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FOREWORD

The last presidential elections held in March 2012 contributed to the strengthening of democracy in Senegal. The rule of law presupposes that the decisions by State organs at all levels are limited by the supreme law and are subject to the judicial review. The hierarchy of the standards only becomes effective if it is jurisdictionally sanctioned and the fundamental rights are effectively protected by an independent judiciary.

Besides, protection of liberties has become an irreplaceable consequence of the democratic principle. To ensure a balance of powers within a state build on the principles of the rule of law and to guarantee fundamental rights and freedoms of the citizens, efficient and effective intervention of an independent justice system is indispensable if not irreplaceable.

These articles written by young Senegalese researchers illustrate perfectly that the rule of law is an essential asset which should be enhanced.

It is within this context that this volume of the *African Law Study Library* compiles a series of reflections produced by young researchers of the Faculty of Juridical and Political Science of the University of Gaston Berger St. Louis (UGB). The works are from a seminar on the rule of law in Senegal which is a part of a series of seminars planned in West Africa within the framework of the Konrad Adenauer Foundation's «Rule of Law Program for Sub-Saharan Africa ». by. These seminars are meant for doctorate students and associate lecturers of the faculty of law present and offer a framework for reflection on the legal reality in the respective countries.

The UGB team thus embarked on determining different aspects of realizing the concept of the rule of law in Senegal. Two articles touch on the role of jurisprudence in the implementation of the rule of law in Senegal. *Abdoul Aziz Sow's* article touches on« Contribution of the electoral judge in the development of the rule of law in Senegal ». After identifying this election judge, he analyses his contribution to the development and consolidation of the rule of law in the entire electoral process as well as through election disputes. By using examples on administrative jurisprudence, his colleague *Omar Dia*, on his part writes on «The role of the administrative judge on the development of the rule of law in Senegal » and throws some light on the manner in which the Senegalese administrative judge protects rights and freedoms which the citizens enjoy within a state governed by the rule of law. In his «Essays on causes of ineffectiveness of the principle of separation of powers on relations between the executive and the judiciary after change of political power in Senegal » *Papa Fodé Kanté* analyses the structural causes of the ineffectiveness of the principle of separation powers on the relations between the executive and the judiciary after the change of political power in Senegal. *Moussa Sarr* studies the levels of realization of the principles of the rule of law in Senegal and examines whether different processes to which Senegal committed herself (sometimes imposed by external players) show « the effectiveness of the rule of law

in Senegal ». *Serigne Ndiagna Sow* touches on the aspect of «Protection of private foreign investments in Senegal » and wonders whether the desire shown to encourage and protect foreign private investments both on legal regulatory and institutional levels has been translated into reality.

We thank UGB authorities for having made it possible to organize the seminar which is directed towards a sustainable collaboration. We thank the *Dean Babacar Kanté* who established the cooperation which led to the realization of this project. We in particular thank Konrad Adenauer Foundation for having integrated the project within the framework of its program « Rule of Law Program for Sub-Saharan Africa ». Finally, we wish to express our gratitude to the participants for their commitment. The opinions expressed herein are those of the authors and do not necessarily represent those of the undersigned or the Foundation.

Ibrahima Diallo **Hartmut Hamann** **Chadidscha Schoepffer**

CONTRIBUTION OF THE ELECTORAL JUDGE TO THE DEVELOPMENT OF THE RULE OF LAW IN SENEGAL

By Abdoul **Aziz Sow***

GENERAL INTRODUCTION

Rule of law, democracy, protection of individual freedoms, are today the key words of the so called civilized nations. Indeed, changes in democratic societies has enabled the established of criteria of a state governed by the rule of law characterized mainly by separation of powers, periodic elections as well as guarantee and respect of fundamental freedoms. Globalization of the law by the so called democratic states, has frantically tried to make democracy a showcase for states governed by the rule of law. Although we often deny African states to be models of democracy, the wind for the rule of law seems to have blown over the continent so much that talking about he law only after a few decades becomes a challenge. Senegal, like other African countries has not escaped this situation. Defined literary as being a legal situation in which each person is subjected to the respect of the law, the guarantee of the rule of law presupposes a strong and independent justice system, being able, when the opportunity arises, to rule on the law, even to the executive authority, particularly if it pertains to elections. Indeed, elections make it possible to gauge the degree of democracy and the respect of the fundamental right of voting.

The rule of law denotes submission of public institutions to legal regulations and they accept to be controlled by jurisdictions of these regulations. As rightly underlined by C Goyard, the rule of law is in effect that which the regulations are clear, known, guaranteed by enactment of legal sanctions, in such a manner that… if the regulations have been contravened, there are ways of recourse to rectify or to destroy the acts incompatible with the regulations in a legal system[1]. Defined as an institutional system in which the public power is subjected to the law, the rule of law is a concept of German origin which redefined in the beginning of the twentieth century by Hans Kelsen, as a state in which legal standards are organized along hierarchical lines in such a way that its power is limited. The model is founded on the principle according to which the legal regulation draws the validity of its conformity with higher regulations. Such system, moreover supposes, equality before the law and the existence of independent and competent judiciaries.

Respect for the supreme law is a major guarantee for the rule of law. Indeed, legal and judicial security requires some coherence of the standards in order to ensure compatibility and if necessary conformity among them. At the apex of this pyramid is the Constitution. The main implication would be the submission of everyone to the law and consequently sanction to eventual violations of this law. The originality of such a model therefore supposes acknowledgement of equality of different subjects of law submitted to the standards in force. This indeed implies that every individual, every organization, at the national level, can contest the application of a legal standard, whenever this standard is not in conformity with the supreme law. At this level, the constraints which weigh on the State are enormous

* **UFR Sciences Juridiques et Politiques Université Gaston Berger de Saint Louis**

[1] C Goyard « *Etat de droit et démocratie* », Mélanges René Chapus, Paris, Montchrestien, 1992, p.301

because the regulations it enacts and the decisions it takes must conform to the supreme law in force, without enjoying any privilege of jurisdiction or a regime derogating from the ordinary law. However, in order to guarantee the respect of the law, the role of courts is fundamental and their independence is an essential requirement.

Etymologically from Latin *electio* meaning choice, election is a choice realized through suffrage (voting, approval) in which all people having the right to vote, are called upon to participate by the electoral body[2]. The objective of an election is to nominate one or several people to exercise an electoral mandate (political, economic, associative, trade union, social,...) during which they represent their electorates. Through their vote, the constituents transfer to them the legitimacy necessary to exercise the power allocated to the office which is the objective of the election.

The population concerned transfers, through its majority vote, legitimacy to the representatives or principals chosen to exercise the power allocated to the position occupied. Several types of elections can be found in a state; but we find mainly in states governed by the rule of law like Senegal, presidential, parliamentary and municipal elections. The stakes are however different even if there is need to acknowledge that presidential elections draw the most attention of the citizens, we should not forget that parliamentary elections and municipal elections (regional, communal and rural) are true barometers of a democracy and subsequently of a state governed by the rule of law. If the elections constitute rare opportunities so that principal holders of sovereign power can make a choice on systems and men and women supposed to lead public institutions, they are indicative of the relevant criteria.

Called upon to rule on the law and even to supervise the elections, the electoral judge or judges are called upon to a certain extend to develop, guarantee and consolidate the rule of law. This mission is operated by a control of the electoral procedure which starts from the registration of voters, reception and supervision of candidacies, conduct of electoral campaigns, funding of the campaigns, announcement of results, reception of election disputes and ruling on any possible electoral offenses. This task is hard enough and very sensitive. It is for this reason that it would be interesting to enquire into the contribution of the electoral judge in the consolidation of the rule of law, in other words what is the contribution of this judge in the development of the rule of law in Senegal?

The answer to such a problem requires enlightenments on an earlier question which constitutes identifying this or these election judge(s). Indeed, in respect to the Senegalese positive law, several judges intervene in the electoral process. It first pertains to the Court of Appeal, the Constitutional Court and the Supreme Court.

The Court of Appeal hears and rules on disputes relating to election of municipal and regional councils, members of trade councils and chambers as well as councils of professional bodies. Pertaining to the elections of the President of the Republic and members of parliament, the Court of Appeal oversees the conduct of voting operations, legality of the poll, counting and tallying of the votes and announces provisional results.

The Courts of Appeal are governed by Decree N° 84-1194 of 22nd October 1984 as amended by the Decree N° 92-916 of 17th June 1992. At that time there was one Court of Appeal on the Senegalese territory, that of Dakar. In terms of Article 25 of this Decree, the jurisdiction

2 http://www.toupie.org/Dictionnaire/Election.htm

of the Court of Appeal spreads to the entire Republic of Senegal. This statute was amended following the establishment of a new Court of Appeal in Kaolack in January and soon thereafter another one established in Saint in January 2009.

As for the Constitutional Council[3], *Article 2* provides that in conformity with the provisions of Articles 24, 25, 28, 29, 31 and 35 of the Constitution, the Constitutional Council receives candidacies for the President of the Republic, rules on the list of candidates, rules on the list of candidates and makes a ruling on issues challenging the elections of the President of the Republic and members of the National Assembly and announces results for these positions. It conducts the swearing of the President of the Republic and notes his resignation, incapacitation, or death as well as the resignation, incapacitation or the death of the people called upon to deputize him in his functions.

In respect to the Supreme Court, revived in 2008[4], its administrative chamber has jurisdiction, as a court of last resort, on disputes concerning voter registration and elections for local authority councils and generally, it rules on disputes devolved upon it by the electoral code[5]. There is need to however note that the electoral code entrusts the president of the Departmental Court with certain duties during elections. They pertain mainly to recourse against striking off from the voters register, against decisions of the administrative commission, also custody of sealed ballot boxes.

For all intents and purpose, we shall mainly be interested in the Judge of the Court of Appeal, judge of the Supreme Court and the Judge of the Constitutional council.

Their contribution in the development and consolidation of the rule of law will be evaluated on the entire electoral process and also through election disputes which will consequently be analyzed. In a nutshell, the identification of this electoral judge on the one hand and his contribution on the other hand, shall constitute the two axes of our reflection. To this end, we will see in the first part difficult identification of the electoral judge (I) before discussing in the second part his mixed contribution (II) in the development and consolidation of the rule of law.

1 Difficult identification of the electoral judge

The identification the electoral judge in Senegal is a real painstaking work to the extent where it does not pertain to one judge, but rather several judges, in that presidential and parliamentary elections are mainly entrusted to the Constitutional Council, elections for regional, municipal and local councils lie within the jurisdiction of the Court of Appeal. Besides, the Supreme Court intervenes as the court of the last resort in disputes involving local council elections. It is possible to discuss electoral judges on the one hand through presidential and parliamentary elections and through local council elections on the other hand. However, for ease of illustration, we will first discuss the report on plurality of electoral judges (A) before emphasizing on the preeminence of the Constitutional judge (B) mainly due to the stake taken by presidential and parliamentary elections in the rule of law.

[3] Law No. Act No. 92-23 May 30, 1992 on the Constitutional Council
[4] Act 2008-35 of August 8, 2008 on the new Supreme Court of Senegal
[5] Law No. Act No. 92-15 of 7 February 1992 on the Electoral Code in Senegal

A- Plurality of electoral judges

According to Djedjro Francisco Meledje[6] democratic societies are characterized, among others, by organization of elections held at regular intervals. Election cases have, in this regard, the objective of verifying the legality of electoral acts and the validity of the election results, in other terms; they are defined as operations which aim at settling disputes putting into question the legality of the electoral processes. Electoral dispute in itself is comprised of several types of disputes: the electoral dispute in actual sense and the punishment aspect which tends to sanction fraudulent acts committed during the election periods and condemnation of the people responsible for such acts.

But beyond the perception that the lawyer can give the notion of what is contentious, that is to say settlement of disputes by jurisdictional organs, it should be pointed out that in electoral matters the expression « settlement of contentious issues» can be taken in an extensive manner; to the point of having recourse to electoral regulation. Whatever the analysis made on concerning the idea of political representation in line with democracy, the dispute appears like the technique which ensures, as much as possible, equity and legality of representation in electoral democracy. But there are no elections without disputes, unless we choose to organize what is called in Africanist jargon «elections without risks ».

This argument puts the problems of elections on the spotlight, in respect to their stakes in Africa, under the prism of the rule of law. Founded on the primacy of the principles of independence and impartiality, the exercise of judicial officers is perceived as being a guarantee of complete effectiveness of the rule of law. This independence[7] established in most constitution of democratic states guarantees the citizens respect of the fundamental rights and freedoms by other political powers and sanctions possible violations of these rights. Such a power of the judge offers the citizens guarantees concerning the choice of their representatives and possibly to expedite recourse before competent courts in case of electoral frauds or clear electoral irregularities.

However, in similar cases, before what court, is the petitioner required file his application? The answer to this question remains mixed according to the option of the States to adopt the formula of unity or duality of jurisdiction. Within this framework, Senegal having renounced the French tradition of duality of jurisdiction chose the system of unity of jurisdiction which appears to be more economical and less complicated. This is what comes out from the exposition of the motives of the Organic law N° 2008- 35 of 8th August 2008 in the relation to the restoration of the Supreme Court of Senegal.

Indeed, for reformers of the judicial system which took place on 30th May 1992, this former judicial formula which represents the creation of several higher jurisdictions has had a harmful impact on budgetary means and human resources allocated to the justice system. Thus, to give the justice system a new lease of life, Senegal embarked on reforms in 2008 aimed at reviving the Supreme Court with a view to fill in the gaps mentioned earlier, which would consequently have led to an unwavering enhancement of the rule of law in Senegal. It is for this reason our country got down to offer the citizens a myriad of possibilities to exercise their rights before some jurisdiction before, during and after electoral operations of course in accordance with the formal and procedural rules set by the law.

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[6] Djedjro Francisco Meledje, *« Le contentieux électoral en Afrique* », Seuil, Pouvoirs, 2009, n°129, pp-129-255.

[7] Section 88 of the Senegalese Constitution of Jan 22. 2001

To this end, putting in place a system which acknowledges multiple jurisdictions of judges was the option chosen by Senegal. This possibility calling upon judges to play a decisive role in electoral operations seems to promote the principles of the electoral process on issues pertaining to locality, nature and stages of the process. This means from the time of voter registration, during voting or after the operations. It is in this spirit that Article L 220 of the electoral code makes a provision concerning regional elections as follows: « *Any voter can make an application for cancellation of electoral operations. The Court Appeal has jurisdiction over such an application*. ».

In the same vein, this code provides in Article L 254 that for election disputes concerning municipal and rural elections, the Court of Appeal has jurisdiction under these terms « *Any voter or any candidate to a municipal or rural election can file a petition for cancellation of the electoral operations. The Court of Appeal has jurisdiction over this matter. The petitions must be filed, in two copies at the prefecture or at the registry of the Court of Appeal five (5) days after the announcement of results. They are certified by the prefect or by the chief registrar. When the petition is filed at the prefecture, the prefect shall immediately forward it to the chief registrar of the Court of Appeal. To be admissible, the petition must state the facts and means alleged. If he deems that the legally stated conditions and forms have not been fulfilled, the prefect can, as well, apply for the cancellation of electoral operations. In this regard, he shall file a petition in two copies to the Minister of Home Affairs within eight (8) days after the announcement of results. The Minister of Home Affairs shall forward the petition to the Chief Registrar of the Court of Appeal who shall certify the same».*

Moreover Article 19 of the Organic law n° 2008- 35 of 8th August 2008 in relation the Supreme Court states that: « *the administrative chamber, which has quashing powers, on administrative matters, hears and rules as the first and last instances excesses of executive authorities, as well as the legality of actions of local authorities; it has jurisdiction as the court of the last resort on disputes concerning voter registration and elections to councils for local authorities. And generally, it hears and rules on disputes conferred upon it by the electoral code*. »

Pertaining to matters which fall under the jurisdiction of a departmental court and relating to electoral operations, Article 75 of the law provides that: « *in matters falling under the jurisdiction of the departmental court and relating to disputes concerning voter registration, for purposes of admissibility the time limit for appeal is ten days after the notification of the decision for appeal* ». Reading the Constitution of Senegal of 2001 shows a similarity between the aforementioned provision and that of Article 92 which provides that: « *the Court of Appeal has jurisdiction as the court of last resort for disputes concerning voter registration and elections for local authority councils.…* ».

There is also need to state that even if the constitutional judge enjoys specific powers in matters relating to presidential and parliamentary elections; it seems relevant to underline the essential role played by other levels of jurisdictions in the electoral process. This remark illustrates the constitutional provisions of Article 32 which touches on the importance of the other judges in the electoral process by stating that: « *Courts and Tribunals oversee the legality of electoral campaigns and the equality of candidates to use the means of propaganda, in accordance with conditions set by an organic law* ».

However, no matter the position reserved for judges in electoral operations, it is noteworthy that the constitutional judge can be considered as their 'senior' due to the number of his powers and his position which is both hierarchical and strategic within the Senegalese judicial authority.

B- Preeminence of the constitutional judge

In Senegal, just like in all other French speaking African countries, national elections (presidential and parliamentary) are entrusted to constitutional jurisdiction sometimes called Council or Court. The Senegalese constitution of 2001 gives the Constitutional Council the jurisdiction to oversee the legality and the validity of parliamentary, presidential elections and referendum, to announce results of the same and hear and rule on any disputes arising therefrom. In accordance with abovementioned constitutional provisions, the organic law on the Constitutional Council and the electoral laws entrust upon the said court the control on legality of parliamentary and presidential elections and referendum from the preliminary operations (making the voters register, presentation of candidacies, organization of electoral campaigns), until the conditions under which the polling is conducted and dispute on the election of a candidate. The constitutional judge can therefore intervene to reverse or cancel the election, pronounce the removal of an elected candidate or decide on any other appropriate sanction. The intervention of the judge can be manifested in the preparatory stage of the elections during the conduct of the voting and during hearing of election disputes.

Therefore, in respect of the doctrine, the judge is considered as the key to the vault and the condition for the realization of the rule of law[8]. This position of the choice of the judge in putting in place the rule of law is confirmed by some authors like Professor Louis Favoreu, who, in a remarkable study entitled *''la politique saisie par le droit''*[9]*(Politics seized by the law)*, observed : « *in the same manner as in administrative law, we cannot treat such or such a question without referring to the Jurisprudence of the State Council, and therefore to this, it is no longer possible, in constitutional law and also in political science to study most problems without considering the positions of the Constitutional council* ». This is to say that so as to analyze today the political game and evaluate the status of anchorage of democracy in a community; we cannot afford to ignore constitutional justice[10]. It is thus in the extent where, besides the control of constitutionality, constitutional judges are in some countries, responsible for control of legality of elections or settlement of election disputes. This is the case in Benin, Cameroon, Senegal and Togo[11].

From this conception emanating from the holders of the doctrine, we can see now that elections occupy a central place in a democracy. This is what comes out from the analysis of Raymond Aron when he writes concerning this subject, that « *Structural straits of democratic regimes are clearly elections* ». [12] . These different arguments therefore make the constitutional judge, the principal organ for regulating both presidential and parliamentary elections. This control of legality presents two important aspects: authentication of preliminary acts of the vote and settlement of disputes arising from opposition to the election results. On this basis, the citizens are in a position to bring before competent jurisdictions preliminary acts of voting which they consider to be inconsistent with the law. Illegalities of electoral operations during presidential and parliamentary elections fall under this array of actions notwithstanding some specificities.

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[8] J. Chevallier, l'Etat de droit, Paris, Montchrestien, Clefs, 2e édit. 1994, p.147.

[9] Favoreu (L) , La politique saisie par le droit, Economica, Paris, 1988 .

[10] Rousseau (D), Droit du contentieux constitutionnel, 3e éd. Montchrestien, Paris, 1993, p .22.

