out through instability, and was primarily marked by military rule. In 1984, following a revolution under Thomas Sankara<sup>5</sup> that was aimed at the establishment of a democratic people's republic following the example of Socialism and a planned economy<sup>6</sup>, the country was for the first time named Burkina Faso.<sup>7</sup> Sankara was murdered during a second coup d'état on 15 October 1987<sup>8</sup>, and his confidant Blaise Compaoré came to power. While he at first led the military's transitional government<sup>9</sup>, he later headed the newly founded Democratic Republic of Burkina Faso.<sup>10</sup> Following the adoption of a new Constitution through the referendum of 11 June 1991, Compaoré's position was legitimized through democratic elections in December 1991.<sup>11</sup> He was reelected in 1998, 2005, and 2010<sup>12</sup> and stayed in power for 27 years. In October 2014, dissatisfaction spilled over in response to attempts at changing the constitution to allow

2 The history of Burkina Faso in detail: *Danielle Ben Yahmed*, *Atlas du Burkina Faso*, Paris 2005; *Roger Bila Kaboré*, *Histoire politique du Burkina Faso 1919–2000*, Paris 2002; *Frédéric Lejeal*, *Le Burkina Faso*, Paris 2002; *Georges Madiéga/ Oumarou Nao*, Burkina Faso, Paris 2003.

3 Partly also called *Mosi*, in their own language: *Moaaga (Sl.)* und *Moose (Pl.)*; with about 50% of the population they constitute the biggest ethnic group of Burkina Faso.

4 *Kaboré*, note 2, pp. 13ff.; *Lawrence Rupley/ Lamissa Bangali/ Boureima Diamitani*, *Historical dictionary of Burkina Faso*, Plymouth 2013, pp. XXXI ff.; *Salif Yonaba*, *Indépendance de la justice et droits de l'homme*, Ouagadougou 1997, pp. 8 f.; for general information about the colonial era see especially: *Gabriel Massa/ Georges Madiéga*, *La Haute-Volta coloniale*, Paris 1995.

5 *Bruno Jaffré*, *Biographie de Thomas Sankara: La patrie ou la mort...*, Paris 2007.

6 *Walter Schicho*, *Handbuch Afrika*, Frankfurt, Wien 2001, p. 153.

7 The name consists of the two most important languages of the country. *Burkina* is Mooré and means integrity; *Faso* is Dioula and means fatherland. Usually, Burkina Faso is translated as *The land of upright people*, cf. *Herbert M. Kritzer*, *Legal systems of the world*, Santa Barbara 2002, p. 217; *Abdoulaye Soma*, *La Constitution du Burkina Faso*, Ouagadougou 2013, p. 21.

8 Cf. *Kaboré*, note 2, p. 220.

9 Military government of the Front Populaire, 15 October 1987 – 2 June 1991; see *Kaboré*, note 2, p. 223 ff.

10 *Soma*, note 7, p. 29.

11 *Rupley/ Bangali/ Diamitani*, note 4, p. 68.

12 *Rupley/ Bangali/ Diamitani*, note 4, p. 70.

Compaoré to run again. Pressure for political change came from civil society and in particular from the country's youth. After demonstrators took to the streets, burning the National Assembly and other government buildings, Compaoré dissolved the government and declared a state of emergency before forced into exile. A transitional government installed with Michel Kafando as interim president until an election within 12 months. Three weeks before the scheduled elections in October 2015, members of the presidential guard loyal to ousted Compaoré arrested Kafando and members of his government. But again the country resisted and protested against a military coup, the coup leaders were overthrown and the country's interim leadership was restored. The historic elections in November 2015 were a turning point for the West African nation, which, for most of its history, has been ruled by leaders who came to power in coups. Roch Marc Kaboré was elected as President in the first truly pluralistic and competitive election since independence from France in 1960.

Burkina Faso is a presidential republic based on the French model.<sup>13</sup> The directly elected State President nominates a Prime Minister from among the strongest group in the National Assembly, and, following the Prime Minister's suggestions, nominates the cabinet.<sup>14</sup> From 2002 until a constitutional amendment in 2012, the National Assembly<sup>15</sup> was the only legislative body in the republic whose 127 members were elected directly every five years.<sup>16</sup> The forth republic initially knew a second chamber, the Chambre des représentants. With the amendment of the constitution on 22 January 2002 the second chamber was dissolved, i.a. for financial reasons. After significant opposition, the former plan of Compaoré for a Senate constituting a second chamber is no longer being pursued.

Even though Burkina Faso's state structure and the structure of the judiciary were strongly influenced by the French Fifth Republic, the newly independent state did not set up a specialized mechanism of judicial review following the model of the Constitutional Council, but a Supreme Court that included a Chamber for constitutional matters.<sup>17</sup>

13 André Cabanis/ Michel Martin, *Influences étrangères sur la Constitution burkinabé*, in: François Paul Blanc/ Albert Lourde/ Bernard Saint-Girons (eds.), *Constitution et régime politique au Burkina Faso*, Toulouse 1994, pp. 63 f.; Schicho, note 6, p. 149; Augustin Loada/ Luc Marius Ibriga, *Droit constitutionnel et institutions politiques*, Ouagadougou 2007, pp. 361 ff.; Yonaba, note 4, pp. 14 f.

14 Art. 46 I, 46 II, 61 ff. constitution of Burkina Faso; hereafter referred to as CBF.

15 Until the amendment of the constitution on 27 January 1997 it was called *Assemblée des députés du peuple*.

16 Art. 78 ff. CBF.

17 Aimé Nikiéma/ Salif Yonaba, *L'organisation judiciaire au Burkina Faso et le destin de la chambre constitutionnelle*, *Revue de droit des pays Afrique* (1986), pp. 287f.; Zachaël Ki, *Le contrôle de constitutionnalité des lois dans la Constitution burkinabé*, in: Blanc/ Lourde/ Saint-Girons, note 13, pp. 94 f.; Enno Kliesch, *Der Einfluss des französischen Verfassungsdenkens auf afrikanische Verfassungen*, Hamburg 1967, pp. 9, 26; P. Marchaud, *L'organisation judiciaire en Haute-Volta*, *Revue de Droit des pays d'Afrique* (1964), pp. 121–129; Rudolf Ullner, *Die Modellwirkung europäischer Verfassungen auf Afrika*, in: *Symposium Europa*, Festschrift zum 20-jährigen Bestehen des Europa-Kollegs in Brüssel, 1950–1970, *Studies in contemporary European issues*, Brügge 1971, pp. 490.

Among its other competences, the Chamber was responsible for deciding on the constitutionality of laws, adjudicating conflicts over competences between the executive and the legislature, and overseeing elections.<sup>18</sup> Its overall record is meager: between 1964 and 1984 there were 72 lawsuits, yet only 22 decisions were issued.<sup>19</sup> Many cases brought before the constitutional chamber were retracted. The chamber interpreted its competences in a very narrow way and acted in a restrained manner.<sup>20</sup> Consultative competences grew at the expense of judicial responsibilities.<sup>21</sup> Increasingly, the government viewed the chamber as a merely consultative body.<sup>22</sup> The overall political instability and the change in political systems during the postcolonial era contributed to the chamber's low level of influence and activities.<sup>23</sup> Even in the context of the wave of democratization during the early 1990s, and the subsequent Fourth Republic's new constitution, this system was not changed right away in Burkina Faso.

Changes only occurred after the protests of 1998 that were caused by the violent death of the journalist Norbert Zongo.<sup>24</sup> 'Trop c'est trop' became the motto of a series of demonstrations and strikes that took issue with the lack of legal investigations as well as with corruption, and lasted two years.<sup>25</sup> While the government initially responded with violence and arrests, it ultimately turned towards political reforms.<sup>26</sup> The President restructured the government and summoned a so-called Council of the wise.<sup>27</sup> They developed a number of reform proposals that were included in their seven point plan.<sup>28</sup> One of the main objectives was a restructuring and greater specialization of the judiciary. These recommendations were put into practice through the constitutional amendment of the year 2000. The Supreme

18 *Yonaba*, note 4, p. 29.

19 *Nikiéma/ Yonaba*, note 17, p. 294, there see also fn. 20.

20 *Nikiéma/ Yonaba*, note 17, p. 295.

21 *Philip Lippens*, *Les Institutions politiques de la Haute-Volta*, *Revue juridique et politique: indépendance et coopération* (1970), pp. 93, 101f.; *Nikiéma/ Yonaba*, note 17, pp. 292, 297.

22 *Yonaba*, note 4, p. 29.