[11] According to Benin Art. 49 of the Constitution of 11th December 1990 and articles 80 and 88 of the Act of 3rd January sets the rules for elections in the republic of Benin. In Senegal of 7th February 1992 sets in Articles LO 135 and LO 136 the Constitutional council as an organ for settlement of electoral disputes. In Togo , the electoral code of 15th September 1997 as amended on 5th April 2000 the on 12th March 2002 and lastly 7th February 2003 empowers the constitutional court to oversee the regularity of electoral operations.

[12] Aron (R), Les désillusions du progrès, Calmann-Lévy, Paris, 1966, p.66. Bourgi (A), Ombre et lumières des processus de démocratisation en Afrique Subsaharienne, in Bilan des Conférences nationales et processus de démocratisation en Afrique, Actes du séminaire de Cotonou , 11- 12 nov.1998, p.185.

Indeed, the Senegalese constituent just like those of other states resolutely undertook to subject regional, municipal and rural polls to a regime derogatory to ordinary law. Thus, electoral operations are placed under the responsibility of the constitutional judge. This is why the Senegalese constituent devoted several provisions which define different powers conferred upon the Constitutional Council in matters pertaining to presidential elections. In this regard, Article 29 of the new Senegalese Constitution included a chapter on the jurisdictions of the Constitutional Council both of the presentation of nominations papers for the presidency and the possibilities for postponement if the need arises. Moreover, Article 30 of the same constitution empowers the Constitutional Council with the task of establishing and publishing the list of candidates. Its powers spread also to the decision to conduct a second round of elections if no candidate obtains absolute majority vote after the first round or in case of dispute on the election of a candidate. It is also entrusted with the responsibility, in terms of the constitutional provisions, of announcing both provisional and final results of the presidential vote.

If we put emphasis on the aspect of electoral dispute, the Senegalese constitution provides clearly in terms of the provisions of the Article para.2 that: « *the legality of the electoral operations can be challenged by one of the candidates before the Constitutional Council within seventy two hours after the announcement of provisional results by a national commission for counting and tallying of the votes put in place by an organic law* ». In concrete terms, in Senegal, the electoral code grants any candidate to a presidential or parliamentary elections, the right to directly challenge provisional results.[13].

We should also emphasize that the importance of the powers of the constitutional judge is not entirely limited to the organization and conduct of the presidential poll; they extend also to settlement of election disputes. Indeed, the authority upon which the decisions are made, make them not be susceptible to appeal before another judge or another jurisdiction. This principle which is recognized by the laws of the Republic is espoused by Article 92 para.2 which states that: « *Decisions of the Constitutional Council are not susceptible in any way to appeal. They are binding to governments and to all administrative and jurisdictional authorities* ».

This position of the constitutional judge with the judicial system is a security of his preeminence over his peers who are placed below the dome of other jurisdictions. However, despite this multiple intervention of the judges within the framework of enhancing democratic principles and the rule of law, there is need to acknowledge a certain number of gaps which slow down the democratic program undertaken by African countries including Senegal.

II Mixed contribution

The participation of the electoral judge in the development of the rule of law and democracy in a state like Senegal creates a lot of interest. Indeed due to the stakes raised by national or local elections, it appears as being the first authority well placed to enforce and perpetuate principles governing any democratic state. This would be explained in the existence of a plurality of electoral judges. However, close analysis of his decisions show some over cautiousness, retained, in short weakness of the judge (A) and consequently a need to strengthen him, rearm him or gild him afresh (B).

[13] Articles 29 of the Constitution, then articles LO 135 and LO 185 of the electoral code.

A- half-hearted judge

A half-hearted judge, here is an expression which would seem funny, arouse heated debates or be of surprise normally in States which claim to be democratic. Indeed, in as much as the standard authority is supposed to rule on the law, all the law and nothing but the law, the judge should be shielded from any hesitation, half-heartedness. This was not the case yesterday and is still not the case today in Senegal. Is it a Senegalese or African specificity? One thing is certain, the analysis of the jurisprudence of the electoral judge in Senegal shows some element of half-heartedness, some reservation from the judge. And this can be verified in all phases of elections be they presidential, parliamentary or senate elections, simply national or local elections. However, it should be stated that, such an attitude of the election judge varies according to the circumstances or according to the phases of electoral terms.

Indeed pertaining to the pre-election period, we notice some firmness on the judge in the decisions he makes. Examples for these decisions are not uncommon. Thus, concerning presidential elections of 1993, he placed importance on non discrimination between candidates by overseeing strict adherence to the principle of equality between candidates as pertains to adherence to the time limits set by rejecting the declaration of additional candidacy of Landing Savané[14].

In another decision of the same year decision n° 3/93- Matter n° 4/E/93, the judge freed himself from the influence of the executive by declaring inadmissible the application filed by Abdou Diouf in these terms : « *Considering that if Abdou Diouf, in his capacity as a candidate for the presidential election of 21st February 1993, has a right to complain as provided by Article LO 93 of the electoral code, his application, filed on 27th January 1993 under n° 4/E/93, is time barred (…)* ».

This firmness, or rather audacity of the electoral judge remains valid for parliamentary elections. The decision n° 33/98- Matters n° 1/E/98 and 2/E/98 of the constitutional council is a perfect illustration of the same: « *Considering that rules in relation to illegibility like those which set the limits for candidacy must always be subject to strict interpretation, and should not be extended to cases which are expressly provided for* ». This decision is interesting going by what Ibrahima Diallo underlines through his comments dedicated to the said decision: « *the judge did not follow the conclusions of the executive and more in particular the minister for Home Affairs. This attitude is significant in that one the essential and primary criteria for the development of constitutional justice constitutes without any doubt the independence of constitutional judges (…). The constitutional judge can only contribute to the enhancement of democracy and to the development of the rule of law from the moment when he enjoys the possibility of opposing the executive power in place* »[15].

In the same manner, in his decision n°81- Matters n°2/E/2001-3/E/2001- 4-/E/2001, the judge remained firm to the democratic requirements when he considered that the name « Wade » and his photograph should not appear on the ballot paper of the « Wade coalition ». Such is the meaning of this argument: « *Considering that the constitutional Council deems that the principle of equality between parties or coalition of parties demand that they be treated the same…* ». The importance of such a decision in the consolidation of democracy in Senegal did not escape the attention of Professor Aliou Sall through his comments on this decision. Indeed, the author declared: « *Here indeed is one of the rare, among very many decisions in which*

[14] Décision n° 1/93-Affaire n°1/E/93 (Publication of the list of candidates for the election of the President of the Republic on 21st February 1993).

[15] -Decisions and opinions of the Constitutional council of Senegal, gathered and commented on under the leadership of Ismaila Madior Fall, CREDILA, 2008, p.206.

the Highest Senegalese Court frees itself from somewhat legal corsets which govern its jurisdiction (…) »[16]. Thus through this decision, the electoral judge, according to Professor Alou Sall introduced « *some sort of ethical requirement in the political game to the extent where he affirmed that the Head of State, who is the head of the party, is not his own, that he is also the symbol of this essential totality which is the nation* »[17].

As pertains to other phases (during and after) of elections, they are characterized by some element of fear, reservation, half-heartedness or even lack of courage and commitment of the electoral judge. In similar cases, the Court of Appeal would not be forgotten. Indeed as the constitutional judge often reminds, the judge of the Court of Appeal is responsible for overseeing adherence to the principle of equality among candidates.

Moreover, the analysis of the decisions shows uncertainties pertaining to « good faith » of the judge to ensure a strict adherence to this principle. In most cases, he merely issues injunctions as attested by this recital of the decision n° 6/93- Matters n° 7 to 12/E/93 of the constitutional council : « *Considering that as pertains to the « deceptive editing » of a report of a meeting on television, there is need to note that the Court of Appeal of Dakar (…), issued a letter on 19th February 1993 to the Director General of Senegalese Radio and Television, in which it ordered him to adhere the legal provisions relating to television broadcast of meetings organized by candidates ; That by a letter dated 17th January 1993, it also issued an order to the Chief Executive Officer of the Newspaper « Le Soleil » so that this media outlet also adheres to the principle of equality of treatment of information* ». The terms of this recital show laxity of the electoral judge on the simple reason that even if the parliament through legislation which allows him to only issue injunctions, he has the freedom to put forward his power of interpreting the law since laws are made to be interpreted.

Without running the risk of making a mistake, the phases relating to the conduct of elections and after announcement of results constitute the moments where the electoral judge show all his limits. Otherwise, it is during these phases that the electoral judge shows inertia, more laxity by looking for less convincing loopholes to the detriment of safeguarding or of the continuity of democratic requirements. This following statement although realistic remains alarming, worrying and sad: the Senegalese electoral judge has never cancelled elections while opportunities have lacked. In order to achieve this, he has at his disposal various processes.

Thus in the treatment of disputes, he is sometimes content with reprimanding applicants in order to impute their possible irregularities during the conduct of elections. For instance, the constitutional judge in his decision n° 10/93 – Matters n° 20 to 23/E/C/93 decided in terms of the recital 27: « *however, it has not been proved that the candidates of such or such political party were the only beneficiaries, that to the contrary, strong presumptions suggest that they were for the benefit of candidates for all political parties, thus, following a constant jurisprudence, the irregularities which arise therein are cancelled* (…) ».

As such, while in some cases he emphasizes on his discretionary power of evaluation, in others he hides behind or cites other instances. What comes out of this recital of the decision n° 10/93-Matters n° 20 à 23/E/93 as aforementioned: « (…); *that lastly, the issuance and use of fraudulent orders constitute criminal offenses which fall under the jurisdiction of the judicial authority* »?

[16] - op. cit., p.418.
[17] - Idem.

In some hypothesis, the electoral judge aware of the irregularities, only formulates regrets as was the case in the decision n° 6/93- Matters n°7 to 12/E/93. The terms of this recital are not ambiguous: « (…); *the fact remains that it is regrettable that the broadcast of this show by television was going to be done when the electoral campaigns are coming to an end* ». But, this decision was an occasion for the Constitutional Council to participate in the development, or rather in the consolidation of the rule of law in Senegal.

Generally therefore and according to Professor I. M. Fall showing classical attitude of the constitutional judge: « *This treats with respect which suits all arguments advanced by the candidates but requires sufficient proofs or their determining influence on the meaning of the vote so as to comply with the application. (…) Even so, the analysis of grievances formulated by the candidates and the answers given by the council show that the reasoning of the council is sometimes not susceptible to criticism because it is relevant, sometimes susceptible to be criticized because it is qualitatively insufficient*»[18]. The half-heartedness of the judge, his lack of audacity, his caution and his reservation would reside in this will not to be able to cancel elections. Why such an attitude? Professor Demba Sy who did not fail to denounce the power of cancellation of elections by the Court of Appeal seems to have found an answer: « *When the Supreme Court makes a ruling on a dispute, it does not cancel the elections, because in doing so it would be judging itself because it is supposed to have overseen the legality of the poll* »[19].

It now appears timely to carry out reforms to be able to make the electoral judge come out of this deplorable state.

B- A judge to be strengthened

In Senegal, the electoral judge is confronted with enormous difficulties in the performance of his duties. This is supported by the fact that in his jurisprudence he sometimes does not hesitate in emphasizing on these difficulties. Thus in his decision n°10/93- Matters 20 to 23/E/C/93, he declares in the terms of the recital 24 : « *that, in his conditions, the electoral judge is faced with almost insurmountable difficulties to give satisfactory solutions to the applications brought before him* ». Various phenomena would be the basis of these difficulties.

Undoubtedly and generally, the judge whether electoral or not, is confronted with phenomenon of dependency vis-à-vis the executive power even there is need to admit that theoretically, by virtue of the separation of powers, judges are independent in the exercise of their duties. Indeed, the electoral judge as an individual is always animated by this desire for advancement during his entire career. But, we know in Senegal advancement and treatment of judges depends to a large extent on the executive, which would be a handicap in their impartiality in his « professional activities ». On this basis, it appears interesting to review this aspect of the law to shield it from any subordination in respect to government authorities. Just to paraphrase Professor Kanté, when the applicants (especially members of the government) have the tendency of pushing him towards a « politicisation of the law », he should be able to resist and on the contrary lead them to accept the « jurisdicisation of politics ».

Concerning the constitutional judge taken separately, due to the heavy and numerous tasks on him, the members constituting it must be increased. The Senegalese doctrine shares this opinion for a long time concerning the former Supreme Court by estimating that the many duties entrusted to one court were significant obstacles to ensure his role as an electoral judge.

[18] - Op. Cit. , p.521.

[19] Voir, Ameth N'Diaye in her comments in relation to the decision of the constitutional council n°7/93- Matters n°13 à 18/E/93 ; idem, p.64.

On the same line of thinking, Professors Sérigne Diop and Salifou Sylla in denouncing the means of investigation in the former Supreme Court note : « *The duty entrusted to the delegates in order to carry out spot checks during the polling day (…) proves necessary inefficient and negatively affects the image of the Supreme Court (…)* »[20]. A big budget therefore needs to be allocated to the electoral judge since stability, survival of democracy, rule of law depend largely on the conduct of elections. For clarification, candidates are not very conversant with the modes of seizing the electoral judge. On this basis it would proper to organize open days.

In the same dynamics, for more credibility of the electoral judge and following Professor Kanté's comments on the constitutional judge, several strategies need to be mobilized: communication strategies comprising mainly issuance of press communiqués accompanying the decisions, not for explaining himself but to the explain the meaning and the impact of the decisions, a report at the end of each election indicating the difficulties and the reforms needed.

The other difficulty to overcome resides in the diversity of the electoral judge. Indeed, multiplicity of electoral judges leads to multiple interferences assuming sometimes a dangerous character. As Jean du Bois de Gaudusson confirms: « *Electoral disputes are in most cases characterized by a discouraging complexity for the populations brought about by sharing of jurisdictions between several judges and jurisdictional levels as well as conflicts which arise in the application of electoral laws enacted in terms favorable for different interpretations* »[21]. Jean- Claude Masclet agrees with this by saying : « *Diversity in jurisdictions does not affect the unity of the law, in the sense that the solutions given are generally based on the same principles. But this is not always confirmed. And we can only avoid subsisting jurisprudential differences or, more seriously, miscarriages of justice* »[22]. As a consequence, why not create in Senegal a unique specialized court with jurisdiction on electoral matters functioning on the basis of simple, simplistic and rigorous rules? Thus to belong to it and to sit in it, competitive entry examinations could be organized in a rigorous manner. The term of its members would be non renewable at the end of a reasonable length of time.

CONCLUSION

The problem of the elections judge or judges in Senegal in the development and consolidation of the rule of law is not only a theme which enabled us to win the bet of identification of the latter, but also to assess its contribution in this gigantic and perpetual quest for a democratic society based on changing precepts of flexible separation of powers, controlled political game and scrupulous respect of human rights. On analysis, it seems that the Senegalese legal and judicial system entrusts the regulation of elections to all judges, from the lowest court to the highest. However, there is a permanent strait which comes out and can serve as the logic for the analysis: it pertains to the preeminence reserved for the constitutional judge. The development of the constitutional justice[23] in Senegal and in Africa generally would not be the main reason for it?

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[20] Cités par A. N'Diaye in his comments relating to the decision of the constitutional council n°7/93- Matters n°13 to 18/E/93 dans, Decisions and opinions of the Constitutional council of Senegal, Gathered and commented on under the leadership of Ismaila Madior Fall, p.64.

[21] Jean du bois de Gaudusson, « *Les élections à l'épreuve de l'Afrique* », Les cahiers du Conseil constitutionnel, n°13, « *Etudes et doctrine. La sincérité du scrutin* », Dalloz, 2002, p.103.

[22] Jean-Claude Masclet, Le Droit des élections politiques, PUF, coll. « Que sais-je ? », 1992, p.313.

[23] Ibrahima Diallo, « *À la recherche d'un modèle africain de justice constitutionnelle* », Annuaire international de justice constitutionnelle, nº. 20, 2004, pp. 93-120.

Moreover, the analysis of the dispute and the practice of the elections judge gives us the image of a classical electoral judge, half-hearted to the say the least. Consequently, the contribution of the judge will only be weak, even if, in respect of some decisions delivered especially by the Constitutional Council, some attempts were made so as to set landmarks in the construction of as state governed by the rule of law, which is an ideal situation in modern societies. There is urgency today that elections, which are true barometers of a state governed by the rule of law, be well organized, well secured. This work falls in the ambit of the electoral judge despite competition from independent administrative authorities (case of the CENI[24]). In this perspective, it would be necessary to ensure, in the broader sense, conditions of true independence of the justice system, so that this judge is able to contribute to the development of the rule of law.

It is only at this cost that the electoral judge in Senegal shall become of the rule of law.

[24] National Independent Electoral Commission (CENI).

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EFFECTIVENESS OF THE RULE OF LAW IN SENEGAL

By **Moussa Sarr***

INTRODUCTION

The theory of the rule of law which first made its appearance among German lawyers[25], is today experiencing both at national and international levels, an astonishing promotion to a point that Jacques Chevallier does not hesitate talking about the phenomenon of ''*globalization of the Rule of law*''[26]. Such an expansion of the rule of law would result into the implosion of the ''Eastern Block'' and the triumph of the liberal ideology thus provoking seismic movement which shook totalitarian regimes which were built on reinforced concrete[27]. In this regard, the passion for democratic ideals practically pushed all African political regimes and the doctrine to formulate the principles of organization of power in accordance with the facts of the rule of law. As such, each African state, currently presents itself as state governed by the rule of law because the latter has become a reference, a title of respectability quoted both on national and international levels.

However, the relevancy of this theory can only be appreciated by observing the conditions of its responsiveness and its implementation, which forms the basis of this study on effectiveness of the rule of law in Senegal. This country, the scope of our reflection, enjoys an old political tradition and the national feeling has already been well affirmed. It is the reason why everyone affirms the Senegalese experience initiated by President Senghor and pursued by President Abdou Diouf demonstrated, contrary to pessimistic predictions by some political scientists on the governability of multiparty democracies in Africa[28]. The emergence of multiparty democracy in Senegal before the first waves of democratization swept across Africa in 1990 showed clearly that the leaders of this state always got down to give effect to the existing standards. This significant progress in democratic matters have been made possible thanks to putting in place institutions susceptible of guaranteeing respect, promotion and protection of human rights since it is true for some that : « *in the perspective of a state governed by the rule of law, the judge appears to hold to the vault and the condition to its attainment* »[29]. It is therefore for this reason the rule of law rests on constitutional timepiece composed of mechanisms of « checks and balances », reciprocal control between powers, meant to avoid abuses arising from concentration or rather confusion of power for the benefit one organ. Accordingly, the constitution plays the role of a catalyst in the State in that it determines not only the relations between different organs but also offers guarantees to citizens. It is for this reason the Dean Hauriou states that the constitutional normative is comprised of two dimensions one being « political » devoted to the organization and functioning of the state, the other being « social » relating to rights and freedoms of the citizens[30].

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[25] Voir Leisner (W), ''L'Etat de droit, une contradiction ?'', in Mélanges Eisenmann, Paris, Cujus, 1974, pp.65 et S

[26] Chevallier (J.), '' La mondialisation de l'Etat de droit'', in Droit et Politique à la croisée des cultures, Mélanges Phillipe Ardant, Paris, LGDJ, 1999, pp. 325 -337

[27] Dounkeng Zele (C.), '' L'Etat de droit face aux défis de son effectivité en Afrique'', in Annales de la faculté des sciences juridiques et politiques de l'Université de Dschang, tome 8, 2004, p.189.

[28] Gérard (C.), '' Les processus de démocratisation en Afrique'' in L'Afrique en transition vers le pluralisme politique (S/Dir.) de Gérard Conac, Colloque des 12 et 13 décembre 1990, Paris, Economica, p.25.