23 *Nikiéma/ Yonaba*, note 17, pp. 297f.; *Salifou Sampinbogo*, *L'Expérience du Conseil constitutionnel du Burkina Faso*, in: *Conseil constitutionnel du Burkina Faso, Les missions du Conseil constitutionnel dans la consolidation de l'Etat de droit et la bonne gouvernance au Burkina Faso, Actes de la campagne nationale d'information et de sensibilisation sur le Conseil constitutionnel*, Ouagadougou 2009, p. 11; *Yonaba*, note 4, p. 29.

24 *Stéphane Bolle*, *La Constitution Compaoré*, Afrilex N° 5 (2006), p. 253; *Rupley/ Bangali/ Diamantani*, note 4, p. 239.

25 *Ibriga/ Garane*, note 17, p. 48.

26 *Mathieu Hilgers/ Jacinthe Mazzocchetti*, *L'Après-Zongo: entre ouverture politique et fermeture des possibles*, in: *Politique africaine, Le Burkina Faso: l'alternance impossible*, N° 101 (2006), pp. 5 ff.; *Augustin Loada*, *Réflexions sur la société civile en Afrique: le Burkina Faso de l'après-Zongo*, in: *Politique africaine, La renaissance Afro-Asiatique?*, N° 76 (1999), pp. 136 ff.

27 *Collège de Sages*, *Rapport du Collège de Sages sur les crimes impunis de 1960 à nos jours*, Ouagadougou 1999.

28 *Ibriga/ Garane*, note 17, p. 49.

Court was dissolved and in its place, the current three highest courts (Court of cassation, State Council, Court of auditors) and the Constitutional Council were created.<sup>29</sup>

## *II. The influence of international role models and actors*

The competences and composition of the Constitutional Chamber had been modeled after the French Constitutional Council<sup>30</sup>, and the same was true for the new independent Constitutional Council.<sup>31</sup> In addition to this, both the neighboring country Benin and the Senegalese Constitutional Council served as role models. The European Commission had also advocated a mechanism of specialized judicial review in its 1998 report on strategies for judicial reform in Burkina Faso.<sup>32</sup> A practice of exchange and interaction with constitutional judges from Benin has become established and has increased over the years<sup>33</sup>, and the West African Economic Community (CEDEAO) has a certain degree of influence over developments in Burkina Faso's domestic constitutional law.<sup>34</sup>

## **B. Institutional foundations**

### *I. Model*

Today, Burkina Faso has a concentrated model of judicial review that matches the continental European model.<sup>35</sup> The exercise of judicial review is accorded to a specialized institutional body.<sup>36</sup> It exclusively deals with constitutional conflicts and therefore does not constitute the court of final appeal for conflicts falling outside the remit of constitutional law.

29 *Ibriga/ Garane*, note 17, p. 138; *Kritzer*, note 7, p. 219.

30 *Loada/ Ibriga*, note 13, p. 19; *Nikiéma/ Yonaba*, note 17, pp. 287 f.

31 *Loada/ Ibriga*, note 13, p. 128.

32 Study by the European Commission, *Stratégie d'une réforme du système judiciaire au Burkina*, 1998.

33 *Gbehe Afouda*, L'expérience de la cour constitutionnelle de la République du Benin, in: Conseil constitutionnel du Burkina Faso, *Les missions du Conseil constitutionnel dans la consolidation de l'Etat de droit et la bonne gouvernance au Burkina Faso*, Actes de la campagne nationale d'information et de sensibilisation sur le Conseil constitutionnel, Ouagadougou 2009, p. 21.

34 *Loada/ Ibriga*, note 13, p. 24.

35 *Loada/ Ibriga*, note 13, pp. 127 f.

36 *Loada/ Ibriga*, note 13, p. 421.

## II. Composition of the Constitutional Council

The Constitution (title XIV) and the organic law N° 011-2000/AN of 27 April 2000<sup>37</sup> set out the composition, competences, operating principles, and rules of procedure of the Constitutional Council. On 6 May 2008, this was complemented by internal rules of procedure.

The Constitutional Council is currently composed of a unified panel of judges that has nine members and an additional president. The President of the National Assembly nominates three members, and the State President nominates three members from among the judges that have been put forward by the Minister of justice, and a further three members directly.<sup>38</sup> The State President also nominates the president of the Constitutional Council<sup>39</sup>, who has a special role and holds the fourth highest office of the state. Due to the importance of this position, the nomination has great political significance. The office holder summons the Constitutional Council, decides upon the agenda, chairs sessions, and casts the decisive vote in case of a tie vote.<sup>40</sup> He is also responsible for the administration and coordination of the budget.<sup>41</sup> The eldest member of the Constitutional Court, the dean, acts as his substitute.<sup>42</sup> The Constitutional Council has a general secretariat that conducts the administration on behalf of the president.<sup>43</sup> Based on a proposal by the president of the Constitutional Council, the Council of ministers appoints the general secretary.<sup>44</sup> In addition to this, the Constitutional Council has a number of legal assistants. In total, it currently employs about 100 public servants. It has been legally stipulated to reside in Ouagadougou.<sup>45</sup>

The members are appointed for a mandate of nine years; reelection is not possible.<sup>46</sup> On 9 December 2002, the first members were appointed for a period of three, six or nine years in order to ensure the subsequent new appointment of three members every three years<sup>47</sup>. In practice, each nominating power therefore appoints one new member every three years, or makes use of its right to propose individuals for nomination. This is meant to guarantee a certain degree of continuity in jurisdiction. In case of a replacement being nominated, the new member first concludes the current mandate.<sup>48</sup> Subsequently, a further mandate is pos-

37 Including a change by the *Loi organique* N° 034-2000/AN from 13 December 2000; hereafter referred to as LO.

38 Art. 153 I CBF; art. 2 LO.

39 Art. 153 I CBF; art. 2 LO.

40 Art. 18 LO; art. 14 ff. *Règlement intérieur*.

41 Art. 14 *Règlement intérieur*.

42 Art. 17 LO.

43 Art. 19 LO.

44 Art. 25 *Règlement intérieur*.

45 Art. 16 LO.

46 Art. 153 II CBF; art. 2 II LO.

47 Art. 2 III 3 LO; *Sampinbogo*, note 23, p. 13.

48 Art. 4 II LO.

sible in order to retain continuity in new mandates.<sup>49</sup> Apart from instances of permanent physical incapacity or criminal prosecution, members may not be removed from office against their own will.<sup>50</sup> The president of the Constitutional Council constitutes an exception, since his/her term of office is unspecified and s/he can be appointed and dismissed at the discretion of the State President.<sup>51</sup> He or she only has some constitutional rights: During elections, at a time when parliament is dissolved, or during a state of exception called for by the president<sup>52</sup>, she or he cannot be dismissed from office.<sup>53</sup>

When new members are due to be nominated, there are no public debates or hearings about potential candidates, their suitability, and their professional competence. This is meant to safeguard the authority of new members, and to avoid power struggles. The selection lies entirely in the hands of the political leadership. Apart from the minister of justice's right to propose candidates (that, however, has no binding effect), the relevant political authorities are free in their decision whom to nominate. Due to this, the selection of candidates typically follows personal and political motivations. Adherents of the opposition have so far not been appointed. The legal text does not contain any formal or material conditions for the nomination of members, e.g. with regard to age, profession, professional experience, or judicial expertise.<sup>54</sup> However, the practice of appointing lawyers is becoming more established. Ethnic minority status or regional origin do not have to be taken into account in the appointment of new members. Both in the past and in the present day, the Mossi have been slightly overrepresented.

In June 2012, the National Assembly decided on a constitutional amendment that contained a large number of innovations following violent demonstrations against the government's political course of action.<sup>55</sup> Apart from a return to a two-chamber system with a sen-

49 Art. 15 LO; similar regulation in France under art. 12 of the regulation from 7 November 1958, see *Philip Mels*, Bundesverfassungsgericht und Conseil constitutionnel, München 2003, p. 175.

50 Art. 4 I LO.

51 Art. 2 II LO; *Conseil constitutionnel du Burkina Faso du Burkina Faso*, Communication à l'occasion du deuxième congrès de la conférence mondiale sur la justice constitutionnel, Commission de Venise, 2011, p. 5, available at: [http://www.venice.coe.int/WCCJ/Rio/Papers/BUR\\_Conseil\\_constitutionnel\\_f.pdf](http://www.venice.coe.int/WCCJ/Rio/Papers/BUR_Conseil_constitutionnel_f.pdf) (last accessed on 24 Juin 2018); *Ibriga*, Juge constitutionnel et suprématie de la Constitution: le gardien du temple en est-il un?, in: *Le Conseil constitutionnel du Burkina Faso*, Les missions du Conseil constitutionnel dans la consolidation de l'Etat de droit et la bonne gouvernance au Burkina Faso, Actes de la campagne nationale d'information et de sensibilisation sur le Conseil constitutionnel, Ouagadougou 2009, p. 104; *Loada/Ibriga*, note 13, pp. 128 f.

52 Art. 59 CBF.

53 Art. 3 LO.

54 *Ibriga*, note 51, p. 104; *Sampinbogo*, note 23, p. 12.

55 Law N° 033-2012/AN, 11 June 2012; decree N° 2012-616/PRES, 20 July 2012; *International Crisis Group*, Burkina Faso: avec ou sans Compaoré, le temps des incertitudes, Rapport Afrique N°205, 22 July 2013, p. 38, available at: <http://www.crisisgroup.org/fr/regions/afrique/afrique-de-l-ouest/burkina-faso/205-burkina-faso-avec-ou-sans-compaore-le-temps-des-incertitudes.aspx>; *Soma*, note 7, pp. 46 f. (last accessed on 24 June 2018).

ate<sup>56</sup>, the inclusion of the ombudsman<sup>57</sup>, the traditional chiefs<sup>58</sup> and a Judicial Council<sup>59</sup>, the introduction of a court responsible for settling conflicts of jurisdiction<sup>60</sup> and of a comprehensive amnesty for former State Presidents who were in office between 1960 and 2012<sup>61</sup>, this also entailed important regulations regarding the Constitutional Council.<sup>62</sup> Due to the beginning decline of Compaoré's government, neither the organic law nor the internal rules of procedure of the Constitutional Council have been adapted accordingly, so that these various innovations have not yet become effective. In the following, the various changes are briefly outlined.

Article 153 of the Constitution was changed so that the Constitutional Council is now composed of the former head of state and twelve appointed members. Apart from the State President and the president of the National Assembly who retain their nominating power, the president of the Senate is now also entitled to appoint three members. Among the three persons appointed by the respective president, one has to be a lawyer (section 1). The members of the Constitutional Council then elect the president of the Constitutional Council from among themselves (section 2).<sup>63</sup> For this purpose, the number of nominated members has been increased from ten to twelve, and the mere appointment of the president of the Constitutional Council by the State President was abolished. He is now a regular member who also has a fixed term of mandate and cannot be dismissed at the discretion of the State President. The *ex officio* inclusion of former heads of state constitutes a parallel to the French Constitutional Council.<sup>64</sup> This is surprising, given that France is currently debating a proposed constitutional amendment to abolish this provision.<sup>65</sup> The number of members has therefore become changeable, and the structure of the Constitutional Council has become more heterogeneous. At the same time, the reform reflects the State President's role as guardian of the constitution.<sup>66</sup> *Ex officio* members are foreseen to hold the same voting rights as well as the same rights and obligations as appointed members. The regulation had mainly been introduced to safeguard the continuous influence of the former president Blaise Compaoré. But after the popular uprising in 2014 forced him out the country, his *ex officio* membership seems inconceivable.

56 Title V, art. 78 ff. CBF.

57 Title XIV bis, art. 160 I, 160 II CBF.

58 Preamble CBF.

59 Title XIV ter, art. 160 III, 160 IV CBF.

60 Art. 126 CBF.

61 Art. 168 I CBF.

62 Title XIV, art. 152 CBF.

63 As well as already the recommendation in decision N° 02/CS/CC, 31 August 2000 to the LO by the *Chambre constitutionnelle*, cf. *Conseil constitutionnel du Burkina Faso*, note 51, p. 5.

64 Cf. art. 56 II French Constitution.

65 Cf. Decision *Conseil des ministres* from 13 March 2013, available at: <http://www.gouvernement.fr/gouvernement/reforme-de-la-constitution> (last accessed on 25 September 2017).

66 Art. 36 II CBF.

## C. Competences

### I. Competence of constitutional review

The Constitutional Council is responsible for determining the constitutionality of laws and parliamentary regulations, as well as the compatibility between international treaties and agreements with the Constitution of Burkina Faso.<sup>67</sup> Parliamentary regulations and laws implementing aspects of the Constitution, so-called organic laws, are subject to a mandatory control by the Constitutional Council prior to their announcement and entry into force.<sup>68</sup> The latter comprise laws that regulate in detail the competences and the organization of the institutional bodies set out in the constitution<sup>69</sup>, and that complement the constitutional text.<sup>70</sup> Other (simple) laws and treaties that require ratification can be submitted to the Constitutional Council prior to their public announcement.<sup>71</sup> The drafters of the constitution have accorded the right to optionally appeal to the court to a clearly delineated circle of political actors. According to article 157 I of the Constitution of Burkina Faso, the State President, the prime minister, the president of the National Assembly, and one fifth of the members of the National Assembly are entitled to appeal to the Council.

Following the constitutional amendment of June 2012, this right shall now also be accorded to one tenth of the members of one the parliament. A system of individual appeals as demanded by the public has not been included in the reforms. Instead, the rights of citizens are to be guaranteed by delegates to the National Assembly.<sup>72</sup> The reduction of the number of delegates necessary for an appeal from one fifth to one tenth therefore constitutes a concession and is a chance that more submissions will be made. In the past, two parties of the opposition had to cooperate in order to meet the quorum.<sup>73</sup> This did not happen during the first two terms of office of the Fourth Republic<sup>74</sup>, and has remained a rare exception ever since.<sup>75</sup>

67 Art. 152 I CBF.

68 Art. 155 I CBF.

69 *Rainer Grote*, Der Verfassungsorganstreit: Entwicklung, Grundlagen, Erscheinungsformen, Tübingen 2010, p. 330.

70 *Salif Yonaba*, Les grandes décisions de la jurisprudence burkinabé, Ouagadougou 2003, p. 274.

71 Art. 155 II CBF.

72 *Conseil consultatif sur les réformes politiques (CCRP)*, Rapport général de la session du conseil consultatif sur les réformes politiques, 2011, p. 44.

73 Decision N° 2006-005/CC concerning the annulment of law N° 014/2001/AN, 3 July 2001 to art. 265 Code électoral.

74 *Sampinbogo*, note 23, p. 14; *Centre pour la Gouvernance Démocratique Burkina Faso (CGD)*, Constitutionnalisme et révisions constitutionnelles en Afrique de l'ouest: Le cas du Bénin, du Burkina Faso et du Sénégal, 2009, p. 17, available at: <http://ebookbrowsee.net/constitutionnalisme-et-revision-cgd-pdf-d71331528> (last accessed on 24 June 2018).

75 *Sampinbogo*, note 23, p. 17.

If a lower court considers a norm to be unconstitutional due to a violation of constitutionally enshrined rights and freedoms, the State Council or the Court of Cassation can from now on refer the case to the Constitutional Council.<sup>76</sup> This corresponds to the question for a preliminary ruling that was introduced in France in 2008.<sup>77</sup> In addition to this, the reforms have for the first time enshrined the right of the Constitutional Council to take the initiative to become active outside its own sphere of competence, if it considers this to be necessary.<sup>78</sup>

So far, reviews have in line with the Constitution only taken place a priori, so prior to a given law's entry into force. In its commentary of 9 February 2005, the Constitutional Council confirmed this with reference to article 155 I of the Burkinabe Constitution.<sup>79</sup> Once the law has been publically announced and has entered into force, appeals to the Constitutional Council are no longer admissible.<sup>80</sup> Despite the fact that prior to the 2012 constitutional amendment, the Burkinabe Constitution did not foresee a *posteriori* procedure, article 25 of the organic law mentions it in the section regarding procedures in the case of basic rights as well as civil rights and liberties.<sup>81</sup> During the examination of the organic law before the chamber of the Supreme Court – this was not declared unconstitutional.<sup>82</sup> Accordingly, a court can suspend a lawsuit and appeal to the Constitutional Council in instances in which it considers a norm to be unconstitutional. So far, this procedure has not been rebuked<sup>83</sup>, so that the current situation includes both the theoretical possibility of an *posteriori* review, and the practical reality of exclusively abstract a priori reviews.<sup>84</sup> The constitutional amendment now enshrines the possibility of an *posteriori* examination in case of submissions by the State Council or the Court of Cassation.<sup>85</sup> However, this option is narrower than article 25 of the organic law, since that provision is worded in a way that allows any court to refer to the Constitutional Council.