[29] François DELPEREE le Renouveau du Droit constitutionnel, in Revue Français de Droit constitutionnel, n° 74 avril 2008, page 457.

[30] Maurice Hauriou, Précis de droit constitutionnel, Sirey, 2e édit. , p. 624.

This idea of Professor Hauriou rejoins the letter and spirit of the thinking of the French revolutionaries who through Article 16 of the Declaration of the Rights of Man and the Citizen of 25th August 1789 stated that: « *any society in which the guarantee for rights is neither ensured, nor determined separation of powers does not have a constitution* ».

However, are we in a position to verify the degree of application of the principles of the rule of law in Senegal? In the light of being able to get answers for such a question, we need to examine the contours of the notions, Rule of law" and "effectiveness".

However, it is necessary to emphasize that it no longer matters to debate on the multifaceted and multicolored spectrum of definitions proposed by abundant literature, since from a usual definition, ''The rule of law'' means *''submission of the State to the law''*[31]. In other terms, the rule of law organizes a body relatively coherent not only representations (power, law, freedom), but also practices which comfort and renew at the same time modern organization of social dominations. The finality of the rule of law is therefore attained from the instant when the law offers to citizens guarantees of protection and sufficient institutions against the powers of the State. It evokes a strict legal regulation of social relations and involves the submission of everyone, including the State and his head to the law.[32]

But, if we leave the domain of intellectual speculation to that of effectiveness, we notice that there are differences between theory and practice of the rule of law in Senegal.

It is therefore for this reason that the relevance of these concepts cannot be assessed on condition that we tackle the social, political, economic and cultural context. In other terms, in Senegal, « *the magical presence of the law* »[33] is not enough to guarantee its application. Effectiveness means a concrete application of the principles of the rule of law, in accordance with its letter or in the least its spirit, meaning at the intention of its maker. It essentially arises from the acceptance of the rule by its subjects[34]. A norm is effective if it translates into facts through observable behaviors and is in conformity with the purview of the norm in question. Judgment of effectiveness is accordingly, a judgment of reality and existence and not a judgment of values[35]. In other words, as a legal phenomenon, ''the State and the Law'' cannot be separated from social formation, seen as a coherent unit of diverse, material and cultural elements, linked to one another, linked in constant interaction and in perpetual movement (hence the idea of historical trajectory highlighted by Perry Anderson and continued by J.F. Bayart)[36]. It therefore follows that effectiveness, which measures the differences between the rule of law and its application, « tends therefore to be confused with efficacy, which enables assessment of results and social effects of the law, and with efficiency which consists of verifying that the objectives assigned in accordance with the law have been attained at the best cost »[37]

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[31] Cf. Lexique Droit constitutionnel, Paris, PUF, 1991, p.49, également Dictionnaire constitutionnel, Paris, PUF, 1992, pp. 415 -418.

[32] Dounkeng Zele Champlain, L'instrumentalisation ou les usages politico-juridiques de l'Etat de droit, in '' Annales de la Faculté des Sciences Juridiques et politiques", Tome 4, Presses Universitaires d'Afrique, 2000, p. 194.

[33] Seurin (J-L) : « Les fonctions politiques des constitutions. Pour une théorie politique des constitutions », in Seurin (J-L) (S/Dir) : Le constitutionnalisme aujourd'hui, Paris, Economica, 1984, p.45.

[34] For a detailled study of the concept of effectiveness of the law, see Rangeon (F) « Réflexions sur l'effectivité du droit », in Les usages sociaux du droit, Paris, PUF, 1989, pp.126- 149 ; Lire aussi Carbonnier (J) : Flexibilité droit, textes pour une sociologie du droit sans rigueur notamment le chapitre 11 sur l'effectivité et l'ineffectivité de la règle de droit, 5e édition, Paris, LGDJ, 1983, pp.125 -137

[35] Slim Laghmani : « L'effectivité des sanctions des violations des droits fondamentaux, Développements récents », in L'effectivité des droits fondamentaux dans les pays de la communauté francophone, Montréal, Editions AUPELE-UREF, 1994, p. 541

[36] Pierre François Gonidec, l'Etat de droit en Afrique. Le sens des mots, in ''Revue Juridique et politique Indépendance et Coopération", Ed. Juris Africa, 53e année n° 1, janvier-avril 1998, p.3.

[37] Rangeon (F), op, cit. p.127.

As for ineffectiveness, it means, on the contrary, a failure, a gap, a default of the rule of law, a refusal of the legal regulation or indifference in its respect.

However, the practice of the rule of law has been and remains an ideal rarely attained. It cannot arise from a simple statement of intention written in such or such constitution. It therefore follows that the rule of law can only exist if the reality of social relations is organized according to its principles. It is a pure concept whose existence can be noticed or not, and which sees that socio-political relations are governed by the law.

Despite institutional reforms or normative revolutions operated in Senegal in view of consolidating the rule of law, its effectiveness is always a problem.

These different considerations enable us to ask ourselves the following question: what is the level of realization of the principles of the rule of law in Senegal? In other terms, are the different processes to which the Senegalese people committed themselves or sometimes imposed by external players pointers to the effectiveness of the rule of law in Senegal?

To this question, we are in a position to reply in that with respect to the multiplicity and the diversity of players all committed, to ensure in a better adherence to democratic principles and the rule of law in Senegal, that the effectiveness of the rule of law in this country is an incomplete process, but which remains irreversible.

Our reflection will thus be articulated around two axes, in the first place, we are going to examine the incomplete character of the process of effectiveness of the rule of law in Senegal (I) before demonstrating that this process is henceforth irreversible (II).

I/ Effectiveness of the rule of law in Senegal: A process still incomplete.

The realization of the rule of law in Senegal still has multiple gaps. These gaps are due to several reasons (A) and comprise a certain number of consequences which deprive the rule of law of its true content (B).

A- Reasons for difficult emergence of state governed by the rule of law in Senegal.

The effectiveness of the rule of law in Senegal experiences a certain number of difficulties. These difficulties are inherent on the one hand to the existence of authoritarian signs (A) and on the other hand to a socio-ideological environment which obstruct its growth (B).

1- Persistence of authoritarianism as a sign of pathology of the rule of law in Senegal.

Although Senegal has experienced a democratic process without major crisis, there is need to emphasize that her Heads of State just like other African leaders had put in place constitutions which suit them. It is in this framework that an author declared that: « *The constitutions adopted after accession of sovereignty for African States did not foresee a limit in the number of presidential terms. With the help of single party democracy, it was therefore easy for the incumbent Head of State to be reelected indefinitely, more often exclusively as the sole candidate. Life presidency in this regard became the norm in Africa, at the very least longevity in power defied any democratic logic* »[38].

38 For examples, between, Ahmadou Ahidjo in Cameroon, 24 years in power (18th February 1958- 4 November 1982) ; 20 years (5

Thus, in Senegal, the constitutional crisis of 1962 changed her political card as indicated clearly by Professor M. Hesseling who emphasizes that : « *the first period of the second Senegalese Republic was placed under the sign of a violent combat against parties… at the establishment of a presidential regime besides , multiparty system is done away with.*»[39]

This situation gave rise to the adoption of a new constitution on 7th March 1963 which put in place a ''*republican monarchy*''. In this regard, the President of the Republic of Senegal, Léopold Sédar Senghor, called upon African history so justify the establishment of a presidential regime in his country and the concentration of power in his hands by affirming that: « *In 1960, we had not well considered the fact that in Europe, the bicameral parliamentary regime was a product specifically western Europe. Democracy in Africa, for thousands of years, is a democracy which is firmly hierarchical, with one crown on one head* »[40]. This same reference of the African tradition was used and abused by Mobutu Sese Seko Head of State of Zaire for over twenty years. Asked about the experience of multiparty system in Senegal in May 1989, after the Francophone Summit in Dakar, he answered that ''*the African chief does not share his power*''[41] From this conception of power came out, a systematic totalitarianism which swept in Africa the protective mechanism of rights and liberties. Hence the relevance of the words of the President of the Bar of Senegal during the opening of courts and tribunals in year 1982 when he said : « *the theory of separation of powers is an imported myth and which is trying to justify itself with difficult. Positively, it is nowhere in our laws except by allusions to international references (…) .Historically, it is foreign to us* »[42].

In this regard, at the formal level, there is need to note that even if the constitutions of the first wave (in the 1960s) sanctioned democracy, proclaimed the rule of law and safeguard of human rights nevertheless, with time, in place of these declarations of intentions, we noted the establishment of ''*constitutional dictatorships*'[43]' about everywhere in Africa. Accordingly, we could notice distortion between democratic constitutional etiquette and autocratic management of power. It is in this thinking that Pierre Gonidec based his argument to say, « *even if, formally, the State continues to be governed by a constitution, it would only to give itself a good image on the international scene, or by fetishism, we can observe that, in several case, the constitution is only a simple facade behind which hide a political regime least bothered about constitutionalism as a technique for limitation of power* ».[44]

It is also in the wake of this, that in order to face the protest movements which were developing in his country, the field marshal president would answer without beating about the bush that the single party, of which he is the founder, « *is neither right wing nor left wing, but an authentic party* ». What his colleague Eyadema of Togo, would say : « *Neither right wing, nor left wing, forward !* ». It clearly pertains here, a strange interpretation of the African

september 1960- 31 décembre 1980) for Léopold Sédar Senghor in Senegal ; 30 years (25 september 1957- 7 November 1987) for Habib Bourguiba in Tunisia ; 34 years (1 may 1959- 7 December 1993) for Houphouët-Boigny in Côte d'Ivoire ; 38 years to date for Omar Bongo in Gabon ; 19 years (26 october 1972- 24 march 1991) Mathieu in Benin before the transition ; 23 years (28 march 1969- 26 march 1991) for Moussa Traoré in Mali ; 38 years (14 April 1967- 2005) for Gnassingbé Eyadema in Togo ; 17 years (14th June 1975- 25 november 1992) for Didier Ratsiraka à Madagascar etc. Cited par J.F. wandjik in Revue Juridique et Politique des Etats francophones 61 année n° 3 juillet- Septembre 2007, p.276.

[39] Gerti Hesseling, Histoire politique du Sénégal, Institution, droit et société, p.251

[40] Propos de l'ancien président sénégalais Léopold Sedar Senghor cités par Albert Bougi, Christian Casteran, Le printemps de l'Afrique, Hachette 1991, p.31.

[41] Rapporté par A. Bourgi et Ch. Casteran, Le printemps de l'Afrique, Hachette, 1991, p.30.

[42] Extrait du Soleil du 5 novembre 1882, p.10.

[43] L. Dubois cité par P-F. Gonidec, '' Constitutionnalismes africains" in RADIC, Mars 1996, Tome 8, n° 1, p.26.

[44] P-F Gonidec, introduction générale sur l'étude comparative des systèmes juridiques in « Encyclopédie juridique de l'Afrique » tome 1, 1993, p.25.

specificity, since this simply forgetting that in pre-colonial Africa, « *those who elected the chief had also the power to remove him if he did not fulfill his obligations in a satisfactory manner* ».

It is also necessary to state that in Africa, life presidency was the norm, to say the least longevity in power defied any democratic logic. Accordingly, those who did not die transferred, but in testamentary impetus, power after many decades at the helm, to a successor of their choice, without popular consultation. In Senegal and in Cameroon, the Prime Minister is furthermore is the appointed heir apparent of the Head of State in case of the office of the President of the Republic falls vacant, a provision which enabled Abdou Diouf and Paul Biya to succeed Senghor in 1981 and Ahidjo in 1982 respectively.

However, questioning the rule of law in Senegal is justified by ideological and sociological factors.

2- Socio-ideological environment and inhibiting burdens of the rule of law in Senegal.

The idea of subjection to the rule of law, come up against the fact that state controlled model of the west which was adapted to it recovers uses and practices fundamentally different. This lack of coherence between the two systems is explained by several reasons.

The real functioning of a state controlled institution does neither correspond to the system of values nor to notification network which prevail in the African society. It is therefore in conformity to the dominant ideology favorable to the constitution of States-Nations and, in any event, to the reduction of socio-economic differences, the African leaders tried to unify the law so as to strengthen their power.

On a number of ideological elements lie *'false alibis which fooled the State in Africa in illusions''*[45], we can retain: the myth of national unity and the developmental premise.

The myth of national unity, whose development was supposed to be ensured by the single party system, remains work which never started[46]. In trying to cover the reality of the phenomenon, we rather encouraged the logic of an African laboratory of experimentation and arbitrariness, all this maintained by an equivocal doctrine in matters pertaining personal rights. This reality was neither justifying nor Eurocentric delights, nor enormous dreams, nor indecent fatality[47]

As to developmental premise, it contributed to justify the logic of strong state despite contrary experiences. By making development the standard value of democracy, this doctrine hardly got rid of cultural imperialism which we deplore today. The democratic claim which is first of all a claim of freedom is beyond cultural borders which fall outside practices of power more inclined to their denaturation[48]. This position was later defended by Emerson when he wrote : '' *regimes of a man and a party are necessary in Africa, precisely because these nations lie on fragile foundations and that they are faced with urgent and monumental tasks of integration and development''*. By taking care to justify the big doctrinal ''hypocrisy'', in these terms : '' *for a population which still has not attained the lowest degree of political formation, the feeling of national*

[45] Marcelin Nguele Abada, Démocratie sans Etat : Contribution à l'étude des processus démocratiques en Afrique in '' Revue de la commission africaine des droits de l'homme et des peuples", tome 7, 1998, numéro 1, page.2.
[46] Ibid. ; également Mélanges à Gonidec, LGDJ, 1985
[47] Cf. R. Aron, Essai sur les libertés, Paris, Calmann-Lévy et Coll. ''pluriel'' 1977, p.81
[48] V. Georges Bernanos, Français si vous saviez, Paris, Gallimard, 1961, p.158.

identity shall probably be easily created by concentration of political attention not only on a single party, but on a single leader''.[49]

Other reasons justify the attitude of African leaders to choose authoritarian systems.

Thus, some think that under development in Africa does not go together with putting in place a democratic regime. This is the position defended by theorists of « modernization » who combine capitalist development and adoption of western model of democracy. A situation which is not totally acquired. Besides, some used to affirm that democracy would constitute not a luxury, but also an obstacle for a government hitched up to the pursuit of development[50].

Beyond the obvious demagogy of this thesis, it deeply pertains to a unitarian vision very reductionist. This doctrine implied that democracy and economic development went hand in hand. 'Accordingly the underdevelopment situation would be an unsuitable framework for democracy according to the developmental school of thought: *De ce fait la situation de sous-développement serait un cadre impropre à la démocratie selon l'école.'*

This connects authoritarian regimes to development stages on the path of modernity, a process during which they meet various conditions and functional demands and of which they constitute a suitable moment [51] a situation which is fairly antonymic and no matter the interest of the developmental doctrine, the direction given to the analysis of the systems mainly African, is in principle, just like elsewhere, marked by economic dimension as a parameter of democracies and dictatorships. Although it can serve as barometer for the assessment of African political systems, this developmental school of thought does not allow taking into account development of political systems today as before the transition.[52]

Other factors can be responsible for the failure to apply laws in Senegal. These are at this time due to sociological factors.

At the first elementary level there is a problem of knowledge of existence of the law. For the so called "modern" law of western inspiration, it assumes the publication of laws in an official report: official gazette or bulletin etc. however, not only are these laws meant for populations of which the majority are illiterate but also among the literate one more than half do not read or have no access to these documents. Thus, the principle according to which ''*ignorance of the law is no defense*'' is confronted with difficulties on Senegalese land. To this can be added the informal religion in different areas. Thus, at the margin of the normal production sector, the informal sector has the tendency of avoiding the application of the official law. It is thus in the extent where, the politics of the state has changed with time. Against the application of official rules of the law which tend to be general, the marginal one makes the informal sector normal. This is why the State first adopted a repressive attitude, then social costs of adjustment which led it to ease the repression, to a point of more or less tolerating it according to his degree of social usefulness and the degree of attainment of legality.

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[49] R. Emerson, '' Parties and national integration in Africa", in J. La Palombara, M. Weimmer (éd.), Political Parties and political development, Princeton, New Jersey, Princeton University Press, 1966, pp.296-297

[50] V S. Huntington, Political order changing society, 1968. D'ailleurs, Jacques Chirac s'est fait le défenseur de cette thèse lors d'une visite à Abidjan en février 1990. Il avait déclaré que la démocratie est ''un luxe pour l'Afrique"

[51] J-F Bayard, L'analyse des situations autoritaires, étude bibliographique, Revue française de Science politique, 1976, n° 3, pp. 483-513. Les études de Rostow illustrent bien cette tendance. Cf. Les grandes étapes de la croissance économique, Paris, Seuil, 1967 ;

[52] J-F Bayard underlines certain" bottlenecks" faced by developmentalist theses: first the matter of " tying back authoritarianism to levels of special developments" which according to him postulate their transitory and temporary character, and thereafter a "dichotomy vision of the tradition and modernity" which moves the worries and make the demonstration deceptive.

In this respect there is need to note that there is also parallel justice beside official justice. The former is delivered by authorities who are sometimes traditional authorities appointed by the law, even by the constitution itself, or by authorities who do not legally have the power to judge (polices, security officers, religious authorities). What M. Kéba Mbaye systematized in his terms : « *In black Africa, passiveness is the norm, majority of the population lives in fear of the State and outside the State*[53] ».

These different reasons lead to a certain number of consequences which justify multiple imperfections of the theory of the rule of law in Senegal.

B- Consequences of the difficult gestation of the rule of law in Senegal.

The latter are on the hand inherent to infringements on the supremacy of the law (1) and to different threat which weigh on respect of fundamental rights on the other hand (2).

1- Magnitude of infringements to the respect of the supremacy of the law.

Just like democracy, the rule of law remains a permanent trait of African constitutions. It is analyzed as a condition necessary for the realization of democracy which, in its turn can perfect it. In all cases, the rule of the law is supposed to express an idea which is otherwise well known. It pertains to a system in which the State is subjected to laws which limit its power and guaranteeing the respect of human rights, in particular by way of recourse to judicial settlements[54]. Despite solemn declarations on the rule of law and an institutional engineering sometimes sophisticated, putting in place, mainly in favor of new constitutions, it is necessary to measure in this party the operational dimension of these declarations of principle with the practice in Senegal.

On this basis, there is need to state that the political history of Senegal show a series of infringements to the principles of the effectiveness of the rule of the law. This is therefore on the supremacy of the party on the Constitution. It is for this reason that President Sédar Senghor declared: « *Our constitution allows multiparty democracy (but) I do not recommend it* »[55] .

As a consequence there is a parallel between « *the constitution which draws the architecture of facade and the status of the party, and a true constitution of fact, which regulates internal and effective life of the State* ».[56] In these conditions, the organs of the state cannot in the least be opposed to those of the party. Thus, the national assembly appears like a chamber of rubber stamping orders of the Head of State. Just like the National Assembly, the justice system is under the strict authority of the ''big boss'' who appoints judges, exercises administrative and financial supervision, transfer them, if need be to the ''operational requirements'' and chairs the Higher Council of the Judiciary, the organ responsible for advancement and discipline of the judges. This is to say that the independence of the justice system in Africa, including Senegal, is a big dream.[57] This attitude vindicates the words of Schwartzenberg when he affirmed that: « *The head of the party-State was both the master and the symbol. The key of the vault for institutions, he only imagines of commanding only, to govern without sharing* ».

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[53] Kéba Mbaye, in Revue des droits de l'homme, 1969, Vol II, p.391.

[54] The rule of law was introduced in the French law by Carré de Malberg from 1920 from the German idea of « Rechsstaat ». It started expanding from the 1970s.