Burkinabe constitutional law does not entail a system of individual appeals in case basic rights violations occur.<sup>86</sup> Basic rights can therefore only be safeguarded via the indirect path of conducting a general judicial review.<sup>87</sup>

76 Art. 157 II CBF.

77 Cf. art. 61 I French constitution.

78 Art. 157 III CBF.

79 Advisory opinion N° 2005-008/CC, 9 February 2005, as cited in: *Loada/ Ibriga*, note 13, p. 130.

80 Cf. decision N° 2007-04/CC, 29 August 2007, Société Etudes et Réalisations d'Ouvrages Hydrauliques (EROH), see below p. 26.

81 *Ibriga*, note 51, p. 106.

82 Decision N° 02/CS/CC, 31 August 2000.

83 *Loada/ Ibriga*, note 13, p. 131; Decision N° 2007-04/CC, 29 August 2007.

84 *Sampinbogo*, note 23, p. 14.

85 Art. 157 II CBF n.v.

86 *Ibriga*, note 51, p. 107.

87 *Sampinbogo*, note 23, p. 17.

## *II. Control of the process of democratic decision-making*

### 1. Control of elections

The Constitutional Council also reviews the regularity, transparency and correctness of referenda, presidential elections and parliamentary elections, and is therefore responsible in the case of electoral conflict.<sup>88</sup> In a 2006 decision<sup>89</sup>, the Constitutional Council partially expanded its competence to local elections (cf. part E. II. 3 below).<sup>90</sup> However, since the constitutional amendment of 2009, the entire oversight of local elections has fallen back under the responsibility of the administrative courts.

In case of conflicts over electoral law, the Constitutional Council can be appealed to by any of the candidates.<sup>91</sup> This leads to a situation in which alongside the review of international agreements, electoral conflicts constitute the largest share of cases before the Court.

### 2. Party-ban proceedings

According to article 13 V of the Burkinabe constitution, tribal, religious, sectarian and racist parties are prohibited in Burkina Faso. In line with article 156 of the Burkinabe Constitution, the Constitutional Council is responsible for party-ban proceedings.<sup>92</sup> In case of declaration of its unconstitutionality, the party is dissolved.<sup>93</sup> So far, no according procedure has taken place before the Constitutional Council.

## *III. Resolving disputes over the attribution of competences between organs of the state*

The Constitution does not set out procedures for disputes between state organs. This is considered not litigable as a matter of principle. Similar to the situation in France<sup>94</sup>, abstract judicial review and preventive review of parliamentary rules of procedure are considered sufficient means to control the executive and the legislature.<sup>95</sup>

88 Art. 152, 154 I, II, IV CBF; art. 28, 238 LO; art. 149–153, 193–202 code électoral.

89 Decision N° 2006-001/CC/EM, 2 February 2006.

90 The responsibility for local elections is a rarity in West Africa, see *Babacar Kanté*, Models of Constitutional Jurisdiction in Francophone West Africa, in: Journal of Comparative Law 158 (2008), p. 162.

91 Art. 154 III CBF.

92 Art 26 f. LO.

93 Art. 27 LO; Art 85 Règlement intérieur.

94 Cf. art. 61 I, II French constitution.

95 Grote, note 69, p. 330.

An important exception to this in a wider sense is the demarcation of the legislative powers of parliament from the government's regulatory power.<sup>96</sup> Article 101 of the Burkinabe Constitution enumerates those fields and basic principles that are to be regulated or further specified by law. All fields of law not included in this list belongs to the regulatory field and therefore fall within the remit of the executive, which in turn amounts to a limitation of the powers of the legislature.<sup>97</sup> In the case of conflict over the demarcation, or of objectionable draft laws or motions for legislative change<sup>98</sup>, the Constitutional Council decides whether the clause in question is classified as a law or as regulatory character.<sup>99</sup>

Under article 107 of the Burkinabe Constitution, the parliament can authorize the government to issue regulations that fall under the legislative competences of Parliament within a specified period of time. The Constitutional Council then assesses their constitutionality in a legal advisory opinion.<sup>100</sup>

#### *IV. Review of constitutional amendments*

The Constitutional Council oversees the procedure leading up to a constitutional amendment.<sup>101</sup> Despite this explicitly stated formal right to review, the competence to conduct a substantive review of constitutional amendments is not enshrined in law. The constitution only refers to competences aimed at controlling the regularity, transparency, and correctness of referenda, as well as the public announcement of results.<sup>102</sup> However, in a much noticed decision of April 2012, the Constitutional Council for the first time undertook this type of review (cf. section E. III. 1 below).<sup>103</sup>

#### *V. Other competences*

In addition to this, the Constitutional Council is responsible for the swearing-in ceremony of the State President<sup>104</sup>, the declaration of his prevention<sup>105</sup>, and the entry into force of

<sup>96</sup> Michel Fromont, Der französische Verfassungsrat, in: Christian Starck, Albrecht Weber (eds.), *Verfassungsgerichtsbarkeit in Westeuropa*, Volume I, Baden-Baden 2007, p. 235, 254; Mels, note 49, p. 333.

<sup>97</sup> Art. 108 CBF; wording as Art. 34, 37 French constitution.

<sup>98</sup> Art. 123 CBF; art. 23 LO.

<sup>99</sup> Art. 22 LO.

<sup>100</sup> Art. 107 CBF; art. 43 LO; *Loada/Ibriga*, note 13, p. 426.

<sup>101</sup> Art. 34, 35 LO, art. 157 I CBF; *Dorothé Cossi Sossa*, *Nouvelles démocraties et socialisation politique*, Paris 2012, pp. 76 f. .

<sup>102</sup> Art. 152 II, III CBF.

<sup>103</sup> Decision N° 2012-008/CC, 26 April 2012; *Centre pour la Gouvernance Démocratique Burkina Faso (CGD)*, *Constitutionnalisme et révisions constitutionnelles en Afrique de l'ouest: Le cas du Bénin, du Burkina Faso et du Sénégal*, Ouagadougou 2009, p. 17.

<sup>104</sup> Art. 44 I CBF.

<sup>105</sup> Art. 43 II CBF, Art. 41 LO.

emergency laws<sup>106</sup>. Impeachment proceedings against the State President or members of government, however, fall under the responsibility of the Judicial Council.<sup>107</sup>

## D. Scope of review, legal consequences and practical implementation

### I. Standard of review

The standard of judicial review procedure is the text of the 1991 Constitution, including all amendments. The preamble constitutes an integral part of the Constitution. This is explicitly stated at the end of the preamble. The preamble refers to the 1948 Universal Declaration of Human Rights, and confirms the support of international tools to protect economic, political, social, and cultural rights. In line with *Loada* and *Ibriga*, one can hope that the judges will expand the so-called *bloc de constitutionnalité* to include these international treaties, so that the standard of judicial review increases to an encompassing protection of basic rights.<sup>108</sup> Due to the suprapositive nature of international human rights law, it can be not only a useful interpretive guidance. It also helps to reinforce and legitimize the decisions. The Constitutional Council has so far been cautious and ambiguous with regard to their integration<sup>109</sup>, despite the fact that international treaties and regulations prevail over ordinary laws<sup>110</sup>.

It is unclear whether the organic laws have constitutional status. While they constitute a category independent from ordinary laws due to their mandatory review by the Constitutional Council, and to the fact that they have specifying and implementing character, it remains doubtful whether that constitutes sufficient reason. Case law clarifying this question is so far lacking in Burkina Faso.<sup>111</sup>

### II. Binding effect

The decisions of the Constitutional Council are justified<sup>112</sup>, officially communicated to the respective parties<sup>113</sup>, and published in the official journal<sup>114</sup>. There are no legal remedies against these decisions. However, the Constitutional Council is entitled to amend its deci-

106 Art. 59 CBF.

107 Art. 137 CBF; *Loada/ Ibriga*, note 13, pp. 426 f.

108 *Loada/ Ibriga*, note 13, pp. 124 f.

109 *Ibriga*, note 51, p. 103.

110 Art. 151 CBF; wording as art. 55 French constitution.

111 *Benoît Kambou*, La Constitution de la 4eme République et l'Etat e droit au Burkina Faso, Ouagadougou 1993, p. 10.

112 Art. 48 II LO; art. 53 Règlement intérieur.

113 Art. 44 Règlement intérieur.

114 Art. 48 II LO.

sions.<sup>115</sup> In case of an a priori judicial review of the main proceedings under article 152 of the Burkinabe Constitution, they are binding on all state organs under article 159 II of the Constitution. They apply *erga omnes*<sup>116</sup> and are legally binding<sup>117</sup>. Whether this applies both to the tenor and to the underlying reasons remains legally and judicially unclear.<sup>118</sup> They do not, however, have force of law like e.g. in Germany.<sup>119</sup>

If the constitutional legality of a norm came up in the context of pending proceedings, and its applicability was suspended in a procedure *par voie d'exception*, then this would only have relative binding effect (inter partes). The decision would then only apply to the case in question, but would not be binding on other cases.<sup>120</sup> As discussed above, this type of proceeding has not yet taken place.

### III. Practical implementation and enforcement deficits

The jurisdiction of the Constitutional Council is binding on all state powers.<sup>121</sup> Irrespective of this, enforcement deficits exist. Up to the year 2010, mere advisory opinions outnumbered binding decisions in many fields.<sup>122</sup> Especially the executive sometimes chooses to disregard these advisory opinions. An example of this is the advisory opinion related to the foundational acts of the African Union that, according to the Constitutional Council, was unconstitutional. It was ratified nonetheless.<sup>123</sup> Parliament, on the other hand, normally takes the decisions of the Constitutional Council into account.<sup>124</sup> The organic law of the Constitutional Council, for instance, was changed in December 2000 after a scheduled advisory opinion of the Judicial Council had been declared unconstitutional in the context of the appointment of members to the Constitutional Council.<sup>125</sup> In some instances, not only unconstitutional passages were deleted from the respective laws, but laws were revised entirely, e.g. in case of the general local authorities code after an advisory opinion on the laws

115 Art. 44 Règlement intérieur; *Loada/Ibriga*, note 13, p. 21.

116 *Loada/Ibriga*, note 13, pp. 21, 132.

117 Art. 159 II CBF.

118 In France this is indisputably the case after a decision of the *Conseil constitutionnel* for part and reasoning; CC, 61-18 L, 16.1.1962; see also *Mels*, note 49, p. 263.

119 Cf. for Germany § 31 II BVerfGG.

120 *Loada/Ibriga*, note 13, p. 132.

121 Art. 159 II CBF.

122 *Ibriga*, note 51, p. 105.

123 See advisory opinion N° 011/CS/CC, 8 June 2001; *Conseil constitutionnel du Burkina Faso*, note 51, p. 6.

124 *Conseil constitutionnel du Burkina Faso*, note 51, p. 6.

125 *Conseil constitutionnel du Burkina Faso*, note 51, p. 7.

pertaining to decentralization.<sup>126</sup> However, there are also a number of negative examples, like the legislative implementation of a decision that had been declared unconstitutional.<sup>127</sup>

## E. Judicial practice

### I. Number of decisions

There is a lack of official data regarding the number of decisions issued by the Constitutional Chamber of the Supreme Court and later the Constitutional Council. Since there is no official and regular collection of these decisions, complete information is hard to find, and in some cases the stated numbers are not properly accounted for. Different sources frequently contradict one another.<sup>128</sup> According to a report by the Supreme Court, 51 proceedings were brought before the Constitutional Chamber of the Supreme Court during the period from the foundation of the Fourth Republic in 1991 to the constitutional amendment and the reform of judicial review in 2000. This included reviews of nine organic laws, fourteen ordinary laws, five decrees by the National Assembly, nineteen international treaties, one on demarcation of competences between the executive and the legislature, and two decrees (this detailed list, however, only amounts to 50 proceedings). Further, the report stated that the State President had appealed to the Constitutional Chamber twice, the prime minister 27 times, the president of the National Assembly 19 times, the President of the House of Representatives two times, and members of Parliament on one occasion.<sup>129</sup>

In November 2012, the Constitutional Council issued a report about its organization, its rules of procedure, and its realm of competence. According to this report, the Constitutional Council issued 425 decisions and advisory opinions during the first ten years of its existence between 2002 and 2012.<sup>130</sup> Own field research has shown that these numbers cannot always be confirmed. An assessment of judicial practice can therefore only be based on the decisions and advisory opinions that have in fact been found. They were taken from a collection of decisions compiled by the Constitutional Council that is not accessible to the general public, but intended to serve for internal use by the court. According to this, the Constitutional Council issued 282 advisory opinions and decisions between 2003 and 2012 (excluding the year 2008 as well as advisory opinions from the years 2005 and 2006 during which these were not collected). 218 of these cases were concerned with instances of con-

126 See advisory opinion N° 2003-36/CC, 17 December 2003; decision N° 02-2000/CS/CC, 31 August 2000; *Conseil constitutionnel du Burkina Faso*, note 51, p. 6 f.

127 Law N° 002-2006/AN, 27 February 2006.

128 *Centre pour la Gouvernance Démocratique Burkina Faso (CGD)*, Avis et décisions commentés de la justice constitutionnelle burkinabé de 1960 à nos jours, Ouagadougou 2009, p. 135; *Nikéma/ Yonaba*, note 17, p. 294.

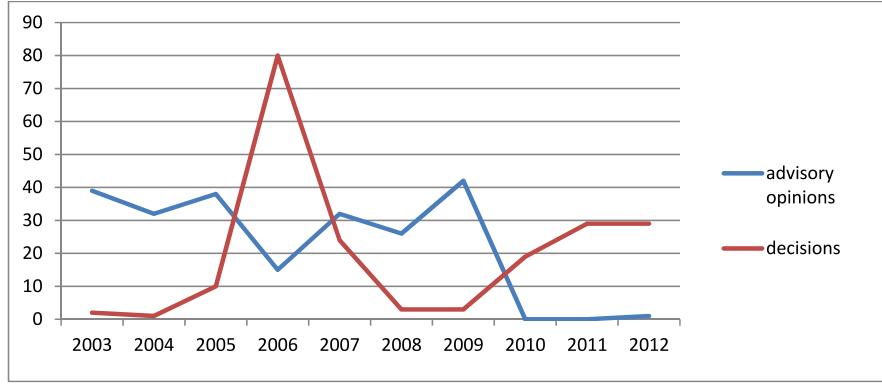
129 Rapport de la Cour suprême du Burkina Faso, 2000, pp. 115 f.

130 *Hadja Alimata Oui*, Conseil constitutionnel du Burkina Faso du Burkina Faso: Organisation, fonctionnement et attributions, Module 1, 2012, pp. 16 f., available at: <http://www.conseil-constitutionnel.gov.bf/index.php/module-1> (last accessed on 24 June 2018).

stitutional review. International conventions and treaties that for the most part concerned matters related to financial assistance were subject to judicial review in 199 cases. Organic laws were reviewed in seven instances, ordinary laws in two instances, and regulations issued by Parliament as well as constitutional amendments in five instances each. Four claims were rejected as inadmissible. The Constitutional Council found the Constitution to be violated in seven cases. Alongside this, the Constitutional Council examined 55 cases of electoral conflict, one conflict over competences, and five other cases. There were no party-ban proceedings.

|                   | 2003 | 2004 | 2005       | 2006       | 2007       | 2008      | 2009 | 2010       | 2011 | 2012 |
|-------------------|------|------|------------|------------|------------|-----------|------|------------|------|------|
| Advisory opinions | 39   | 32   | 38<br>(-)  | 15<br>(-)  | 32         | 26<br>(-) | 42   | 0          | 0    | 1    |
| Decisions         | 2    | 1    | 10<br>(13) | 80+<br>(8) | 24<br>(30) | 3<br>(-)  | 3    | 19<br>(30) | 29   | 29   |

*In brackets: Deviation based on decisions identified by the author*



*Development of judicial practice according to information provided by the Constitutional Council*

There has been a striking reduction in the number of advisory opinions issued since 2010 (often down to zero per year), alongside a clear increase in decisions.<sup>131</sup> This can be explained by the decision issued in early 2010 that introduced a classification of different competences of the Constitutional Council with regard to decisions, advisory opinions, and mere reports.<sup>132</sup> It stipulates that the majority of proceedings require decisions. This classification is meant to be binding. Future years will therefore see a continuation of the pattern that decisions are issued more frequently than mere advisory opinions.

131 See also *Ibriga*, note 51, p. 104.

132 Decision N° 2010-005/CC, 24 March 2010.

## II. Role in elections

Since the adoption of the Constitution 1991 and the establishment of the multi-party system, four presidential elections, five parliamentary elections, and four local elections have taken place in Burkina Faso.<sup>133</sup> The Constitutional Council is more active during election periods, and has greater public visibility.<sup>134</sup> According to article 154 III of the Burkinabe Constitution, any candidate can call upon the Constitutional Council. This encompasses both individual persons and each candidate's party.<sup>135</sup> While article 154 III of the Burkinabe Constitution refers to parliamentary elections, this is interpreted as also being valid in the case of communal elections.<sup>136</sup>

Up to today, Burkina Faso has seen no changeover of power through regular elections. In spite of boycotts, protests and contestations of the electoral process in recent years, the Constitutional Council has dismissed complaints on numerous occasions. Especially in the context of the controversial 2005 presidential elections, it ruled in favor of the existing government.<sup>137</sup>

### 1. Decision No 2005-007/CC/EPF of 14 October 2005; candidature Compaoré

The most important decision deals with the candidature of Blaise Compaoré, and with the limitation of the presidential mandate to two terms of office, in line with article 37 of the Burkinabe Constitution.<sup>138</sup> This is the one article of the Constitution that has been changed most frequently.<sup>139</sup> While in 1991, the duration of a presidential term of office was fixed at seven years with a maximum of two mandates, an unlimited number of reelections were allowed in 1997. In the context of the constitutional reform of 2000, the term of office was reduced to five years with a maximum of one reelection. At the time of his candidature, Compaoré had already served two terms of office (elections 1991 and 1998). Five other candidates with a right to appeal according to article 154 of the Burkinabe Constitution turned to the Constitutional Council in order to have Compaoré's candidature declared invalid. Apart from the invalidity due to the terms of office that had already been served, Compaoré was accused of crimes against humanity in the context of the Zongo-affair and the suspicion of political assassinations. These accusations would preclude a candidature.