[55] Cité par P-F Gonidec, Les systèmes politiques africains, Tome 1 , p 309.

[56] Cf. G. Conac, Les constitutions des Etats d'Afrique" Paris, Economica, 1979, p.403.

[57] This incontestable fact was confirmed by the team of M. pierre Lyon- Caen, Prosecutor of the High Court of Nanterre, during a conference organized by ENM of France from 25 to 26 June 1991, on the theme'' Justice and Democracy". See also title 7 of the Senegalese Constitution of 1963 and title 8 of the new Senegalese constitution of 2001.

Other signs can also lead to putting into question the rule of law in Senegal: electoral processes are more and more broken down; we are witnessing revival of violence, and a decline of social well being. Therefore many signs which show that, despites some facelifts, arbitrariness has still better days to come and that solemn declarations are not, themselves alone, sufficient to attest an authentic rule of law in Senegal. The mechanisms, even the most sophisticated, seem to be far from guaranteeing the subjection of the State to the law ; and a true protection of fundamental rights. More so in Senegal, the external view does not always correspond to the internal reality. Such a table thus enables to apprehend better the observation of Professor Yves Gaudemet concerning the rule of the law when he wrote: « *The rule of the law is not in the legislation; it is in the minds and morals. It presupposes stability, conviction, adherence to the rules which the legislator is limited to express* ».[58]

Infringement of the principles of the rule of law constitutes also a threat to respect of the fundamental rights.

2- Threats to respect of fundamental rights.

Respect of fundamental rights remains a permanent trait of the rule of law. Fundamental laws, following international instruments, are much more involved in the rule of law than democracy and the rule of law, through the position reserved for them. In these regard, the Senegalese constitution of 2001 provides in Article 7 that: « *the human person is sacred. It is inviolable. The State has the obligation of respecting it and protecting it….* ». This Senegalese constitution, not only develops a list of human rights, but reserves a whole chapter which is the first on well before the chapter on public powers. However, this process of constitutionalism of fundamental rights would not constitute an effective mechanism of their protection. Thus, multiple threats obviously weigh on the fundamental rights and which is often the matter with state controlled authorities.

To the number of obstacles in the exercise of the freedoms constitutionally protected, we can cite: banning of demonstrations by administrative authorities for reasons related to disturbances of law and order and also arbitrary detentions and arrests.

Thus, in 2003, Senegal, a country which is usually cited as an example in matters pertaining to respect of freedom of expression was the land of election for the violation of freedoms. Some references illustrate this phenomenon: on the night of 5th October 2003, some unknown people tried to assassinate Talla Sylla, the leader of the opposition party Jef-Jel. Explaining the reasons assassination attempt, on 15th October 2003, the directors of publication of private newspapers Walfadjri and le Quotidien were interrogated at the police station of Colobane.

In the same vein of infringement on the freedom of expression, El Hadji Ibrahima Fall, journalist of the daily newspaper L'Info 7, was attacked on the night of 23rd June 2003, by agents of the Mobile Intervention Unit (GMI), who burnt his notepad and destroyed his camera. He was covering the expulsion of sculptors from the craft market of Soumbédioune in Dakar. At the end of July 2003, Abdou Latif Coulibaly, journalist and director general of Sud-FM, was a victim of repeated threats. He had published on 12th July, a book criticizing the Head of State which had the title: « Wade, an opponent in power: change of power trapped? ». The list for arrests, violence or detentions is long[59].

[58] Yves Gaudemet, L'occupation privative du domaine public, Mélanges en l'honneur de Guy Braibant, Dalloz, p.309.

[59] Lire à ce propos. , Frank Wittmann, La presse écrite sénégalaise et ses dérives dans Politique africaine n° 101-mars-avril 2006, p. 184

Nevertheless, it is important that, in a State governed by the rule of law « *freedom be the rule, police restriction the exception* »[60]. It is in this framework that the ruling of the State Council of 25th November 1999 intervened, Democratic League- a movement for the Labor Party (LD /MPT) versus Sénégal[61], where the judge for the State Council cancelled prefectural decision by considering that: « *when the prefect tends to stop a walk, he must give the reasons on which he bases his decision to enable the State Council to exercise normal control* ». This list of banning demonstrations for reasons of disturbance of public order was applied on the organization of a walk planned by the opposition on the day of inauguration of the monument for African renaissance on 3rd April 2010, which was lifted this time round thanks to the intervention of a religious leader. These different bans are contrary to Articles 8 and 10 of the Senegalese constitution of 2001 which provides for freedoms which include those relating to demonstrations, meetings, etc.

The sword of justice is added to this scene, which is already dark, by imposing, blindly and without any mitigating circumstances, heavy sentences of fines on independent press or opposition to a point forcing them to close down.

The most topical example is given by Senegal in the matter of CSS/MIMRAN versus Sud communication. The newspaper Sud communication was condemned in July 1996 by the lower court of Dakar to pay five million (500000000 FCFA) as damages.[62]

There is also need to note that a culture of impunity of law exists in Senegal. The amnesty proposed by the Isidore Ezzan MP and voted by the National Assembly in 2005 illustrates well this practice of impunity in Senegal. Indeed, it was pertaining by this law, to granting amnesty to all those who committed crimes since 1993 until the adoption of this law, and to those responsible for assassination of the former president of Constitutional Council, Babacar Seye Advocate . The seriousness of this impunity provides that the public powers intervene directly to take measures in view to absolve those who commit serious and massive violations of human rights. Thus, it confers to those who committed crimes jurisdictional immunity, meaning the guarantee to be shielded from any legal proceedings[63].

Confrontations due to problems of gold mining in Sabadola in 2008 between Senegalese law enforcement forces and the residents of Kédougou, a new region which is situated in the East led to loss of human lives.

With all these violations of human rights and where those responsible were identified without being brought to justice show that human rights are threatened in Senegal.

However, we should not lose sight that even if the practice of the rule of law is not complete, it remains today an irreversible fact in Senegal.

II- Anchorage of the rule of law in Senegal, an irreversible process.

Enhancement of the practice of the rule of law in Senegal is as a result of several factors : it pertains on the one hand to the action of political leaders who worked to break down the decline of the rule of law (A), thereafter, an awakening of pressure groups at internal level

[60] C.E 10 août 1917 Baldy.
[61] Voir Bulletin des arrêts du Conseil d'Etat de 1999, p.26.
[62] Le jour n° 434 samedi et dimanche 6 et 7 juillet 1996, p.5
[63] René Degni-Ségui, '' Les droits de l'homme en Afrique noire francophone" (Théories et réalités), Abidjan, 1998, p.176.

and the existence of an opposition, which participated in the consolidation of democratic principles (B), lastly, the international dimension also constituted a paradigm, bearer of principles guaranteeing the implementation of the rule of law in Senegal (C).

A- Development of the rule of law in Senegal, a perpetual building site for governments.

The merit of different regimes in Senegal resides in the fact that each one of them has had to bring its spirit with a view to prevent infringements on the principles of the rule of law. This is why, it would be important to first examine the efforts agreed by the governors in matters pertaining to respect of democratic principles (1) and what pertains to the promotion and protection of fundamental rights on the other hand (2).

1- Implementation of the rule of law in Senegal, a governmental practice before the first waves of democratization in Africa.

African states that attained independence by adopting multiparty democracy moved away from it very early. It followed that during the last three decades, single party system of governance became the norm almost unanimous and the multiparty system in Senegal was the exception.[64]. Just before 1990, only one State, Senegal, had, among eighteen others, an experience of multiparty system of governance. This multipartism experience, from the rest, different fortunes, was not imposed without difficulties, as its development can attest[65].

Senegal is one of the Sub-Saharan African countries whose "democratic" reputation is well established, her image at the international level is that of a moderate country, which since independence has neither had a *coup d'état*, nor succession crisis. If for long, Senegal had experienced a regime of a *de fact*o single party, it was relatively a short period (1966- 1974) and according to modalities certainly authoritarian, but never tyrannical or totalitarian as was the case in most African countries[66]. This democratic opening was also manifested in the field of information: the new press code was adopted in 1979, and, in the 1980s, several satirical and opposition newspapers show the light of the days.

Putting in place multipartism by Senegalese political leaders contributes to the process of democratization of her political system. Indeed, such a system offers the possibility to the people, the true repository of power to choose its leaders. Thus, in terms of the provisions of Article 3 of the Constitution of 7th March 1963 '' *political parties contribute to the expression of elections. They are a maximum number of three and must represent trends of different schools of thought. They are supposed to respect the principles of sovereignty and democracy and to conform to those they claim etc.* '' This constitutionalization of political parties justifies the possibility of political change of power, which is another fundamental principle of democracy. But, democracy would not have existed without the rule of law. Indeed, ''*the latter is analyzed as a necessary condition to the realization of democracy which, in turn, can perfect it. The two notions are closely related that separating them becomes artificial. This is why constitutions bring them together without losing sight of their specificities*''[67].

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[64] René Degni- Ségui, op, cit, p.153.

[65] Ibib., p.155

[66] Christian Coulon, La tradition démocratique au Sénégal. Histoire d'un mythe, in Démocraties d'ailleurs, démocraties et démocratisations hors d'Occident (S/Dir.) de Christophe Jaffrelot, édit., Karthala, 2000, p.67.

[67] Ibid. p.39.

This solid experience relating to the practice of the rule of law experiences a fortune in Senegal. Too, when Abdou Diouf succeeded President Senghor, it was judged both realistic and more democratic to embrace full multiparty system of governance. Senegal was then able to get back together again with the parliamentary system of governance. Opposition was accepted and, thanks to freedom of the press, it was able to express itself freely, not treating its attacks among leaders. Presidential elections which became competitive no longer had the significance of a rite for massive legitimization.[68] This primacy of the rule of law was also felt by putting in place of a policy of promotion and protection of rights constitutionally established.

2- Adoption of political and jurisdictional mechanisms for the promotion and protection human rights by Senegalese public authorities.

African states after a long night of colonial oppression, appeared at the time of attainment of independence, wearing the heart of ''Republics of human rights''[69]

Concerning Senegal, efforts falling under the framework of promotion and protection human rights in the constitution was realized by successive regime through instruments of reference at the international level and in the regional level. Thus constitutions adopted by the Senegalese legislator, solemnly affirm, their adherence to principles of the United Nations Charter, Universal Declaration of Human Rights of 1948, Declaration of the Rights of Man and of the Citizen of 1789 etc.[70] The Senegalese constitution of 2001, adds the United Nations conventions on women and children rights, African Charter on the Rights and Welfare of the Child of July 1990.

On reading different constitutions, we notice that the common denominator of all the aforementioned declarations remains human dignity, a postulate unanimously admitted by all trends of political, philosophical, moral or religious thinking, as Professor René Dégni-Ségui wrote, «*…human rights, at the least basic rights and fundamental freedoms, are consubstantial to the human person, that is to say inherent to man. In other terms, fundamental rights and freedoms form an integral part of man* »[71]. This is what led to the Senegalese constituent, through the provisions of Article 7, to dedicate sacredness, inviolability and inalienability of human person, and furthermore, the articles which follow enumerate rights and freedoms granted to citizens. However, Senegalese constitutions are not content with dedicating human rights; they were also preoccupied with their protection by organizing at jurisdictional level sanctions for their violation.

In this regard, there is need to note that effectiveness of the rights proclaimed is observed through general control of legality. This consists of «*establishment by an appropriate organ that a legal act enacted by a public authority was taken in violation of the Constitution and consequently deprived of any legal force* »[72].

It is within this framework that the State Council of Senegal had annulled the decision to ban a demonstration organized by LD/MPT in 1999 by believing that the reasons advanced by the administrative authority were both illegal and insufficient to justify such a ban.

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[68] Gérard Conac, op, cit. p.83.
[69] Michalon Thierry, '' La recherche de la légitimité de l'Etat", dans la Revue française de droit constitutionnel, n° 34, p. 289.
[70] See Preamble of the Constitutions of Senegal since 1960 à 2001.
[71] René Dégni-Ségui, Les droits de l'homme en Afrique noire francophones, Théories et réalités, 2° édition, CEDA, Abidjan, 2001, p.15.
[72] Bernard Chantebout, Droit constitutionnel et science politique, 17e éd., Economica, Paris, 2000, p 54.

This control of legality is a consequence of the hierarchy of legal standards, regardless of the organ responsible for the control, because « *from the basis of kelsienan theory of legal system, legal rules are superimposed to form a pyramidal structure where the constitution is found at the apex* »[73]

With the aim of ensuring adherence to effective application of the pyramid, Senegal put in place a control. In this regard Article 92 of the Senegalese Constitution of 2001 submits the control of legality for legal actions (laws and regulations) in relation to human rights to the system applicable to constitutionality of laws. Thus, Senegal like other Francophone states has a Constitutional Court known as the Constitutional Council which, through the reforms of September 2008 instituting the Supreme Court, constitutes one of the Chambers of this court.

There is also need to emphasize that techniques for human rights protection were implemented in Senegal. These techniques vary in accordance with the legal act in question and a law or a regulation.

In the first place, the protection is organized within the classical framework of the dispute for annulment of administrative acts, an objective dispute since it pertains to a trial on an act which infringes on the rights dedicated by the Constitution[74]. The decision delivered by the *Supreme Court of Senegal dated 6th February 1974, is an illustrative example of this matter*.[75]

On the other hand, when it pertains to individual rights, the initiative for this type of control does not arouse any particular difficult since the act being punished presents a grievance: the interest and the quality to act by the applicant are obvious and, in his control, the judge of excess of power is faced with « *a confrontation between the act criticized and the law. Abuse of power is synonymous to an illegality* ».[76] . The decision *delivered by the Supreme Court of Senegal in 1978*[77] intervened under this framework. However, the process of consolidation of the rule of law was especially set in motion by internal pressure groups constituted by opposition parties, civil society etc.

B- Human rights, a resource mobilized by internal players for the consolidation of democratic principles and rule of law in Senegal.

In relation to enhancement of the rule of law in Senegal, some groups can also be considered as being the real promoters. This is in the first place the political opponents (1), and other pressure groups, be they civil society, media, organizations for promotion and protection of human rights etc. (2).

1- Influence of political leaders within the framework of enhancement of the rule of in Senegal.

Human rights, the principal instruments of fight for independence in Africa, also served as the framework for the establishment of multiparty democracy in Senegal. It is for this reason the Senegalese constituent put in place the right to opposition among the rights

[73] Mouhamadou Mounirou Sy, La protection constitutionnelle des droits fondamentaux en Afrique, L'exemple du Sénégal, l'Harmattan, Paris, 2007, p.73.

[74] Cf. André de Laubadére, Jean- Claude Vénézia et Yves Gaudemet, Traité de droit administratif tome 1, 12e éd., LGDJ, Paris 1992, pp.441 et suiv, besides the appeal for abuse of power, Professor René Dégni, Ségui includes the exception of illegality before the judge ruling on an administrative matter in the techniques of control of respect of human rights. Cf. op. cit., pp.142-143.

[75] In this matter, the judge believed that the constitutional provisions link administrative authority and it is for the administrative judge seized for the appeal for abuse of power to sanction the actions overlooking the constitutional provisions.

[76] André de Laubadére et autres, op.cit., p.444.

[77] The Senegalese judge through this decision believed that the exclusion of a student does not fall under the framework of the powers of the President of the Republic but falls under the jurisdiction of the disciplinary council

and liberties constitutionally proclaimed. Thus, at the dawn of independence in Senegal, there was an emergence of opposition parties which had, among others the desire to get power and consolidate the supremacy of the law. Such goals constituted essential elements in the democratization process of the Senegalese political system and the tendency of state controlled authorities to observe and enforce the law.

In this regard, it would appear important to note that the Senegalese regime embarked on politics of democratization before most of the African countries (this means before the first waves of democratization in Africa in 1990).

From 1974, with the formation of Senegalese Democratic Party (PDS), of Abdoulaye Wade Advocate, the current President of the Republic of Senegal. In 1978, a constitutional reform organizing an official three-party government which enabled in the same year opposition parties to sponsor candidates for parliamentary and presidential elections. Finally in 1981, the new president Abdou Diouf, inaugurated his term by repealing the law on limitation of the number of parties and enacting legal provisions restoring powers on electoral matters to the Supreme Court[78].

The opposition parties therefore became ''secular hands'' for safeguarding the democratization process undertaken by Senegal from independence. President Léopold Sédar Senghor had to give fame to this early nationalist interpretation of African humanism, even pleading this historical depth to support that Senegalese democracy had nothing to copy from the West.[79] Existence of political opponents in power is seen as being indispensable for adherence, safeguard, protection and consolidation of the principles of the rule of law and democracy in Senegal. Indeed, by limiting the number of presidential terms, the new Senegalese constitution finally opens the way for democratic change of political power defined as ''*the legal power organized for political parties having different social undertakings to succeed one another in power through democratic rules of devolution and exercise of power founded on the sovereignty of the people*''[80].

This process can give rise to political change of power which supposes not only the renewal of the term of political leaders, but mainly the social undertaking. This development has been made possible in Senegal thanks to a certain number of factors:

First, the organization of free and fair democratic elections par excellence for selection of the ruling class. This means that the voters are in a position to express without any constraint their sincere choice, in that the results announces are in conformity with the choice really expressed by the electorate, and regular to the extent where the consultation is organized at the expiry of the term and in accordance with preset rules and accepted by all[81]. Thereafter, the status of opposition'[82]' adopted by the Senegalese constituent assembly of 2001, offers another opportunity for democratic change of political power. In fact, such a status not only puts in the collective conscience legitimacy of the opposition which is no longer presented

[78] Christian Coulon, La tradition démocratique au Sénégal, op.cit, pp 67et 68,. Voire également la Loi n° 81-16 du 6 mai 1981 portant révision constitutionnelle ; Loi n° 81-17 du 6 mai 1981 relative aux partis politiques, JO, n° 4834 du 15 mai 1981 ; Le Soleil, des 2-4-1981, 25/26-4-1981 et 287-4-1981.

[79] Propos recueillis par Christian Coulon, dans '' tradition démocratique au Sénégal", op.cit, pp. 62.

[80] Ibrahima Fall : Sous-développement et démocratie multipartiste, l'expérience sénégalaise- Dakar-Abidjan NEA.-1977-P.70. Voire aussi article 27 de la Constitution du Sénégal du 22 janvier 2001.

[81] Théodore Holo, Les Constitutions du renouveau démocratique dans les Etats de l'espace francophone africain : Régimes juridiques et systèmes politiques, p.21. In ''Revue des sciences juridiques et administratives" n° 16, année 2006.

[82] Voir titre 5 de la Constitution sénégalaise du 22 janvier 2001.

as the enemy of the Nation but also gives it the means to prepare in peace for conquest and exercise of power. Beside these political organs, there is also a series of movements to safeguard the rule of law in Senegal.

2- Rule of law as combat tactic of other internal players for the promotion of human rights and means of influence on the rules of the political game in Senegal.

There is need to rule out the idea that claim for the rule of law originates from complete mimicry. This is only a simplistic idea, an easy argument which established powers emphasize to disqualify democratic claims. It is in this regard that Léopold Sédar Senghor used to affirm ''…*Democracy in Africa, for thousands of years, is a democracy which is firmly organized along hierarchical lines, with one crown on one head*''[83].

However, the blossoming of organizations for defense of human rights, the existence of a civil society conscious of its role, the establishment of free and independent press, constitute many factors which contributed to the consolidation of the rule of law in Senegal.

The importance of these different associations resides in the fact that they constitute privileged mechanisms for the protection of rights and freedoms in Senegal. Under this framework, they use information as a means of pressure on political decision makers. This tool which is information contributes to change of opinions and decisions of those responsible by providing them with new data[84].