133 *CGD*, Alternance et les règles du jeu démocratiques au Burkina Faso, Ouagadougou 2001, p. 4; *Loada/ Ibriga*, note 13, pp. 263 ff., 425.

134 *Ibriga*, note 51, p. 106.

135 Decision N° 2006-001/CC/EM, 13 December 2005; *Constitutional Council*, Rapport sur la gestion des élections nationales et locales, Ouagadougou 2009, pp. 6ff.

136 *CGD*, note 128, p. 97.

137 *Loada*, L'élection présidentielle du 13 novembre 2005: un plébiscite par défaut, in: Politique africaine, Le Burkina Faso: l'alternance impossible N° 101 (2006), pp. 19 ff.

138 Decision N° 2005-007/CC/EPF, 14 October 2005; *CGD*, note 177, p. 76 ff.

139 *Loada*, La limitation du nombre de mandats présidentiels en Afrique francophone, Revue électronique Afrilex N° 03 (2003), pp. 139 f.

The Constitutional Council rejected the latter accusation quickly and firmly based on a lack of competence. The decision of the Constitutional Council is therefore predominantly concerned with the question whether the constitutional reform of article 37 of the Burkinabe Constitution has retroactive power. In this context, it referred to the reform proposal of the *Collège des Sages*, the vote of the National Assembly regarding the constitutional reform, and the preceding two reforms of the presidential mandate. According to the report of the *Collège des Sages*, the change of article 37 of the Burkinabe Constitution was to enter into force after the end of the current mandate. The Constitutional Council deduces that no retroactive application had been intended. The representatives of the *Parti pour la Démocratie et le Progrès/ Parti Socialiste (PDS/PS)* had left the plenary prior to the vote on the constitutional reform. The Constitutional Council was therefore only able to take into account the intention of the representatives of CDP and ADF/RDA who had participated in the vote. These were held to not have intended retroactive applicability. Commentators of the decision criticize that the number of individuals participating in the vote had no added value for the interpretation.<sup>140</sup> Critics further point out that neither prior considerations regarding the constitution, nor the original intentions of the drafters of the constitution were taken into account, despite the fact that the limitation of the presidential mandate had previously been discussed.<sup>141</sup>

The Constitutional Council refers to the basic principle that laws can only apply to the future and never apply retroactively. Exceptions to this rule would only be possible in those cases where the law itself stipulates retroactive applicability, or where this lies in the nature of things. Further, it held that the continuous applicability of an old law by means of an explicit regulation, or in order to protect party interests, was legitimate. This, however, was not fully regulated by the legislator. The Constitutional Council compares the situation with the reform of article 94 of the Burkinabe Constitution that concerned the replacement of members of parliament who had to leave parliament due to being called to fill higher state offices.<sup>142</sup> Following a constitutional reform, the replacement was only allowed up to the mid-term of the legislative period. The Constitutional Council pointed out that in this case as well, the law had had no applicability for the National Assembly in office at the time. It therefore ruled that the complaint against the candidature was altogether unfounded, and rejected it. This opened up the possibility of another term of office for Compaoré. This decision received widespread public attention and was widely criticized.<sup>143</sup> While it ran counter to the expectations of critics and of the opposition, it succeeded in calming the political situation. However, the conflict hadn't been fully solved by the decision and ongoing discussions regarding a further reform of article 37 of the Burkinabe Constitution led to democrat-

140 CGD, note 128, p. 86.

141 Bongnissan Arsène Yé, Burkina Faso: Les fondements politiques de la IVe République, Ouagadougou 1995, pp. 91 f., 123; CGD, note 128, pp. 84 f.

142 CGD, note 128, p. 80.

143 CGD, note 128, pp. 81 ff.

ic uprising in fall 2014. The question of term limits for the President remains a point of importance for the new Constitutional commission and is in the focus of attention of the new draft that provides a limit of two terms.<sup>144</sup> However, the temporal limitation of mandates constitutes a political rather than a judicial question.<sup>145</sup>

## 2. Decision No 2005-004/CC/EPF of 14 October 2005; bias of the Constitutional Council

Prior to the decision, a candidate had turned to the Constitutional Council and had accused four of its members of being biased with regard to the question whether or not Compaoré's candidature was legitimate, due to them having previously held positions as ministers, ambassadors, or members of the board of enquiry of the Zongo-affair. This complaint was also rejected as unfounded.<sup>146</sup> In terms of content, the Constitutional Council referred to the nomination of members according to article 153 of the Burkinabe constitution, as well as to the regulations of incompatibility. The latter were held to not have been violated, since they do not apply to previously held positions.

Neither the Constitution nor the organic law entails provisions for excluding members of the Constitutional Council from a decision on grounds of bias. The regulations of ordinary courts therefore apply, provided they do not run counter to the status of members of the Constitutional Council. This, however, is criticized due to the fact that the nomination of members of the Constitutional Council is final and without the possibility of ad hoc appointments. The Constitutional Council can only decide if at least five of its members are present.<sup>147</sup> In case several members were to be excluded, it might not be possible to meet this requirement. The adoption of provisions stipulating procedures in case of bias would be desirable, since it would stress the growing independence of the Constitutional Council.

## 3. Decision on the demarcation of competence between Constitutional Council and judicial review during elections

A number of decisions are concerned with the demarcation of competences between Constitutional Council and the administrative courts. In the context of the 2005 presidential elections, presidential candidate Philippe Ouédraogo lodged a complaint against the candidature of his competitor Soumané Touré.<sup>148</sup> He claimed that the party had not been legally recognized (cf. articles 123, 124, 125 electoral code). The Constitutional Council rejected the complaint, arguing that it did not lie within its competences, since its substantive competence does not comprise the legality of administrative acts.

144 *Soma*, note 7, p. 57.

145 *CGD*, La limitation du nombre de mandats présidentiels en Afrique, le cas du Burkina Faso, Ouagadougou 2013, p. 15.

146 Decision N° 2005-004/CC/EPF, 14 October 2005; *CGD*, note 128, pp. 62 ff.

147 *CGD*, note 128, p. 64.

148 Decision N° 2005-006/CC/EPF, 14 October 2005; *CGD*, note 128, pp. 71 ff.

Shortly afterwards, this was contradicted by a decision regarding the legality of a resolution adopted by the National Electoral Commission (CENI) in which the Constitutional Council suspended an administrative act.<sup>149</sup> CENI's members who had only been elected for the duration of the presidential election in 2005 should have been entitled to stay on the committee for following local elections in 2006. The Constitutional Council was responsible for electoral conflicts (art. 152 II CBF). Controlling the regularity of electoral procedures and the transparency of local elections, however, was the responsibility of the administrative courts.<sup>150</sup> The Constitutional Council decided that henceforth, the responsibility of the administrative courts regarding the oversight of local elections would be limited to candidates' eligibility to stand for elections (article 259 electoral code), the overall legality of the election (article 260 electoral code), and the counting of votes (article 261 electoral code). All other electoral conflicts and in particular preparatory measures were to fall under the competence of the Constitutional Council, since they had not been assigned to any other court.<sup>151</sup> The CENI's decision was considered a preparatory measure, so that the Constitutional Council ultimately affirmed its competence. Critics claimed that the decision belonged in the realm of administrative justice and would lead to conflicts over competences, and that the Constitutional Council had overstepped the boundaries of its legitimate room for interpretation.<sup>152</sup>

The legislator reacted to this decision by changing article 34 of the electoral code in a way that now allows for a CENI commission to remain active as long as the period between two elections does not exceed six months.<sup>153</sup> Since the constitutional reform of 2009 administrative courts are fully and solely responsible for the control of local elections, as well as for the announcement of the results at the state Council.<sup>154</sup> The Constitutional Council is only responsible for presidential and parliamentary elections.