This statement made by Jean-Marie Denquin, seems well justified on matters pertaining to human rights in Senegal. Since several human rights association like Amnesty International and the media publish information on human rights in Senegal, such information play a role in enhancing the practice of democratic principles and the rule of law in Senegal because it influences the main political players. The same applies to national associations for the defense of human rights, civil society and religious confraternities.

The media report daily phenomena for human rights violation in Senegal, which are finally amplified, ignored or trivialized by the international community in a selective manner. Reporters and journalists of course play a significant role in the collection of information and their dissemination. For any government, the idea of information controlled by independent media already constitutes a brake to certain abuse or crude manipulations. The most patent example is that the President of the Republic of Senegal Abdou Diouf, after the irrepressible liberalization of the media and audiovisual sector, was a victim of his own policy for opening the media sector during the presidential elections of 2000[85]. Indeed, the media contributed to the emergence of citizen consciousness and played a determinant role in the transparency of the polls thus contributing to the victory of the opposition led by Abdoulaye Wade[86].

However, there is need to note that even if Senegal has had an early experience of democratic practices and the rule of law, nevertheless external factors contributed to consolidate their consolidation.

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[83] Albert Bourgi, Le printemps de l'Afrique, op.cit., p.30.

[84] Denquin (J-M), Science politique, Paris, PUF, 1985, p.384.

[85] Frank Wittmann, La presse sénégalaise et ses dérives, op, cit, p.183

[86] R. Talla, « Conclusion », in D. Senghor (dir.), Médias et élection au Sénégal. La presse et les nouvelles technologies de l'information dans le processus électoral, Dakar, Institut Panos, 2001, p.81.

C- Contribution of external players in the consolidation of practices for the rule of law in Senegal.

Consideration of external elements cannot be overlooked as pertains to reflection on rule of law practices in African countries, and particularly in Senegal. Two factors are going to attract our attention: these are, the collapse of Eastern Europe (1) and the speech of la Baule (2).

1- Collapse of the political systems of Eastern Europe, a justification for reaffirmation of merits for the rule of law and democratic principles in Senegal.

Independence was granted to African states in conditions which ensured continuity of North-South relations but did not encourage application of autonomous strategies for an authentic development of these new countries. Almost all of these countries preferred strong attachment to their motherland. This heritage underwent a denaturation inherent to a series of ideologies both internal and external. Thus in the name of national unity and economic development, the single party system of governance was the rule in almost all countries. It brought about establishment of autocratic regimes founded on social unanimism favorable for the confusion of values. Any idea of multiparty democracy was rejected in the name of an incomprehensible « periodisierung » which claimed to ensure development before building democracy[87]. Already in 1960, at the Congress of the former Progressive Union of Senegale, M. Léopold Sédar Senghor defined clearly the political system which later won the praise of Eyadema « *(The party) has the role of organizing the general policy of the Nation by rationalizing it. Its goal is to put into practice political options after developing and defining them…* »[88]. On the other hand, the collapse of communist dictators and single party systems in Eastern Europe forced Africans to reevaluate their political regimes. In a sermon delivered in January 1990, Rev. Dr. Timothy NJOYA (Kenya) said how necessary it was that African leaders reconsider, in the light of the recent events in Eastern Europe, the single party system of governance:

« *The parties of this type did not absolutely succeed in becoming democratic in eastern European countries such as Romania, Hungary and Poland, where they were developed and from where they were imported to Africa by the first African nationalists like Kwame Nkrumah, Julius Nyerere and Modibo Keita* »[89]. The collapse of political systems in Eastern Europe on the hand hit very hard the authority of the presidents who took them as models. This explains why African leaders put in place political systems which were more or less democratic. Professor Conav systematizing the democratic path borrowed by African head of states affirmed: « *while it seemed well controlled by autocratic powers, the African constitutionalism entered abruptly in a phase of intense volcanic activity. Relegated for many years to a supporting role, it became almost every where a stake and a factor which cannot be overlooked in the political life of States. This awakening is certainly the repercussion of seismic movements which shook social and political systems of USSR and countries of the Eastern Europe since 1989 and reorganized data for international life… But what characterizes the current development, is that it ignores state boundaries… Rather than resist the risk of being carried off by the demands, the most realistic Head of states deem more prudent to hold him back by constitutional reforms or accept to come up to a compromise with oppositions who come out from their clandestine nature or who organize themselves hurriedly in the name of defense of human rights. Africa commits herself to multiparty democracy and praising the rules of*

[87] Edem Kodjo, Le réaménagement européen et l'Afrique, in '' Revue africaine de politique internationale : Afrique 2000", n° 2, juillet-aout-septembre 1990, pp. 16 -17.

[88] M. Vignon Yao Biova dans sa thèse intitulée :"Recherche sur le constitutionnalisme en Afrique noire francophone : Le cas du Congo, de la Côte d'Ivoire, du Sénégal et du Togo » soutenue le 5 juillet 1998, tome 2, p. 568.

[89] New African, mars 1990, p.16.

law almost unanimously that she had opted for single party democracy and personalization of power immediately after independence… »[90]. It is in this spirit that Senegal in 1991, the leader of the most influential opposition party Professor Wade, accepted the proposal of President Diouf to join the government. At the same time a new step was taken towards democracy by the adoption of a new electoral law, prepared by a level committee of lawyer[91].

Besides this influence of the disappearance of the Eastern bloc, it will be important to note that the policy of conditionality of aid adopted by northern countries contributed to the emergency of the principles of the rule of law in Africa.

2- The policy of conditionality of aid, a cause of action for putting in place for the rule of law in Senegal.

From the 1990s, the emergence of the process of democratization in Africa or at least a certain opening towards a bigger respect of human rights was desired by external players. The development of the rule of law became for the western countries, '' *the only criterion for legitimacy of African political powers*''[92] . Henceforth, aid to African political regimes is linked, to their efforts of democratization. It indeed enables delegitimization at the political level of States which are not in conformity and which systematically violate human rights. The conditionality of La Baule was clear:

> ''*Aid from France will henceforth be conditioned by resolute commitment of the beneficiary state towards democratization conducted with swiftness*'[93]'.

A country which excluded itself from the process of development of the rule of law and democracy would be left out by the international community and the risk was too big to be deprived of international financial assistance[94] . Consequently, the democratic conditionality remains the lever for dissemination of the rule of law in Africa. Transposed in the speech of donors, the rule of law participates, in doing so in conditioning and structuring behaviors of States who are beneficiaries of international aid. Established in the necessary referent, the requirement of the rule of law, under the pavilion of the democratic conditionality, confers to donors the power to assess the operations of institutions and possibly the power to sanction in case of violation the principles which govern them[95]. It is under this framework at the end of the Franco-African Summit of Kigali held from 21st to 22nd 1979, the participants decided to send to Bangui a commission of enquiry composed of judges of Côte d'Ivoire, Togo, Rwanda, Senegal and Liberia, to get more information on the revelations made by Amnesty International denouncing the massacre of high school students and university students in 1979 in Bangui by the imperial army which led to the death of fifty to a hundred deaths, according to the report. In August, when the commission published its report which

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[90] Gérard Conac, op, cit, p.12.

[91] Idem. p.25.

[92] Read propos Olinga (A-D) : ''L'impératif démocratique dans l'ordre régional africain", in Revue de la commission africaine des droits de l'homme et des peuples, vol 8, 1999, N° 1, pp. 55-76.

[93] Read the speech of President Mitterrand during the Franco-African Summit of La Baule dated 21- 6-1990.

[94] It was indeed demonstrated that the interest well understood by western countries was at the centre of their involvements in the process of development of the rule of law in Africa. And, bearing in mind the attitude of certain holder, during some electoral processes (Cameroon, Togo,...), it is allowed to think that democracy required by them was an instrument at the service of their economic interests and not to the service of flooding African people on the political scene. See in this regard Ebolo (M-D.) :" The involvement of western powers in the democratization process in Africa : analysis of French and American actions in Cameroon", in Polis, Revue camerounaise de science politique, vol 6, N° 2, Août 1998, pp 19- 55. Voir aussi Olinga (A-D) : op.cit., p.64.

[95] Public international policies for democratization are from now henceform recorded in the contemporary architecture of International relations, voir M. Gounelle, La démocratisation, politique internationale, Mélanges offertes à Hubert Thierry, Ed. A, Pédone, 1998, p.201.

was deemed damning, Paris drew the consequences of the enquiry by African lawyers and suspended her financial assistance to the Empire, with the exception of operations concerning health, education and food.[96]

This approach is illustrated at the international level, for instance, by the final declaration of the conference on human rights held in Vienna in June 1993, and which called upon '' *States to strengthen national institutions and infrastructures which maintain the rule of law, with a view to create conditions which enable each one to enjoy universal rights and fundamental freedoms*''[97] . Thus, in Cameroon, for example, the national committee for human rights got in 1996, a financial assistance of twenty five million CFA Francs which enabled her to organize a regional meeting in Yaoundé for institutions for the promotion of human rights, to disseminate the electoral law and to strengthen her documentary database[98].

At the European level, since 1995, the Lomé 4 A convention provides, in Article 5, that development policy between the European Union and ACP is from now henceforth « closely linked….to respect of fundamental human rights and freedoms, as well as to the recognition and application of democratic principles, consolidation of the rule of law and to good management of public affairs… ». A clause of non performance was introduced in Article 366 A of the convention for sanctions on breaches of the obligation concerning one of elements mentioned in Article 5 above[99].

Besides the renewed commitment to the principles of democracy, human rights and the rule of law in general, the Cotonou Agreement signed on 23rd June 2000 assigns also good management as fundamental objective and gives a big priority to fight against corruption[100].

[96] Hilaire De Prince Pokam, '' Human rights as political stakes in Africa: Essay for analysis by a «political scientist » of a legal category through its political uses, in ''Annales de la Faculté des sciences juridiques et politiques, Ed. Spéciale Droits de l'Homme, Tome 4, 2000, Presses Universitaires d'Afrique, p. 24.

[97] Declarations and action program of Vienna, New York, 1993.

[98] Voir Coopération France-Cameroun, bulletin du service de coopération et d'action culturelle de Yaoundé, 1998, 35.

[99] Y. Dauge, Le nouveau partenariat UE-ACP : changer la méthode, Rapport d'information, Assemblée nationale, n° 1776, juillet 1999, p.66. ; M. Mankou, Droits de l'homme, démocratie et Etat de droit dans la convention de Lomé 4, R.J.P.C., 2000 , n° 3, p.313 .

[100] Voir P. Lowe, Le 21e siècle a bien démarré pour le partenariat ACP-UE, le Courrier, juin-juillet 2000, p.2.

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PROTECTION OF PRIVATE FOREIGN INVESTMENTS IN SENEGAL

By Serigne **Ndiagna Sow***

INTRODUCTION

Senegal like almost all African countries experienced for two decades (1980s and 1990s) Structural Adjustment Policies guided by the desire to improve public finances on the one part, and economic recovery through promotion of private national investments and also private foreign investments on the other hand.

It is for this reason that authorities, after sensitization on close relations existing between regulation and efficiency of public institutions on promotion of private foreign investments, started a process of improving the legal framework proposed to private capitals, mainly to companies. Senegal therefore was supposed to focus her efforts on these two aspects: institutional and normative or legal since on a purely political level she fits the bill for a target destination for investors.

Thus, on this level Senegal is a part of rare African countries which has never experienced up to date coup d'états and the democratic transition with the coming into power of the alternating regime led by Abdoulaye Wade and the fall of the socialist party remains up to today cited as an example to follow in the continent.

Besides globalization there are very significant transformations even to a point of threatening our right which, currently, is supposed to meet the new legal requirements of a market economy which is almost multinational. In that case, Senegal having aligned her regulations to the dictates of international market, decided to correct, improve and complete her regulations on private investments already realized or potentially realizable on the Senegalese territory, without however forgetting the organs supposed to implement and control the application of these rules.

But in reality, was this desire to encourage and to protect these private foreign investments both on legal normative and institutional levels translated into facts?

It is therefore in the reasoning of this question that it would be convenient to place our analysis on this subject relating to « *protection of private foreign investments in Senegal* ».

Investment refers to the gross formation of capital, that is to say the value of durable goods acquired by units of production to be used for at least one year in their production process[101] with a view to get a long term gain[102].

As for protection, it can be taken to mean « the act of shielding (someone or something) from anything which can be harmful or dangerous». But in a more precise manner, protection of

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[101] JESSUA (C), LABROUSSE (C), VITRY (D), Dictionnaire des sciences économiques, Paris, PUF, 2001, 1043p

[102] Vocabulaire juridique de G. CORNU p. 464, Association H. CAPITANT

private investments must be understood here through the attitude of the Senegalese state in terms of adoption of measures defined through a normative, organic or institutional, organizational and functional entity, meant to attract investors to « the Senegalese market » and to secure them.

This policy of incentive or promotion of investment consists in a way of guiding the investor whether local or foreign and accompanying him from the beginning to the end of the process, for smooth running of his economic activities. This supervision must move not only from simplifying the formalities of business development but also and especially once settled, to enable these businesses to expand calmly in a peaceful and competitive environment.

Already, not long ago poverty affected two (2) out of every three (3) Senegalese and unemployment was at 40 to 50% of the population; which explains the necessity to create an attractive climate for private foreign investments to try to boost our moribund economies in order to promote economic growth.

Indeed, this necessity in concrete terms resulted into an effort to relax the legal framework, to exempt some companies from custom duties and tax charges by putting in place a fiscal incentive policy, by encouraging fair competition, by guaranteeing free transfer of funds and profits, by initiating a policy for modernization of justice and by being driven by the desire to ensure equity in transactions which involve the regulatory authority of the State. Thus we can notice that the legal security, both at normative and institutional levels, can be a stimulant of entrepreneurship for business men and a guarantee to safeguard the interests of investors.

It thus appears relevant to ask ourselves the question of knowing to what extent are private foreign investments protected by the Senegalese law.

Regarding this question, it is important to note that our positive law put in place very pertinent legal mechanisms for protection of foreign investments in Senegal both at normative and institutional levels.

Private foreign investment has always been considered as the linchpin for economic development. However, not long ago, investment flows were very slow in Senegal. This suspicion of investors was largely due to legal and judicial insecurity characterized by the dilapidated state of our legal arsenal.

This is why Senegal, in order to make up for this difficulty, got down to develop new measures and mechanisms guaranteeing respect for rights and freedoms of the company on legal and judicial levels.

In the light of this direction, the study of this subject shall be articulated around two dimensions: normative and institutional.

With regard to the fact that the legal framework is composed of standards and support institutions, it is convenient then to locate forces and possibilities which the Senegalese law creates on investment at two essential points:

On the one hand at normative level **(I)** and on the other hand at institutional level **(I).**

l- Protection mechanisms at normative level of private foreign investments

So as to be in perfect harmony with community and international provisions, Senegal laid down the principle of non discrimination for nationals and foreigners concerning the exercise of rights and freedoms (**A**).

However, this principle of protecting foreigners wanting to invest in Senegal is also extended concerning certain guarantees (**B**).

A- Establishment of the principle of equal treatment between nationals and foreigners from the point of view of rights.

This absence of discrimination can be observed at two levels: through recognition of the right to certain freedoms to the company but also some fiscal benefits granted to investors.

I- From the point of view of freedoms.

Concerning these freedoms we can say that it is Article 9 of the Senegalese Investments Code which lays the principle in these terms : « *Natural or legal persons targeted by the first Article of this Code can, within the framework of laws in force, acquire all the laws of any nature concerning property, concessions and administrative authorization to take part in public procurement procedures* »[103].

This explains why foreign investors in Senegal enjoy all rights and freedoms to become property owners for the same reasons as Senegalese nationals without any form of discrimination whatsoever, to take part in public procurement proceedings and to have access to raw materials.

- Acquisition of private property

In effect, Article 4 in relation to guarantees and protection of property provides that « *in accordance with the conditions provided by the laws and the applicable regulations, private property of any property, movable of immovable, material or immaterial is protected, in all its legal and commercial aspects, its elements and its subdivision, its transfer and the contracts it subjected to* »[104].

This is how the acquisition of property is a better plan if one intends to settle in Senegal. It is possible to invest there in real estate sector, however such an investment must be done with care, requiring knowledge of laws and regulations in force in this country in relation to land property.

The Senegalese land law is largely inspired by the French legislation on federal land, thus an acquirer cannot effectively be the owner without a title deed which is obtained either through purchase, or through application after obtaining a piece of land through a long lease. However, according to the law of the country, land always belongs to the State and the title deed only gives right to use. This means there is actually no sale of land but sale of

[103] See also article 13 of Act No. 2004-06 February 6, 2004 of Senegal Investment Code «subject to compliance with its obligations, such as that provided for in the following article, the company enjoys, a full and entire economic and competitive freedom.». This includes freedom to acquire property, rights and concessions of any nature necessary for its activity, such as property land, household, real estate, commercial, industrial or forestry.... »

[104] Article 4 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senegal

the title for the property. Thus once the sale is concluded, the title deed is registered in the name of the acquirer.

- Participation in public procurement procedures

No matter their nationality, natural or legal persons targeted in the first Article of this code receive, subject to the provisions of title III, the same treatment in respect to rights and obligations arising from Senegalese law and in relation to the exercise of activities defines in Article 2 above.

In this regard, natural or legal persons receive a treatment similar to that of natural or legal persons of Senegalese nationality, subject to reciprocity and without prejudice to measures which concern all foreigners or arise from provisions of treaties and conventions to which the Republic of Senegal is a signatory. [105]

In this regard, it is possible, due to this principle of non discrimination between local and foreign companies, for any foreign company having invested in Senegal to bid for tenders and hope to win.

Thus, any unjustified restriction to this possibility which is offered to these companies give them the right to seek redress for the rights violated before a court of law.

- **Access to raw materials**[106]

The freedom to have access to unprocessed or semi-processed raw materials, produced in the entire national territory is guaranteed. Agreements or practices which distort competition are punished by the law.

2- ***From the point of view of social benefits***

These social benefits, which investors are entitled to under certain conditions, are different depending on whether we are on the implementation or operation phase.

- During the implementation phase

During this phase of implementation, special benefits are granted to the investor with the aim of enabling him to pay-off his investments. These benefits which cover a period of three (03) years are presented as follows:

- Exemption from payment of customs duties for equipments and materials which are neither produced nor manufactured in Senegal and which are specifically meant for production or operations within the framework of the program agreed;
- The modalities for exemption on spare parts, passenger vehicles, when they are specific to the agreed program, and individual vehicles shall be fixed by decree ;
- Suspension of value added tax (VAT) charged at the point of entry for equipments and materials which are neither produced nor manufactured in Senegal and

[105] Article 10 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senegal
[106] Article 8 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senegal

which are specifically meant for production or operations within the framework of the program agreed , in accordance with modalities which will stated by decree;

- Suspension of value added tax (VAT) invoiced by local suppliers of goods, services and works necessary for the realization of the program agreed, in accordance with modalities which will be stated by decree[107].

o **During operations phase**

The benefits offered are spread over different schemes as follows[108] :

➢ **The scheme for new companies:**

- Exemption from Employers lump-sum contribution (CFCE) for five years.

  If the jobs created, within the framework of the investment program agreed, are above two hundred (200) or if at least 90% of jobs created are situated outside the region of Dakar, this exemption is extended up to eight (8) years.

- Special benefits on tax on profits :

In terms of tax on profits, newly certified companies are allowed to deduct from the taxable amount of profit a part of investments whose nature shall be defined by decree.

For new companies, the amount of deductions authorized is fixed at 40% of the amount of investments retained. For each fiscal financial year the amount of deductions shall not be above 50% of the taxable profit.

These deductions can be spread over five (5) successive fiscal financial years at the end of which, the balance of the tax credit authorized and not used is neither chargeable nor refundable.