### *III. Further selected decisions*

#### 1. Decision No 2012-008/CC of 26 April 2012; legislative period

A more recent decision indicates that there are prominent examples that raise hopes for independent and courageous constitutional justice in Burkina Faso. In April 2012, the Constitutional Court<sup>155</sup> ruled that a constitutional amendment<sup>156</sup> was unconstitutional, and thereby for the first time carried out a substantive review that the constitution explicitly does not

149 Decision N° 2006-001/CC/EM, 2 February 2006; CGD, note 128, p. 93 ff.

150 Art. 152 III CBF.

151 CGD, note 128, p. 94.

152 CGD, note 128, p. 100.

153 Law N° 002-2006/AN, 27 February 2006.

154 Art. 152 IV CBF, Law N° 015-2009/AN, 30 April 2009.

155 Decision N° 2012-008/CC, 26 April 2012.

156 Law N° 001-2012/AN, 22 March 2012.

foresee.<sup>157</sup> The current legislative period that according to article 81 of the Burkinabe Constitution comprises five years was to be extended up to the point in time when new elections were held, which at the very latest were to take place on 3 June 2013. Prior to this, the Constitutional Council had issued an advisory opinion that stated that an extension could only be introduced through a constitutional amendment or a referendum.<sup>158</sup> While the decision then confirmed the legality of the constitutional amendment procedure, the judges considered the exceptional regulation to be in violation of basic constitutional principles. The law in question only concerned the case of the current legislative period and had no general applicability. In the eyes of the Constitutional Council, this was in contradiction to the foundational principles of the constitution. In its decision outlining the substantively unconstitutional nature of the law, the court referred to unwritten constitutional principles. Prior to this, the judicial practice of the Constitutional Council had neither developed nor established any general legal principles. Whether it will increasingly do so in the future remains to be seen.

The decision has been at the center of public attention and deserves special attention due to its affirmation of the review competences: Through this, the court distanced itself from the stance the French Constitutional Council typically takes towards the sovereignty of constitutional amendments<sup>159</sup>, and went beyond the scope of earlier decisions<sup>160</sup>. However, in the following, the legislator replaced the originally intended exceptional provision that only applied to the ongoing legislative period by a permanent mechanism regarding the postponement of parliamentary elections, and changed article 81 of the Burkinabe Constitution.<sup>161</sup> Due to this, parliamentary elections can now be postponed up to a year, provided this takes place due to force majeure, or if both the government and parliament agree on its necessity (articles 2 and 3). In its advisory opinion, the Constitutional Council confirmed that regulations of this kind were principally acceptable<sup>162</sup>, and in line with this refrained from renewed critique of the constitutional amendment in its final review<sup>163</sup>. Even though the ultimate benefit of this decision seems limited, it nonetheless shows that the Constitutional Council is unwilling to simply accept constitutional amendments that destabilize the Constitution and reduce trust in democracy and legal certainty.<sup>164</sup>

157 *Bolle*, Le Conseil constitutionnel annule une révision dangereuse, 21.09.2012, available at: <http://www.la-constitution-en-afrique.org/categorie-10195474.html> (last accessed on 24 June 2018).

158 Advisory opinion N° 2012-001/CC, 20.01.2012.

159 Thereto cf. Decisions in France N° 2003-469 DC, 26 March 2003 (decentralization reform), N° 1962-20 DC, 6 November 1962 and N° 1992-312 DC, 2 September 1992 (Maastricht).

160 Cf. Decision N° 2009-002/CC, 2 June 2009 to the amendment of art. 37 CBF.

161 Law N° 023/2012/AN, 18 May 2012.

162 *Soma*, note 7, p. 44.

163 Decision N° 2012-009/CC.

164 *Stéphane Bolle*, Les révisions dangereuses, in: Placide Mabaka (ed.), *Constitution et Risque(s)*, Paris 2010, p. 253.

## 2. Decision No 2010-013/CC of 2 June 2010; mandate of a member of parliament

The *Convention Nationale des Patriotes progressistes/ Parti Social Démocratie (CNPP/ PSD)* won 12 seats in the 1992 parliamentary elections. The next year, nine of its representatives left the party and founded the *Parti pour la Démocratie et le Progrès (PDP)*. They retained their positions as representatives at the National Assembly. A group of 61 other representatives lodged a complaint against this at the Constitutional Council. The court deemed this to not fall under its competence and hesitantly declared the appeal inadmissible<sup>165</sup>, which triggered a great degree of attention by the different parties.<sup>166</sup> In 2009, article 85 of the Burkinabe Constitution was changed in a way that now stipulates that representatives automatically lose their mandate in case they leave their party or are expelled from it during a legislative period.<sup>167</sup> When conducting a formal review of this constitutional amendment, the Constitutional Council declared it to be compatible with the constitution.<sup>168</sup>

## 3. Advisory opinion No 2007-03/CC of 20 April 2007 and No 2007-011/CC of 20 July 2007; contract with the Islamic Development Bank

Two advisory opinions of the Constitutional Council regarding a contract between Burkina Faso and the *Islamic Development Bank (BID)* indicate the degree of influence that can potentially be exerted on legislation.<sup>169</sup> Both advisory opinions were issued within a space of three months. In January 2007, the bank signed a contract with the country to finance a road construction project worth 8.8 million US Dollar. In article 22 I of the contract, the contracting parties submitted themselves to sharia law. With reference to article 31 of the Burkinabe Constitution according to which Burkina Faso is a democratic, unitarian and secular state, the Constitutional Council deemed this contract to be unconstitutional. This created a great degree of political animosity. On 5 July 2007, the Prime Minister therefore again approached the Constitutional Council with the request to decide on the constitutionality of the contract. In its second advisory opinion, the court then declared all aspects of the contract to be in line with the Constitution, without the contract having been revised in any way.<sup>170</sup> In its written decision, it deemed the contract to be “useful” and to implement goals mentioned in the preamble.<sup>171</sup> It did not include a discussion of article 31 of the Burkinabe

<sup>165</sup> CGD, note 128, p. 15 f; *Ibrahima Diallo*, A la recherche d'un modèle africain de justice constitutionnelle, in: *Annuaire international de justice constitutionnelle* XX (2004), pp. 93, 115.

<sup>166</sup> *Conseil constitutionnel du Burkina Faso*, note 51, p. 12.

<sup>167</sup> Law N° 2009-002/AN, 30 April 2009; CGD, note 128, p. 21.

<sup>168</sup> Decision N° 2009-002/CC, 2 June 2009, critically to this see *Soma*, note 7, p. 58.

<sup>169</sup> Advisory opinion N° 2007-03/CC, 20 April 2007 and N° 2007-011/CC, 20 July 2007; CGD, note 128, p. 113 ff.

<sup>170</sup> CGD, note 128, p. 117.

<sup>171</sup> CGD, note 128, p. 116.

Constitution, despite the fact that even critics would have considered this desirable.<sup>172</sup> The advisory opinion is therefore opportunistic and undermines the credibility of the Constitutional Council.<sup>173</sup>

#### F. Self-image and perception

The Constitutional Council considers itself to be an autonomous state body outside the regular judiciary, while at the same time representing the judiciary.<sup>174</sup> It is responsible for constitutional law matters and decides according to juridical criteria, not according to political preferences or goals. It considers itself to be a court<sup>175</sup>, yet emphasizes the importance of referring to members rather than judges. This indicates that the institutional entity lacks a clear theoretical grounding.

The members consider their own role and responsibility to lie with the regulation of state institutions. There is the stated desire to be a “rigorous republican institution”, impartial and independent, in order to be able to guarantee strict adherence to the constitution.<sup>176</sup> The consolidation of the rule of law, democracy, and good governance are therefore considered to be the task of the Constitutional Council.<sup>177</sup> In discussions of its independence from political power as well as from the institutions that nominated them, there are frequent references to Robert Badinters “obligation to be ungrateful”<sup>178</sup>.

The public perception of the Constitutional Council is far more negative and marked by a widespread lack of knowledge and skepticism. Important points of criticism are the influence of the governing majority on the nomination of members, the procedures that are limited to political actors, and the inability of citizens to directly appeal to the Constitutional Council. “Instrumentalized and timid”<sup>179</sup>, “disarmed and helpless”<sup>180</sup>, dependent, biased, weak, apathetic, and despondent<sup>181</sup> constitute examples of the widespread critical assessments and characterizations. However, the recent past has also seen more positive examples of decisions being characterized as courageous.<sup>182</sup> Overall, the public perception of the

172 *CGD*, note 128, p. 118.