➢ **The scheme for expansion projects :**

- Exemption from Employers Lump-sum contributions (CFCE) for five (05) years. If additional jobs are created, within the framework of the program agreed, are above a hundred (100) or if at least 90 % of the jobs created or situated outside the region of Dakar, this exemption is extended up to eight (08) years.
- In terms of tax on profits, expansion projects agreed are allowed to deduct from the taxable profit amount a part of investments whose nature shall be defined by decree. For expansion projects agreed, the deduction amount authorized is fixed at 40% of the investment amount retained.

For each fiscal financial year, the amount of deductions shall be above 25% of the taxable profit.

These deductions can be spread over five (5) successive fiscal financial years at the end of which, the balance of the tax credit authorized and not used is neither chargeable nor refundable.

[107] Article 18 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senegal
[108] Article 19 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senegal

B- Establishment of the principle of equal treatment between nationals and foreigners from the point of guarantees

Business in Senegal enjoys certain financial guarantees **(1)** and also and especially a right to a certain guarantee against any action of nationalization, compulsory acquisition or requisition over the entire territory of Senegal ; in one word, risks of dispossession of property **(2).**

I- Financial guarantees

These guarantees are provided in Articles 5, 6 and 7 of the Investments Code. These guarantees touch on the availability of foreign exchange, transfer of capital and profits.

Transfer of capital

The freedom for the company to transfer income or proceeds of any nature, arising from its operations, from any sale or liquidation of its assets, is guaranteed in accordance with the laws in force[109].

In this precise point, it is possible to compare Senegal with Ghana, a country which provides incentives for foreign investments but very restrictive on transfer of capital and profits outside the country.

Transfer of profits

The freedom to transfer all or part of profits of an investor, regardless of his legal nature and the amount expressed in local or foreign currency, is also guaranteed, to any associate or shareholder of a company, a national of a third country.[110]

This is also provided by Article para.2 which provides that : « *The same guarantee (Freedom to transfer income or proceeds of any nature) is extended to investors, entrepreneurs or associates, natural or legal persons who are not Senegal nationals, concerning their profit share, proceeds from the sale of their associate rights, contribution in kind, their share of bonus after liquidation* ».
Availability of foreign exchange [111]

Obtaining foreign exchange necessary for the activities of companies is not limited within Senegal. The company has, consequently, the guarantee that no restriction can be imposed against him, on his needs for foreign exchange, mainly to :

- make his normal and current payments ;
- finance his supplies and provisions of various services, mainly those provided to natural or legal persons outside Senegal.

These payments as well as transfer operations, provided in Articles 7 and 8 hereinafter, however remain subjected to justifications required by foreign exchange regulations in force in Senegal.

Save for these financial guarantees, foreign investments are also protected from risks of dispossession.

[109] Article 6 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senegal
[110] Article 7 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senegal
[111] Article 5 of Act No. 2004-06 of February 6, 2004 of the Investment Code of Senega

2- *Guarantees against risks of dispossession*

Disputes relating to operations of promotion and protection of investments often involve an investor and a state which initiates nationalization and compulsory acquisitions measures. They result into clarification of the investments law and logical declaration relating to these measures of dispossession, potential sources of legal and ideological controversies, behind which emerges difficulties of compensation operations.

In strict sense, the term dispossession targets nationalization and compulsory acquisition that is to say any measure « *which deprives the investor of his essential rights on the investment to the benefit of the public authority* »[112].

This explains why our study will essentially open up to these two forms of dispossession.[113]

For PSD, the principle of permanent sovereignty justifies the measures for compulsory acquisition and nationalization affecting foreign investors and preserve free economic choice. But it is necessary to also remember that these measures should not be initiated by ignoring the rights of the investors who are the victims.

It is under this framework that Resolution 1803 which supports these measures states that : « *Nationalization, compulsory acquisition or requisition should be founded on reasons or motives of public utility, security and national interest recognized as dominant over simple particular or private interests for both nationals and foreigners. In this meaning, the owner shall be adequately compensated, in accordance with rules in force in the country which takes these measures in the exercise of its sovereignty and in conformity with the international law* ».

Similarly CIJ affirmed vigorously this necessity to encourage investors with an obligation of protection of the investment: « *From the moment when the State admits on its territory foreign investors or foreign nationals, it is supposed to grant them the protection of the law concerning their treatment* »[114].

This is why any action for dispossession of property belonging to foreign investors for the benefit of public activity must be justified by utility needs or public interest.

However, transfer within the framework of nationalization must be generally be guided by political, economic or social reasons.[115]

Today in Senegal, laws are such that the legality of compulsory acquisitions and nationalization is subordinate to the triple condition of public interest requirement, non discriminatory character and non exploitive character of these operations[116].

That said, it is necessary to remember that these measures for dispossession must be accompanied by an obligation for compensation of the victims.

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[112] D. CARREAU et P. JUIILLARD, Droit international économique, Paris, L.G.D.J., 1998, p. 522

[113] Such a meaning however leaves aside forms of dispossession of the investor like confiscation, spoliation or privatization

[114] C.I.J., Barcelona Traction Light and Power Company (deuxième phase), 5 février 1970, Rec. 1970 § 33, p. 32; Voir sentence CIRDI, Asian Agricultural c/Sri Lanka (N° ARB/87/5) du 27 juin 1990, J.D.I., chr. 1992, p. 216.

[115] See Act n° 99-85 of 3rd September 1999 authorizing the President of the Republic to ratify the Agreement on promotion and protection of investments between the government of Malaysia and the government of the republic of Senegal, signed in Montégo Bay 10 February 1999 (J.O.R.S. 25 september 1999, pp. 1268-1272)

[116] In the matter of Benvenuti, the congolese government had transformed the mixed economy company through a simple internal memo and the company was acquired by the State.

And this particular field, the Senegalese law is very clear[117]. The compensation relating to these measures must be prompt, effective and represent the full value of the property nationalized or acquired compulsorily.

These terms hold a terminological diversity; in this case the compensation is ***prompt*** if it occurs with a reduced time line; ***prerequisite*** when it is fixed before the operation of disposition and effectively transferred to the investor; ***fair*** through its representation of the real value of the property corrected by reason and truth.

ll- Institutional mechanisms for private foreign investments in Senegal

These institutions are those which are grouped following the two orders of intervention: On the one hand, there are institutions in charge of investments promotions and supervision of major works (**B**).

On the other hand institutions in charge of settlement of investments disputes (**A**).

A- Judicial mechanisms for the protection of private investments: the possibility of institutional settlement of disputes related to private investments.

Investment is a very unstable and dynamic field due to the fact that it is largely practiced behind state borders. Consequently, it is not only accompanied by many international and community standards but also by institutions specifically responsible for settlement of disputes which would arise.

This is mainly the International Centre for Settlement of Investment Disputes (ICSDI).) (**1**) ; and the Common Court of Justice and Arbitration of the OHADA. (**2**).

1- By international institutions (for example ICSID)

The World Bank Group has within itself five institutions. These are International Bank for Reconstruction and Development (IBRD.), Agency for International Development (AID), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA), and lastly Centre for Settlement of Investment Disputes (ICSDI).

ICSID founded in 1966 seeks to facilitate, through reconciliation and arbitration, disputes which would arise between foreign investors and the receiving states.

Since it came into force on 14th October 1966, the convention links a big majority of African states.[118]

Moreover, « international investments contracts, national investment codes and bilateral or multilateral investment conventions often contain provisions foreseeing that disputes shall be settled through arbitration under the auspices of ICSID ». Its importance is attested by the number of member states.

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[117] V. Art. 4 al. 2 of the abovementioned law « the company is mainly the guarantee against any measure of nationalization, compulsory acquisition or requisition on the entire national territory , safe for purposes of public utility legally provided. Where necessary the company shall be entitled to fair and prior compensation.

[118] On 1st October 2002,153 signed the treaty and 136 ratified it. Among the latter we can name some sub-Saharan African states as follows : Benin, Botswana, Burkina Faso, Burundi, Cameroon, Congo, RDC, Cote d'ivoire, Gambia, Ghana, Guinea, Kenya, Liberia, Malawi, Madagascar, Mauritious, Mauritanie, Mozambique, Niger, Nigeria, Uganda, République Centrafrique, Rwanda, Senegal, Sierra Léone, Sudan, Tanzania, Chad, Zambia, Zimbabwe.

Indeed, until 30th June 2004, 150 states appeared on the list of members who had signed the convention for settlement of investment disputes between states and nationals of other states. 140 states of the same list had presented their ratification instruments, among them Senegal. In a more precise manner, Senegal signed the said Convention in 1966, she thereafter presented her ratification instruments on 27th April 1967, which led to coming into force of the Convention on 21st May 1967.

ICSID has today more and more power-treaties. Besides assistance on settlement of disputes, it carries research activities, consultancy and publication in the fields of law relating to arbitration and investment.

Among the publications is a bi-annual review known as "ICSID Review - Foreign Investment Law Journal " and two series of periodic publications " Laws on investments in the world " and " Investment conventions". ICSID publishes its own **annual report**, which can be enquired at its secretariat.

That being the case, the advantage which Senegal was able to draw from her relations with the ICSID, is rather the fact that the latter enhances riches and diversity of her legal framework mainly through international arbitration, for a better promotion of her knowledge on regulations applicable to investment disputes on her territory. This is without substantial gain both for already established international investors, potential investors not yet established in Senegal, Senegalese lawyers in their preoccupation to adapt to modern techniques for settlement of business disputes.

This is almost the same goals assigned to CCJA, only this time, they are contemplated under a community dimension and more recently, which advocate for fight against legal insecurity above all.

2- Through community institutions (for example the CCJA)

According to a study done on the relations between OHADA reform and globalization, it is stated that «Judicial insecurity constitutes one the recurrent grievances of private investors among member countries of the OHADA. Among the many troubles often decried is instability of jurisprudence which itself has the consequence of doubtful origin of procedures. One of the explanations of this phenomenon is insufficient training of judges on disputes of business law. Other causes less respectable would explain the constant fear African business environments which are under state controlled justice systems. It therefore seemed imperative to the authors of the OHADA Treaty to adopt measures susceptible to restore confidence in judicial institutions. One of these measures, undoubtedly the most important was the creation the Common Court of Justice and Arbitration (CCJA). Emphasis was also put on the training of judges and judicial officers».

For all intents and purposes, with CCJA, member states among them Senegal have Uniform law for business law, which in principle, play an important role in the settlement of certain disputes related to investment in Senegal. The Treaty puts in place two ways of settlement of disputes.

In the first place, through judiciary, there is settlement of disputes in the application of uniform acts in the first instance and appeal by national courts.

It can also play the role of annulment of decisions in place of supreme courts or appeal courts. Moreover, decisions of the CCJA have authority over the matter judged and operative legal force of each state party.

In the second place, through arbitration, the OHADA Treaty makes arbitration a major instrument for settlement of contractual disputes. Thus, even if the CCJA does not in itself judge the disputes, it appoints and confirms the arbiters. It is also informed on the on the conduct and progress of the proceeding and examines the decisions rendered, but can only propose changes of form.

Arbitration rulings delivered have the final authority of the matter judged on the territory of each member state same as the decisions delivered by courts of the state.

They can be subject to a forced execution by virtue of an enforcement decision.

Lastly unification of business laws is without doubt one of the most important points concerning investors, they should for this reason be of benefit to Senegal, mainly by consolidating and giving credibility to her policy of attraction for private investments, through promotion of contractual arbitration, one of the alternative means most appreciated by the parties in resolving business conflicts which arise between them.

Administrative mechanisms for protection or promotion of private foreign investments: Renewing the institutional framework for the promotion of investment

Towards the last major reform of 2004 we participated in the creation of new organs which had respectively the mission to create an incentive framework and to improve business environment. Among these organs some are specifically for investment support (1) while others are charged with the responsibility of improving business environment (2).

1- Putting in place specific organs for supporting investment

The most modern and the most visible support structures in the field of investments promotion are four (04) : A.P.I.X. (National Agency for the Promotion of investments and Major Works), A.D.E.P.M.E. (Agency for Development and Supervision of Small and Medium Enterprises), A.S.N. (Senegalese Agency for Standardization), and lastly F.P.E (Economic Promotion Fund).

This new arrangement is more specialized and simple, to the extent where it reduces the number of existing structures and exercises all functions for investment promotion and support in conformity with the objectives sought. Moreover, the coordination of activities for these specialized is ensured by a single structure, C.G.C.D (General Consultative Committee for Development).

- **National agency for promotion of investment and major works (APIX)**

A.P.I.X[119] is a structure created in July 2000, with the main objective of assisting the President

[119] The functional organization of the Agency lies on two entities which are: ***Strategic Committee for the promotion of investment*** is the organ for supervision and control of the activities of the Agency in the field of investment promotion, in respect with the directions given by the President of the Republic. This is why it proposes measures susceptible to encourage investment to create an atmosphere of good management and good governance.

of the Republic of Senegal in the formulation and implementation of a clear policy, first in the field of investments.

Precisely, its mission for investments promotion consist of:

a. Promoting export activities for local products ;
b. Promoting Senegal as an investment destination by giving incentives to companies and private investors to produce in Senegal for export ;
c. Seeking and identifying national and foreign investors with a view to increase the volume of investments ;
d. Following contacts and evaluating investment projects thus contributing to improvement of the image of Senegal.

However, the role played by APIX was not enough. This led to the creation of ADPME (Agency for Development and Supervision of Small and Medium Enterprises) one year later.

- **Agency for Development and Supervision of Small and Medium Enterprises (ADEPME)**

Recall that by the establishment by Decree No. 2001 - 1036 of November 29, 2001 of A.D.E.P.M.E [120]., the Senegalese Government decided to make the private sector the engine of growth.

In the same manner it was decided to support SMEs which cannot be overlooked in the economic development of the country.

It is all within the meaning of the Strategy Document for Development of the Private Sector (D.S.D.S.P), developed within the framework of a partnership between the State, the Private sector and the donors.

A new structure came to enhance the policy of A.D.E.P.M.E, that is to expand to the concepts of quality.

At the same time, it defines the operational program, budget and procedures of the agency in the field of investment promotion.
It also monitors the implementation of the activities of the agency and approves the activity report of the Director General for investment promotion. ***The Head office*** oversees proper implementation of the missions of the Agency. For day to day execution of its mandate, the Head office is supported by three operational directorates: Directorate of Investment Generation (D.G.I) ; Directorate of Service to Investors (D.S.I.); Directorate of Communication (D.C.O.) ; and lastly the Directorate of Major works (D.G.T.).

[120] After its creation by the Decree n° 2001-1036 of 29th November 2001 and its incorporation in the Ministry of SME, ADEPME . is in charge of ensuring :
- development for creation of companies through stimulation of entrepreneurial initiative ;
- assistance to putting an environment favorable for growth of companies ;
- putting in place and driving of a national and international support system in company advice and techniques ;
- support creation of employers and professional organizations by assisting them in the enhancement of their permanent expertise, diversification of their sources of incomes, increment in the number of their members and satisfactorily meet their expectations, putting in place reliable data bases, providing information necessary for creation of companies; carrying out feasibility studies ;redefining and setting up projects ;focusing on products, searching for partners, research-development and innovation; technological choices ; audit and reorganization; legal an fiscal assistance; provision of administrative services; miscellaneous studies ; management and lastly facilitation of joint-ventures.

➢ **Senegalese Agency for Standardization (ASN)**

Senegalese Agency for Standardization is a non-profit making association whose objective is to promote quality, productivity and standardization.

It is mainly responsible for:

- Putting in place a system for information and measures (standardization, certification, metrology, productivity indicators) ;
- Inventory of production and productivity development challenges and inventory of standardization needs ;
- Awareness of all players on the necessity to raise the level of productivity and quality ;
- Comparative analysis of different costs for adoption of standards truly adapted to working conditions of different sectors ;
- Putting in place a permanent system for detection of overcharges and non quality ;
- Study and prospective of new production techniques ;
- Comparative study for productivity levels and inter-company, inter branch and inter-states remuneration levels ;
- Assessment of cost for administrative services and the impact of its mode of operation on the total productivity ;
- Availability of diagnosis and study techniques and tools ;
- Providing consultancy services to companies ;
- Lastly, training of players and service providers

On the other hand, we are used to saying, « banks only lend to the rich ». consequently even if ASN assists small scale enterprises to develop, it should be noted that it should also be assisted by another structure which will a special mission of facilitating access to funding of these category of enterprises, since any production or distribution activity seems unimaginable without credit.

2- Through putting in place organs for improvement of business environment

Among these very many organs, we chose **C.P.I.** (Presidential Council for Investments) and **CNLNTCC** (National Commission for the Fight Against non Transparency, Corruption and Embezzlement).

➢ **Presidential Council for Investments (CPI)**[121]

Instituted in November 2002, CPI is a consultation and reflection framework on reforms to be initiated in order to improve business environment and attract investors.

[121] CPI is a small size structure, composed of 28 Heads of companies, according to the following plan :
- a third of Senegalese investors, a third of foreign investors established in Senegal
- and a third of foreign investors not established in Senegal.

Under its impetus, a big number of them are already effective in Senegal. The fourth session of CPI held on 10th May 2004 was an occasion to go further. It also enabled progress in the preparation for Strategy for Accelerated Growth (S.C.A).

In other terms, the Presidential Council for Investments (CPI) was put in place to conquer the private sector. This council, in charge of eradicating obstacles which block investments, proposes to assist Senegal to draw priorities in her reform programs.

It is a consultative organ whose main objective is to enhance dialogue between Government and investors so as to accelerate the process of identifying and implementing reforms favorable for improving business environment; it is therefore «a powerful tool to stimulate investment ».

The members of the council committed themselves freely to consult with the President of the Republic of Senegal every six months.

Thus, within two years of operations, the Presidential Council for Investment enabled Senegal to put in place a very expansive program of economic reforms since the devaluation of CFA Franc in 1994, mainly in the fields of the tax system, administrative barriers, regulatory framework of infrastructural projects and employment legislation.

In the same dynamics of improving business environment, the National Commission for the Fight Against Non Transparency, Corruption and Embezzlement, with a view to clean and give credibility to the image of the host legal framework for investments was established.

- **National Commission for the Fight Against Non Transparency, Corruption and Embezzlement (CNLNTCC)**

The National Commission for the Fight Against Non-Transparency, Corruption and Embezzlement is an autonomous structure as compared to public authorities, guaranteeing her total independence. It is supposed to:

In the first place, to identify structural causes of corruption and incriminations related to this offence.

Secondly, to propose any legislative reforms, regulatory or administrative for promotion of good governance, including in international transactions.

Thirdly, to receive physical or legal claims on corruption or related offenses.

And finally, to initiate useful diligences on the merits of these claims by enabling the persons or organizations questioned to be aware of the facts alleged and present observations on the facts denied, and by taking statements from any person susceptible to establish the facts in question.

The Commission exercises its duties without prejudice to court activities. When it deems that it has indications which can justify opening of legal proceedings, it shall forward a circumstantial note and recommendations to the President of the Republic by stating the people susceptible of being committed to legal proceedings.

The Commission, from the point of its composition, has ten (10) members who are:

- Chairperson ;
- Three (3) representatives of the administration ;
- Three (3) representatives of the civil society ;
- Three (3) representatives of the private sector and socio-professional organizations.

All said and done, the renewal of the institutional framework for the promotion of investments is not simply limited to structural reforms of support for growth of productivity and competitiveness of national or foreign companies, or putting in place organs for improving business environment.

This is why in it's dynamic of revitalizing the climate for private investments, Senegal developed a new institutional framework reserved for infrastructure, known for its sensitivity for attracting capital.

Conclusion:

The last major reform undertaken by the State is materialized by efforts for adaptation of preexisting legal tools and by creation of new structures favorable for establishment of a favorable climate for private, national or foreign investments. This reform has its forces by virtue of legal advantages it consent to private investors. It also offers multiple and varied legal possibilities to enlarge the spectrum of choice for investors both from the point of view of the pieces of legislation and the accompanying organic device. This is the basis of its attractiveness.

It is therefore for these reasons that it is possible to affirm that the entire Senegalese legislation is very attractive to foreign private investors.

However, there is need to reveal some constraints which can be analyzed as obstacles to investment and entrepreneurship spirit of which the most spectacular are the informal sector and corruption

Senegal is characterized by a very well developed informal sector as attested by the survey « 1-2-3 » carried out by Ansd[122] in 2003[123]. According to this study, the informal sector occupies a very important position in developing countries like ours. The contribution of the said sector is evaluated at 605 of the Gross Domestic Product (GDP) in Senegal. The players of the sector are however up to now reluctant to any normal payment of taxes, even within the framework of single overall contribution (CGU)[124] at the time when companies in the formal sector are forced to pay taxes. This statement makes the informal sector, which is constantly changing, to remain a true competitor of the formal sector.

Corruption, which falls somewhere in the operation of the justice system, can also slow down the arrival of foreign investors who will fear for the security of their capital.

Corruption is generalized and affects all the components of justice; judges, court clerks and elements of judicial police including advocates[125].

[122] National Agency for statistics and demography

[123] The survey revealed that in one region of Dakar, the informal sector produced in 2002, 50.8 Billion de FCFA of goods and services and created 356.3 Billion FCFA of value added, i.e.10,7% of Gross Domestic Product (GDP).

[124] Source : Sud quotidien newspaper dated 24th November 2008, Taxation of the informal sector in Senegal : the biggest fraudster

[125] In the specific case advocates, the following testimony is illustrative enough : « going round advocates' firms on 31st December, you

Thus, if we want to improve the position of Senegal as a target destination for foreign investors we only need to fill these two gaps: further clean up of our administration not only by eradicating corruption but also by trying to accompany the informal sector towards a process of formalization.

will see wrapped gifts meant for judges ; ties, perfumes etc, this is corruption ».

ESSAYS ON THE INEFFECTIVENESS OF THE PRINCIPLE OF SEPARATION OF POWERS ON THE RELATIONS BETWEEN THE EXECUTIVE AND THE JUDICIARY AFTER CHANGE OF POLITICAL POWER IN SENEGAL.

By Papa **Fodé Kanté**

Drawing inspiration for democratic principles originating from the Declaration of the Rights of Man and of the Citizen of 1789 which provides that « *any society in which guarantee of rights is not ensured nor the separation of powers is determined does not have a Constitution* »,[126] and driven by the desire to establish a state governed by the rule of law, Senegal addressed in her constitution of 22nd January 2001 the principle of separation of powers. « *Separation and balance of powers designed and exercised through democratic procedures...* »[127].

The content of this principle is extremely simple: « Powers should not be concentrated in the same individual or on one group of individuals, there is need to distribute them among distinct organs; allocated to distinct constitutional organs the exercise of a specific social function ».

It is this principle which Montesquieu put forward by stating that « *when on the same person on the same body of judicature, the legislative power is joined together with the executive power, there is no freedom, because we can fear that the same monarch or the same senate will make tyrannical laws to be executed tyrannically* ».This principle, contrary to a very well known opinion, Montesquieu had neither discovered it nor invented it. Indeed the doctrine of separation of powers was invented by Aristotle, taken over by Locke and systematized by Montesquieu who gave it current aura. It is Locke who would consider that « *this would be to provoke very strong temptation for human frailty, subject to ambition that to entrust to the same who already have the power to make laws to have them executed* ».This principle very dear to Montesquieu became the founding principle of modern democracies. There is no state which does not claim to have its organization and operation based on this principle. It enables to make the distinction between dictatorial regimes on the one hand and democratic regimes on the other hand. The government originating from the political transition of 19 March 2000 in Senegal is not an exception to this rule, to the extent that the principle as previously mentioned is addressed by the fundamental charter.

However, notwithstanding the constitutionalism of this principle, « *which is the highest degree for making a rule sacred* », there are multiple limits to its concrete application. This lack of conformity between legal prescriptions and the reality are more regrettable and more prejudicial to the rule of law in the relations between the executive power and the judicial power. This situation can be the origin of reduced confidence, a feeling shared by the Senegalese people in respect to courts. (results of opinion poll of afro barometer of 2006 show that 58 % of Senegalese had confidence in the justice system, results of the survey of Round 4

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[126] Article 16 of the Declaration for the rights of man and of the citizen of 1789.

[127] Preamble of the Constitution of 22nd January 2001.

of 2008 showed that only 46% of the Senegalese people had total confidence in courts). This is a disappointing paradox, since at the beginning of the democratic change of the political regime, the new Senegalese authorities had shown their firm desire to close the page of authoritarian excesses and solitary exercise of power which had dotted the African political history, from independence until 1990s and still subsists in some areas of the continent. These excesses coupled with economic difficulties largely contributed to the fall of the Senegalese Socialist Party after four decades in power. Based on these considerations, the banner of the liberal regime was consolidation of the foundations of the rule of law, the guarantee for any development. In the first place, with an independent and impartial justice system capable of giving each citizen regardless of his social standing, his political allegiance and his religious convictions, his « *uprightness* »[128]. It is in this perspective that the authorities of the third republic affirmed clearly the importance of judicial power in institutional architecture of the country. In this regard, the President of the Republic Abdoulaye WADE affirmed in his speech during the solemn ceremony to mark the beginning of the judicial year 2005 for courts and tribunal that justice « *ensures a balance which enables all social forces to hold their position in confidence and security* ».This statement was in consonance with the requirements of the rule of law and with the aspirations of the Senegalese people to be governed differently and better on all levels (political, economic and social). A decade after its accession to the highest judicial authority, the statement which stands out on all observers on the operations of the justice system is that the latter due to several factors mainly structural and economical is breakdown of credibility and hardly able to ensure its role as the watchdog of rights and freedoms of the citizens as defined by the Constitution. There is a very wide gap between constitutional and legislative provisions on the principle of separation of powers and the independence of judicial power and their effective application. This makes the judiciary today to be at the centre of heated debates, and is subject to bitter criticism from those under trial, politicians, members of the civil society and even from some members of the judicial body. A lot of interference from the executive in the operations and management of some files of the judicial institution is blatant. It is in this perspective that the statement by AUEUIR found relevance: « *The contemporary state by recovering its political dogma of separation of powers emptied it of its dimension of balance of powers to make a purely formal organization rule which incidentally does not in any way prevent concentration of powers on one or the other classical organs* ».[129] in the current Senegalese context, the executive power superseded the judicial power and exercises a big influence over it. If it is without doubt that it is in the effectiveness of the rules of the principle of separation of powers in which the respect and consolidation of the rule of law resides, it is self-evident to say that for enhancement of democracy, it is imperative that the independence between executive and judicial powers be more guaranteed. Especially that the consequences of the majority phenomenon make the two main powers to be really opposed to each other in safeguarding freedoms in the State. The legislative power has become *de facto* support for the executive due our system of collaboration of powers. It is in this perspective that Mr. Ibrahima DIALLO affirmed that « *to ensure a balance of powers within a state governed by the rule of law and guarantee fundamental rights and freedoms of the citizens, effective intervention of an independent justice system is indispensable if not irreplaceable* [130]».Thus, in a state which claims to be democratic, governed by the supremacy of the law, the justice system must constitute a shield against

[128] According to Ulpien in the institutes of Justinien, justice is a firm and persistent desire to grant each person his uprightness. It is cited by Mrs Sokhna TOURE ; adviser of teh Court of Appeal of Dakar in her speech of the solemn ceremony for the beginning of the judicial year for courts and tribunals in November 1991, in the right to knowledge number 8 : Judicial power in Senegal against other powers, published by CRAFORD Editions, P9.

[129] A.AEUIR : le principe de la séparation des pouvoirs dans les États africains : l'exemple de la Constitution malgache de 1992 ; revue de droit des pays d'Afrique francophone, numéro 816 oct.-déc. 1994.

[130] Ibrahima , DIAOLLA ,à la recherche d'un modèle africain de justice constitutionnelle

abuses of the public authorities at the same time protect citizens from illegal actions in the exercise of the power. This requirement of the rule of law, a foundation of modern democracies, is it a reality in Senegal after 19th March?

Before answering this question, semantic points on the subject of our reflection come on board.

Senegal after change of political regime coincides with the period from the year 2000 to date which is marked by a democratic change of political regime, constituting a new era of long walk towards consolidation of democracy.

As for democratic political change, according to Professor Ibrahima FALL : « *it is the legal option organized for political parties having different programs for the society to succeed one another in power through the game of democratic rules of devolution and exercise of power founded on the sovereign of the people.* [131]»

As for the judicial power, it is the one which in the State is supposed to judge over disputes and express itself in the observation of a legal situation. The executive power is the organ responsible for the execution of laws through an administrative act. The doctrine of separation of powers is that which advocates for the idea according to which: in order to guarantee freedom of citizens in the State, each of the three powers must be entrusted to distinct organs independent from one or the other. As for ineffectiveness, it expresses here a failure, a gap, a default, a refusal or a disinterest in the concrete application of the principle of separation of powers. It is pitted against the alder of effectiveness of another rule which leads here to a concrete application of the principle of separation of powers, in conformity with the letter and spirit, i.e. the intention of the author. That is to say, it is the character of a legal rule which produces the effect desire, which is actually applied or still the character of a situation which actually exists. However, between the formal address of a principle which was universal and its application, there can be several limits.

Thus, as effective as it can appear the principle of separation of powers in theory in Senegal, it should be noted that it suffers from several exceptions in practice. Consequently our concern in this essay will consist of going beyond theoretical considerations so as to try to address ourselves concretely on the causes of the ineffectiveness of separation of powers which is highly extolled but which, remains a simple principle with a purely political value. Indeed, this lack of establishment of the principle of separation of powers in the relations between the executive power and the judicial is due to a certain number of factors which we will first call structural causes, and thereafter economic causes. Structural causes are those inherent to the organization and to the operation of the judicial power which is the guardian of a higher council of the judiciary and which through its composition and its powers constitute a true limit at the independence of the justice system. Economic causes are linked to the socio-political context after change of political regime and especially at the conception that the new authorities have different institutions and their relations. It is on the basis of these considerations that we are going through a double approach to see the structural causes of the ineffectiveness of the principle of separation of powers in the relations between the executive and the judiciary in Senegal after the change of political regime (I) before discussing economic causes of the ineffectiveness of the principle of separation of powers in Senegal after the change of political regime (II).

[131] Ibrahima FALL:sous développement et démocratie multipartiste, l'expérience sénégalaise-DAKAR-ABIDJAN NEA-1977-P70.

I- STRUCTURAL CAUSES OF THE INEFFECTIVENESS OF THE PRINCIPLE OF SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND THE JUDICIARY IN SENEGAL AFTER CHANGE POLITICAL REGIME

One of the fundamental causes of lack of independence of the judicial power vis-à-vis the executive power in Africa in general and in Senegal in particular is found at the level of its institutional organization. In Senegal the negative influence that the executive exercises on the higher council of the judiciary and which echoes on the independence of judges need no longer be demonstrated. The manner in which the higher council of the judiciary operates makes it an organ deprived of any independence. However, the basic idea of its creation was to guarantee independence of the judicial power. Today the institution is stripped of its original mission to become a real limit to the effectiveness of the principle of separation of powers. Only, before emphasizing on its limits, it is important to revisit its original duties.

A- HIGHER COUNCIL OF THE JUDICIARY IN A DISCONNECT WITH ITS ORIGINAL MISSIONS

At the origin of its creation in France, the essential role which was devolved to the higher council of the judiciary was to free the judicial power from the supervision and pressure of political powers

a- PROTECTION OF JUDGES AGAINST POSSIBLE PRESSURES FROM POLITICAL POWERS

According to Professor DEBBASCH : « *the higher council of the judiciary is an independent authority responsible for the protection of independence of judges. According to him, independence of justice system that is the absence of submission of judges in the exercise of their jurisdictional function to external powers is an essential component of the rule of law* [132]».

The higher council of the judiciary: institution inherited from the French political tradition has the declared objective of making judges the repository of the « *power to judge* » from temptations of political powers. However, during its entire evolution in France, the exercise of its mission has been sincere. Since its creation which goes up to the 3rd Republic, in the 1880s, its path is marked by a not very glorious period because it was characterized by a judiciary under the domination of the empire. But, the institution reappeared under the auspices of the Constitution of 1946 marked by a firm desire to set up a justice system independent from political powers. However, the institution stumbles on a strong political composition (6 members elected for 6 years by the national assembly, 2 by the president of the Republic and 4 members elected by the judicial body) which pressurizes it. It is in 1958, in order to restore the continuity of the republican state and to give it a judicial system it deserves, that the Constitution of the fifth republic instituted the current higher council of the judiciary to the assist the head of State, the cornerstone of the institutions in its constitutional duty to guarantee the balance and independence of different of different institutions. It is this 3rd creation which strongly inspired legislators of several African French speaking countries at independence mainly, the Senegalese parliament. Thus, through its powers, the higher council of the judiciary is the only which can pronounce disciplinary sanctions against judges and is the only responsible for appointment and advancement of the latter without any dependence whatsoever on political leaders as a member of government. The

[132] DEBBASCH,C,L'indépendance de la justice,in mélanges en l'honneur de louis DUBOUIS:au carrefour des droits,Paris,DALLOZ,2002.

first objective of the legislator is to act in a manner that judges are not linked in the exercise of their duty of guardian of individual freedoms at the influence of any political authority. It is for this reason the pressure of the executive on the judges that the law gives the President of the Republic the possibility to sit in the higher council of the judiciary only on matters of appointment. In the same manner, on disciplinary matters, the formation of the higher council of the judiciary sits in the law courts on the presidency of its statutory members who are judges. Executive authorities are categorically excluded from its composition in the goal of ensuring the calmness of the judges' vis-à-vis their authority of appointment or their higher hierarchy for the republic prosecutors.

According to Professor PACTET, « *on the legal level, the independence of the judges can be guaranteed ... by entrusting the control of their advancement to an independent organ of the government and largely corporative* ». It is on the basis of these considerations that the higher council of the judiciary was created in France by the Constitution of 1946 and maintained by Articles 64 and 65 of the current constitution that of the 4th October 1958. It is the same thinking which is at the basis of the establishment of the organ by the Senegalese legislator immediately after independence. Indicated by Article 90 of the Constitution of 22nd January 2001, the higher council of the judiciary subject in terms of its organization and operations to Ordinance n° 60-16 of 3rd September 1960 as amended by the organic law n°92 -26 of 30th May 1992 and by Act n° 2008-36 of 8th August 2008. According to Article 1 of this ordinance, the higher council of the judiciary is chaired by the President of the Republic and the Minister for Justice as the vice chairperson. The council is composed of statutory appointees and elected members. Article 2 of the above mentioned ordinance declares the statutory appointees: the president of the State council, the first president of the Court of cassation and the attorney general of the same court, the first presidents of the courts of appeal and the attorney generals of the same said courts. With the judicial reform doing away with the state council and establishing the Supreme Court the organic law n° 2008-35 of 7th August 2008, it is the first president of the Supreme Court, the attorney general of the said court, the first presidents of the courts of appeal and the attorney generals of the said courts who are statutory appointees of the institution. Article 3 of the same legislation provides that the council comprises, in addition to three members elected for four years by their peers among the judges. Three alternate members are elected under the same conditions as the holders. In order to guarantee independence of judges, their appointments to various positions of responsibility, their advancement, their discipline lie under the jurisdiction of the higher council of the judiciary. However, we can notice through its composition, the higher council of the judiciary in the exercise of its mandate presents some gaps which divert it from its original mandate as the guarantor of the independence of the judicial power.

b: GUARANTOR OF THE OPERATIONS OF THE JUSTICE SYSTEM

The higher council of the judiciary is the main organ for the appointment of judges. Their appointment to various positions of responsibility, their advancement and their discipline lie under its jurisdiction. As pertains to appointment, the higher council of the judiciary is convened by the Head of State or where applicable by the Minister of Justice. It is therefore chaired by the former or in case of his unavailability by the latter. It is the Minister of justice who formally proposes a candidate for appointment on the basis of report by a member who will have studied the administrative file of the candidate concerned and will have made recommendations on his capacity to exercise judicial functions. The organ gives its opinion which is purely advisory: (i.e. it is not binding on the appointing authority) on the proposals for appointment which will be forwarded it by the Minister for Justice.

After deliberation and vote taken, the vote of the presiding authority of the council i.e. the President of the Republic or the Minister for Justice is preponderant in case of a tie. When in terms of the deliberations, it appears that the council will approve the appointment of judge to a determined position, this appointment shall only be legally established when it empowered by a decree. This explains why the President of the Republic in his capacity as the custodian of the constitution, supreme chief of the judiciary and guarantor of the independence of the judicial power ratifies the procedure of appointment. In legal terms he makes official the appointment of judges to various positions of responsibilities. However, along the procedure, the council must also supervise that the appointments are on one hand in conformity with the rule of impartiality, which is a guarantee of the independence of judges, and on the other hand integrity criteria and professional qualifications which constitute a guarantee for the quality of judges in the performance of their duties. Indeed the main guarantee for the independence of the judges is found in the process of their appointment. The intervention of the council, the technical organ for appointment and regulation of the career for judges is principally to remove the process of their appointment from the control of the executive and therefore to shield it from political influence. The higher council of the judiciary is the instrument for regulation of public service of the justice system. As the facts show, the appointment of judges by only the council does not fully guarantee independence from it. It is under this framework that effective presence of the council in the management of their career is promoted. Indeed, in the exercise of their duties, judges are subjected a certain number of obligations due to the importance of their duties and the gravity of the decisions they make. These obligations are often professional and range from incompatibilities to prohibitions. Indeed, the search for independence for serenity and impartiality inherent to the « [133]duty to judge» explains the provisions of Act number 92-27 of 30th May1992 on status of judges in Article 9, amended by the Act number 2005-21 of 5th August 2005 which stipulates that « *judicial functions are incompatible with any public or private activity* ». Indeed, the position which is eminently occupied by the judge in the society makes him to be in such a position that the decisions he will have to make are exempted from any reproach. This is why Article 13 of the abovementioned statute stipulates that « *they cannot comment on personal knowledge what they have of the matter. They cannot defend verbally or in writing as consultation for matters other than those which concern them personally*». In order to guarantee this neutrality and to avoid any attempt of corruption, « *judges are supposed to reside in the place of the jurisdiction. They can only be absent by virtue of being on leave, except for personal and temporary authorization granted by court heads or by the minister for justice in accordance with the rules provided under article 27 and other relevant articles of this statute* ».