173 *Conseil constitutionnel du Burkina Faso*, note 51, pp. 14 ff.; *CGD*, note 128, pp. 115 ff.

174 *Conseil constitutionnel du Burkina Faso*, note 51, p. 2.

175 *Sampinbogo*, note 23, p. 11.

176 *Oui*, note 130, p. 26; *Sampingbogo*, note 23, pp. 17 f.

177 *Sampinbogo*, note 23, pp. 17 f.

178 *Conseil constitutionnel du Burkina Faso*, note 51, p. 10; during an interview with the newspaper *Le Monde* in 1982 Badinter spoke of a „*devoir d'ingratitude*“ for the first time.

179 *Ibriga*, note 51, p. 104.

180 *Ibriga*, note 51, p. 101.

181 *CGD*, note 128, p. 2; *Ibriga*, note 51, pp. 101, 105.

182 *Bolle*, Le Conseil constitutionnel annule une révision dangereuse, 21 September 2012, available at: <http://www.la-constitution-en-afrigue.org/categorie-10195474.html> (last accessed on 24 Juin 2018).

Constitutional Council is dominated by major doubts regarding the question whether or not it is really the most important building bloc for consolidating constitutionalism.<sup>183</sup>

## G. Assessment

### I. Problems and weak points

The Constitutional Council has a number of deficits that obstruct it in its task to serve as a judicial counterweight in an otherwise one-sided power constellation.<sup>184</sup> Its role as guardian of the constitution has therefore remained limited, and it is sometimes regarded as instrumentalized, vulnerable, and inaccessible.<sup>185</sup> Consequently, there are few decisions that testify to the courage of the Constitutional Council to wholeheartedly stand up in defence of the constitution.

On the one hand, the Constitutional Council has in the past adjudicated complaints in a strictly verbatim and formalistic manner that has been subject to criticism.<sup>186</sup> Critics claim that it thereby limits its own scope for a more liberal interpretation that would enable an expansion of freedoms and a consolidation of the young democracy.<sup>187</sup> According to this view, a meaningful practice of judicial review can only develop through dynamic new developments and a change of paradigms.<sup>188</sup> However, the decision on the substantial review of the constitutional reform pertaining to the legislative period of the National Assembly<sup>189</sup> could initiate a fundamental change.

On the other hand, members of the Constitutional Council have repeatedly been confronted with the accusation that they lack independence. Due to the fact that they are nominated solely by the State President and his dominant governing party, they are sometimes regarded as mere pawns of his political interests. Especially the current role of the president of the Constitutional Council who without a mandate is completely at the mercy of the State President leads to accusations of partiality, excessive loyalty, and lack of credibility.<sup>190</sup> The influence that the political class has on the members is here most apparent.

In general, the Burkinabe judiciary has a number of weaknesses. The working conditions of judges, for instance, are inadequate due to insufficient facilities, a lack of person-

183 *Soma*, note 7, pp. 55, 78 f.

184 *Louis Favoreu*, Brèves réflexions sur la justice constitutionnelle en Afrique, in: Gérard Conac (ed.), *Les Cours suprêmes en Afrique*, Tome II, 1989, p. 43.

185 *Ibriga*, note 51, p. 11.

186 *Ibriga*, note 51, pp. 105, 108; *Soma*, note 7, p. 53.

187 *CGD*, note 128, p. 3.

188 *Soma*, note 7, p. 78.

189 See Part V. 3. a.

190 *Loada/ Ibriga*, note 13, pp. 128 f.

nel, and the influence exerted on the Ministry of justice.<sup>191</sup> Public access to and debates about decisions and other forms of information are also lacking. While a website for publishing all decisions and laws is currently being prepared, there are no signs of a clear commitment to transparency. Instead, shortcomings in archiving are exacerbated by the secrecy of state institutions.<sup>192</sup> There is therefore no collection of decisions that is accessible to the public.

Limitations to the right to appeal further contribute to this overall negative assessment. While the situation of the opposition will be slightly improved through the impending reform, there still is no direct right to appeal for citizens. This may well be the Court's greatest weakness. Especially given the fact that this existed in the Second and Third Republic, there are good reasons for calling for a continuation of this tradition.<sup>193</sup> Without an expansion of the right to appeal, constitutionalism in Burkina Faso will not become consolidated.<sup>194</sup>

## 2. Future perspectives

Despite all this, there have been recent glimpses of hope like the surprising and perhaps courageous decision against an extension of the legislative period. For the *Société burkinabé de droit constitutionnel*, the constitutional reform of 2012 marked a significant and decisive turn for the country's constitutionalism.<sup>195</sup>

The process of constitutional reform has been accused of securing Compaoré's power, and of primarily pursuing a change to the mandate of the State President. Alongside individual problematic features of the reform like ensuring former State Presidents' membership, the expansion of the right to appeal by the court of cassation and the State Council, the right of the Constitutional Council to become active of its own accord, and the strengthening of the president of the Constitutional Council deserve a positive assessment. However, especially appeals by the court of cassation and the State Council are not mandatory, but subject to these institutions' discretion.<sup>196</sup> In 2007, after the court of cassation had refused to lodge a complaint, the society EROH appealed to the Constitutional Council di-

191 CGD, note 128, p. 1; *International IDEA*, *La démocratie au Burkina Faso*, Stockholm 1998, pp. 24, 30.

192 CGD, note 128, p. 3.

193 Here, the Constitution of the Forth Republic is hence a retrograde step, cf. *Benoit Kambou*, *La Constitution de la 4eme République et l'Etat e droit au Burkina Faso*, Ouagadougou 1993, p. 22.

194 CGD, note 128, p. 2.

195 *Société Burkinabé de Droit Constitutionnel*, *Déclaration sur la révision constitutionnelle du 11 juin 2012 au Burkina Faso*, available at: <http://ddata.over-blog.com/1/35/48/78/Burkina-Faso/Burkina-declaration-SBDC-revision-11-juin-2012.doc> (last accessed on 24 June 2018).

196 *Soma*, note 7, pp. 52 f.

rectly on the basis of article 25 of the organic law.<sup>197</sup> The Constitutional Council declared the complaint inadmissible due to a lack of entitlement to lodge a complaint.<sup>198</sup> Even though this decision was issued prior to the 2012 constitutional amendment, it still indicates the fundamental lack of a comprehensive legal protection mechanism that currently is overly dependent on members and judges being willing to become active. A clear duty to lodge complaints would be desirable.

As has been noted above, the reform of the Constitutional Council has not yet been implemented. Due to major public protests against the senate, the popular uprising in fall 2014 and the following transition, further delays of a new organic law of the Constitutional Court are to be expected. So it remains to be seen whether the reform will be implemented and can indeed strengthen the Constitutional Council in a way that makes it easier to fulfill its role as guardian of the Constitution.

The fact that this cannot so far been assessed with any degree of confidence is related to the uncertain developments from popular uprising to political reforms of the new government. After the official end of the transition year, excitement and optimism that emerged in witnessing the Burkina Faso democratic uprising calls for political reforms. The success of the uprising may inspire similar revolts in West and Central Africa against longtime presidents. Symbol of a new beginning in Burkina Faso is a proposal of a new Constitution for a Fifths Republic. Kaboré has set up a commission of 92 members, including different social groups, the opposition and faith-based organizations, to draft a new constitution in order not only to break with the old regime but also to accommodate the spirit of the popular uprising. The constitutional revision has been outlined as a means to promote peace and consolidate democracy. Major innovations are expected on the Bill of Rights, the mandates of the President and the Members of Parliament and the unicameral parliament. The draft will be introduced to the National Assembly and discussed in popular forums before its submission to a referendum. However, the schedule is uncertain. The future of the Burkinabe Constitution is therefore becoming a decisive factor for the country's political future, and for the Constitutional Council. The first draft proposes a renaming in Constitutional Court. Whether this will also be accompanied with substantial reforms and an increasing access remains equivocal.

It will be of great significance whether the constitutional amendment and the reform of the organic law will finally implemented or not. But apart from the Court's competences and access to the court's jurisdiction, the members' independence, both their personalities and their willpower, are decisive for defending the constitution. Whether or not the Burkinabe constitutional review can meet the hopes it has raised in terms of securing or even expanding the rule of law and democracy remains to be seen.

197 Decision N° 2007-04/CC, 29 August 2007, Société Etudes et Réalisations d'Ouvrages Hydrauliques (EROH); CGD, note 128, pp. 119 ff.

198 *Soma*, Le contrôle de constitutionnalité des lois constitutionnelles en Afrique noire francophone, in: Aktuelle juristische Praxis – Pratique juridique actuelle (2011), p. 265.