Given that the consequence of the compulsory character of a legal rule is sanction for its non-adherence, any judge who would not respect the requirements of his status shall answer for the same before competent authorities. This is why article 15 of the abovementioned statute stipulates that « *any breach by a judge of its obligations of his status, honor, tactfulness or dignity constitute a disciplinary offence* ». And the higher council of the judiciary is the only authority, by virtue of the prerogatives conferred upon it by the law suited to control and to sanction the behavior of a judge in case of misbehavior. In accordance with the provisions of Act 92-27 of 30th May 1992 on status of judges as amended « the higher council of the judiciary is competent for appointments, transfer and movement of judges. It is the council of discipline for all judges. » This is what comes out of the words of Wilfrid MBILAMPINDO when he affirmed that: « *it is through its powers on disciplinary matters and administration of the career of*

[133] MONTESQIEU, de l'esprit des lois 1748.

judges that the council truly holds the power of decision making »[134]. Indeed, the council is the sole disciplinary authority for judges. It is chaired by the first president of the Supreme Court and the attorney general of the said Court. It has all the freedom to pronounce one of the sanctions provided by the statute for judges. In disciplinary matters, the higher council of the judiciary has the character of a sovereign jurisdiction: its decisions are not subject to appeal. The sanctions in respect to the offending judge beyond warnings which can be issued by the court heads to judges under their authority vary and range from reprimand to revocation of appointment. And like any civil servant, offences committed by judges are criminally sanctioned. Criminal responsibility of a judge is commenced in case of misappropriation of public funds, embezzlement, corruption or abuse of power. It can also be commenced in case of arbitrary detention. Jurisdictions on disciplinary matters are exercised in accordance with the status of the judiciary; it should be noted that in its capacity as the appointing authority, it is upon it to evaluate the behavior of the offending behavior susceptible to justifying a sanction against the officer in question.

B : LIMITES OF THE HIGHER COUNCIL OF THE JUDICIARY IN THE EXERCISE OF ITS ORIGINAL MISSION

This will pertain to analysis of the limits of the higher council of the judiciary in the exercise of its mission as a guarantor of the independence of the judicial power first through its composition (a) then from the point of view of its powers (b)

a : DUE TO ITS COMPOSITION

Although the principle of independence of the judicial power is addressed in the Constitution of 2001 in Article 88, the effectiveness of this principle leaves a lot to be desired due to the uncertain independence of the higher council of the judiciary. Indeed, according to observations from the report of **Afrimap** survey (program for observation and advocacy on governance in Africa, a program of **OSISA** Foundation (Open Society Initiative for Southern Africa) published in 2007, carried out in 6 African countries :(Benin Mozambique ,Senegal, South Africa ,Malawi and Ghana): Senegal is a typical example of the country where executive control on the higher council of the judiciary has a negative influence on the independence of the judicial power. Indeed, by virtue of the Ordinance number 60-16 of 3rd September 1960 on organic law on the organization and operations of the higher council of the judiciary amended by the organic law n°92 -26 of 30th May 1992 and by law n° 2008-36 of 8th August 2008, the President of the Republic and the Minister for Justice, are above the members comprising the higher council of the judiciary. The organic law on the higher council of the judiciary above mentioned provides that: the higher council of the judiciary is chaired by the President of the Republic and the Minister for justice is the vice chairperson. These two personalities of the executive play the first roles in the administration of the organ which ensures the career of judges. As the chairperson and the vice-chairperson, the meeting for the council is either convened by the President of the Republic or by the Minister for Justice. This is what comes out of the provisions of the Decree 92-918 of 17th June 1992 which stipulates that « the higher council of the judiciary shall meet at the Presidential Palace convened by its chairperson and in case of the unavailability of the chairperson, by the minister for justice. The higher council of the judiciary is composed of other statutory members who are the first president of the Supreme Court, the attorney general of the

[134] W. MBILAMPINDO, the institution of a higher council of the judiciary in CONGO, a legal and political journal for African Francophone countries, N P310.

Supreme Court, the first presidents of the courts of appeal and the attorney generals of the Courts of appeal. In addition to the statutory members, there are three judges elected by their peers for four years with alternate members elected under the same conditions as the holders. The composition of the council is strongly criticized in Senegal by a large section of judges who think that it is a threat to the independence of the judicial power and it makes the council as an organ which is not a representative of the judges. In an interview granted to the press after his appointment as the head of the union of judges of Senegal, judge NIANG, advisor at the Court of the Exchequer, indicated that one of the priorities of his program would be to obtain a review of the composition of the higher council of the judiciary, so as to have the majority as members elected by their peers. According to him, so that the council can play its role, « *elected judges must be the majority, to the extent where it is them who reflect the diversity in the judiciary.* » The ideal situation would be for him to cut the umbilical cord between the Council and the executive. He declared to the private radio known as Radio Futurs Médis (RFM) on 19th August 2007 that since « *The President of the Republic can neither be the head of the national assembly nor the senate* » *in principle and to ensure real independence of the judges « he cannot be the head of the judicial power through the higher council of the judiciary.* » In view of the obviousness of these words, there is need to note that composition only does not constitute the only limit of this institution in the exercise of its mission. Its powers also have serious gaps.

b: DUE TO ITS POWERS

In reality, a big number of competences having an influence on the career of judges like appointment are directly exercised by the executive. In this framework, the Council undergoes influences from the members of the executive, which empties from its contents the principle of the independence of the judicial power. For instance, in appointment, the status of the Council in the first place, is confronted with the preponderance of the vote of the executive authority which chairs the council. After adoption of the proposal by the higher council of the judiciary, it is the President of the Republic who holds the power to ratify by decree the choice of the council. It is therefore true to say that the law subjects the judicial power to the supervision of the executive in Senegal. This why the president of the UMS says that the council is incompatible with the principle of the separation of powers whose adherence would have meant « *that there is no mechanism of supervision of power over another .powers in the constitutional principle, are independent and separate.* » . Only the practice shows that deliberation and voting procedures within the council are often simple formalities which the executive authorities chairing the council sometimes overlook when it pertains to appointment or promotion of judges for purely political reasons. According to a report by **JURISCOPE**, entitled special status of judges and the judiciary regimen in Senegal, 1997, p6: « *sometimes the President of the Republic giving effect to rejection manifested by the Council for a proposal on appointment from the minister of justice, the minister of justice kept the appointment of the judge proposed, sometimes the President of the Republic despite a positive opinion from the members of the Council did not approve the appointment of judges proposed.* ».

On transfers also, the degree of control attributed to the executive on the Council is such that practically all decisions of the latter on transfers and movement of judges is subject to suspicions. This was the case in February 2007 when Mrs. DIAKHATE, investigating judge in the regional court of Dakar was transferred by the Minister for Justice on a certified notice from then Council to the UEMOA Court of justice. At this time she was dealing with the matter of ANOCI sites (National agency for organization of Islamic Conference led by Karim WADE son of the President of the Republic) whose secretary general of the presidency was

involved. Persistence of rumors on the political reasons behind this transfer even led to the Minister for Justice to issue a communiqué denying them on his official website. (http://www.justice.GOUV.sn/actualités.php)

II : CYCLICAL CAUSES OF THE INEFFECTIVENESS OF THE PRINCIPLE OF SEPARATION OF POWERS IN RELATIONS BETWEEN THE EXECUTIVE AND THE JUDICIARY

The current situation of non adherence to the principle of separation of powers between the executive power and the judicial power is not a secret for any one in Senegal after the change of political regime. All the dynamic forces of the society, the political class, the civil society, from the members of the judiciary to ordinary citizens have recognized and decried it. Which is why « *for several years, the justice system is at the centre of a larger problem and in the middle of several controversies* [135]».Studies of the NGO **RADI** (African Network for Integrated Development) published recently and carried out in urban areas of these regions Thies, Dakar, Kaolack and Saint-Louis informs us albeit not in details the negative perception Senegalese people have on their justice system. However, there is need to note that this situation did not start after the change of political regime in Senegal in 2000. It is the fruit of a long development which its underpinnings in the organization even in the public of the justice system which we described before as the structural causes of the ineffectiveness of the separation of powers. However, even if the new regime can be exonerated from blame in this case, it should be noted that it is responsible for the « *credibility of judges which is seriously under attack* [136]» after six years in power. This situation is largely due to the lack of a clear understanding of the separation of powers especially executive authorities an essential condition to the existence of the rule of law (A). But also it is the result of a poor understanding of the notion of institution, the basis of any democracy (B).

A- LACK OF A CLEAR UNDERSTANDING OF THE PRINCIPLE OF SEPARATION OF POWERS AS ADDRESSED BY THE CONSTITUTION

One of the criteria for evaluation of democratic regimes and the existence of a state governed by the rule of law: is the principle of separation of powers. This principle which is so dear to Montesquieu is set up as a constitutional principle in Senegal. This means it stands out at all political, administrative and jurisdictional authorities which moreover are supposed to oversee their strict observation through adherence to constitutional provisions. However, the statement which stands out for every observer in the Senegalese context after change of political regime, is that the Constitution, far from its duty of safeguarding freedoms and organization of power is considered as a purely formal organization rule. This has negative consequences on legal security and freedom of citizens in general and on the independence of the judicial power in particular. This trivialization of the Constitution only targets in particular to perpetuate a regime.

a- THE CONSTITUTION AS A PURELY FORMAL RULE OF ORGANIZATION FOR INSTITUTIONS

In terms of the first paragraph of Article 88 of the Senegalese constitution of 22nd January 2001 which forms the basis of the third Republic and opening a new page of political and

[135] Pr Demba SY,la condition de juge en AFRIQUE:l'exemple du Sénégal,revue AfrilexN°3, Juin 2003.
[136] Alioune Badara FALL,le juge ,le justiciable et les pouvoirs publics,revue AfrilexN°3,Juin 2003.

institutional history of Senegal : « *the judicial power is independent from the legislative power and the executive power*».

By addressing with any ambiguity this old provision of previous constitutions, the new Senegalese authorities only confirmed an old tradition which marks the attachment of Senegal to the ideals from the thinking of Montesquieu and to democratic principles affirmed by the Declaration of Rights of Man and of the Citizen of 1789, the basis of liberal philosophy. Indeed, after the fall of communist regimes, the only system which prevails today is liberal democracy whose foundation is individual freedom and legal legality. It is this political regime which presently enables us to make a distinction between democratic regimes on the one hand and dictatorial regimes on the other hand. Senegal like a good number of African countries and in the world, claim to be wrong or right. Indeed, one thing is to address a political philosophy or a general principle of the law and another one is to oversee its effective application through adherence of the Constitution, a fundamental charter which dominates and organizes the hierarchy of legal rules in the State. In Senegal after the change of political regime, the non adherence of the prescriptions of the Constitution by the highest authorities, same as those which were at the basis of its adoption seem to be the rule and its adherence the exception. Indeed, the proof of violation of the authority of the thing judged and the principle of separation of powers, the most recognized of the constitutional provisions came to us from the President of the Republic, Head of the executive, custodian of the constitution. Indeed, one year after accession to the supreme judiciary, the Head of state went beyond his prerogatives by asking for explanations through a mail addressed to the constitutional council, the highest court of the country whose decisions are subject to appeal by virtue of the law. And this following a decision delivered by the council at the edge of parliamentary elections of 2001 which did not favor his party. This attitude of official interference by politician on the operations of justice was to our knowledge unpublished in Senegal after the change of regime. It is more so deplorable in that it could influence future decisions other different judicial institution by virtue of their big political weight of the President of the Republic and his prerogatives in matters of appointment of judges. More regrettable in that it gives information on the conception that the country's highest authority, the head of the executive has relations with the judicial power despite clear and precise provisions of the Constitution which provide that in Article 90 « the judges are only subjected to the authority of the law in the exercise of their duties ». This attitude of the Head of state in respect to the jurisdiction responsible for the regulation of politics on the basis of the Constitution contributes to undermine the foundations of the rule of law because it is totally against the spirit and the cardinal values of modern constitutionalism which recognizes that the supreme rule enjoys its privileged position of organization of powers and regulations of their reports. The second matter which is subject to many controversies to have left a big impression of executive interference in the judiciary, but also a feeling non adherence to the constitution, is the matter of proceeding for torture in 2000 against the former president of CHAD Hissien Habré. This trial up to now has not taken place and this, despite insistence from the international community and from some organizations for defense of human rights. At the end of the meeting of the higher council of the judiciary held on 30th June 2000, the first chaired by the Head of state four months after his election, it was decided to transfer judge Demba KANDJI from his position of investigation judge while he was in charge of the matter of criminal proceedings against Habré and the investigation was in progress. In the same meeting, it was decided to promote the president of the trial chamber of the Court of appeal of Dakar Mr. DIAKHATE to the position of a judge of the state council, while this indictment chamber had been seized with the appeal of Habré against his indictment and this happened three days before it could

deliver its judgment. Although these decisions for transfer were legal in accordance with law governing the operations of judges they dealt a serious blow to the principle of security of tenure for sitting judges. They cast serious doubts on their opportunity, more especially because they occurred a few days after the leading advocate of Habré, Madické NIANG the current minister for foreign affairs of Senegal had accepted the post of legal adviser to the President of the Republic. Even if we except for reasons of scientific harshness any judgment of value on a possible attempt of the executive to influence the operations of the judicial power in this matter, it is the question of strict application of the constitutional provisions which was and which still is at stake, since it is not yet entangled. Indeed, Senegal having signed and ratified the international convention against torture and other penalties or cruel, inhuman or degrading treatments of 10th December 1984 which authorizes any member state to exercise its jurisdiction to offenses in question, regardless of the place of commission or the nationality of the offender, was purely and simply was supposed to respect the provisions of her Constitution and her commitment in respect to the international community. The third matter which enhanced the doubt on the interference of the executive in the operations of the justice system is the one known as the site of the road 'Ouest de Dakar'. Indeed, this corruption story involved the Secretary General of the government then, the current minister of armed forces: Mr.Abdoulaye BALDE. In February 2007, the investigation Judge NDIAYE DIAKHATE of the regional court of Dakar who was in charge of the matter was transferred from this position by the Minister for justice on advice from the Higher Council of the Judiciary to to UEMOA court of justice. This decision was subject to many debates and rumors on the political reasons of the decision. They were so persistent and embarrassing that the minister for justice was forced to publish a communiqué to remove any suspicion. However as it was stated by a renowned lawyer: « *To the extent where the ruling class find in the constitution, the foundation of legitimacy of their authority, they cannot free themselves from it, without compromising the regulation of their decision* ».Finding credibility and giving legitimacy to their decision in this context of suspicion, requires from the executive authorities the production of a « substantial or social »[137] democracy. In order to take care of the true aspirations of the people and not confine the Constitution to the role of a simple instrument for perpetuation of a regime.

b- CONSTITUTION, AN INSTRUMENT OF PERPETUATION OF THE REGIME

The advent of political change of regime after forty years of the reign of the socialist regime had aroused a lot of hope for the Senegalese people who were aspiring to be governed differently and better in all sectors.

It is in this perspective that after having opened the doors of the Presidential palace to Wade, the Senegalese people had overwhelmingly supported the Constitution he had given to them, in the legitimate goal of giving him the legal means of applying his policy. A few weeks before on 1st April 2000, from the terraces of president SENGHOR stadium, during his inauguration speech, he expressed his desire and determination not only to respect» the constitutional provisions but, he added that « *the era of solitary exercise of power is over in Africa. Let the Republic of the citizens start.* [138]» A decade after multiple tampering subjected to the Constitution of the third Republic of Senegal are not in conformity with the spirit of democracy which President Wade proclaimed. The Constitution appears like an instrument

[137] Babacar,KANTE:les juridictions constitutionnelles et la régulation des systèmes politiques en Afrique,in mélanges en l'honneur de Jean GICQUEL, Constitutions et pouvoirs,Montchrestien,2008.

[138] Abdoulaye WADE,Président de la République du Sénégal,discours de son investiture le premier Avril 2000.

of liberal regime, a rule tailored at the measure of the Head of state, at the service of his party or his coalition for main aim of perpetuating his power. Its roles of organization and regulation of relations between different powers same as its duty of guaranteeing individual freedoms of the citizens is relegated to the second position. The many reviews and amendments to which it is subjected without any ideological basis or the objective of satisfying the general interest, or consolidation democracy and the rule of law are perfect illustration. Indeed, since the advent of change of regime in 2000, hardly a week passes without a bill disguised under the label of being proposed by a member of parliament of the majority for debate by the national assembly which adopts it without thinking twice regardless of its targets or reasons of the originator. The question of legitimacy or the opportunity of a constitutional review does not very much arise with a regime coming from a political change provided that the latter is in a position to have all what it takes to win an election[139], to satisfy political clients[140] or to neutralize an opponent who has become cumbersome[141]. The most obvious illustrations are the amendment of Article 33 of the Constitution on the eve of presidential elections of 2007. This article was to put conditions on the election of the president of the republic in the first round to the double condition that the leading candidate must have obtained the absolute majority of the votes cast, representing at least a quarter of the registered voters. The Head of state was fearing a low voter turnout for various reasons (mainly lack of interest or lack of commitment by the citizens vis-à-vis political class which are least penetrated by the will to respect their commitments vis-à-vis their representatives) would deprive him of his possible victory posed by this act of mistrust to the legislator and to the opposition that he overwhelmingly won the elections. Four months earlier, that is on 12th February 2007, or seven years after his election to the highest office, the Head of state amended the constitution to reintroduce the senate, the second chamber of the parliament in the institutional arrangement of the country. Yet, he had done away with this institution which he used to consider as an instrument of satisfaction to the political clientele of the former regime, a waste of country's resources and without any returns as a campaign argument. Just immediately after his election, he had done away with it before changing his mind. Wanting to get rid of the former baron of the socialist party Mbaye Jacques DIOP allied to PDS between the two rounds of the presidential election who was no longer in his political program and who was not willing to resign, the Head of state had a bill adopted by the cabinet and voted by the national assembly on 26th November 2007 to do away with CRAES (Republican Council for Economic and Social Affairs), the institution of which he was the head. In a similar manner on 19th February 2007, few days to the presidential election, constitutional law number 2007-19 of 19th February 2007 amending article 34 of the constitution was adopted. At the time, the former prime minister, candidate at the election had reconciled with President WADE after 7 years in prison. In a situation where the constitutional provisions provided that withdrawal of a candidate during the electoral campaign would automatically lead to the postponement of the election, the review targeted the withdrawal of SECK from the poll without leading to the postponement. It is this cascade of reviews specifically based on political tactics with a view to satisfy «*a political battle* » only to mention but a few led to Professor Ismaïlia Madior FALL to talk of « *pathology of constitutional revisionism* » which according to him showed once again if need be that in Africa and in Senegal « *the idea of Constitution is not made sociable* ». This situation is nothing

[139] Postponement of parliamentary elections from 25th Februray 2006 to 27th Februray 2007 to held at the same time with the presidential vote so as to assist the victims of floods of floods according to the regime. A political strategy for the ruling party to organize itself according to the opposition.

[140] Constitutional amendment on 12th February 2007 to extend the Senate which the President of the Republic himself used to consider it as useless and costly at the time of the socialist party and only used to satisfy a political clientele.

[141] Bill to do away with CRAES adopted by the cabinet and voted by the national assembly on 26th November 2007.

else rather a clear case of abuse of power as declared by Assane THIAM that « *Senegal is not a constitutional state above any critic. And that the rule of law is less seen as an absolute to be respected that as a reflection of a relation of force which can be amended at any circumstances*[142] ».

B- LACK OF A CLEAR UNDERSTANDING OF THE NOTION OF INSTITUTION

In all modern democracies, « the objective of any political association is the guarantee of rights and freedoms of citizens and the satisfaction of their demands. The idea of a state falls under this perspective. Thus, colossal material, human and legal means put at the disposal of the leaders in the exercise of their duties are delegated to them by the people and are only justified by the objective they are able to achieve. Unfortunately this understanding of the institution of the state and often denied by some leaders who confuse their person to the institution they embody hence the tendencies of personalisation of the political power, a common phenomenon in Senegal after the change of regime.

a- Personalisation of the executive power

Institutionalized power which is the mode of organization in our modern states lays out in clear and precise manner the modalities of devolution and exercise of political power. Its rules differentiate the person of the one who exercises the power and from those who the original holders of the power: meaning the people. this mode of organization of power guarantees in a better way the rights and freedom of citizens and more even to reflect the idea of institution at the service of satisfaction of the general interest of which the state is the bearer. The people entrusted with this duty in the first place the president of the republic are only agents of power mandated by the community to translate their aspirations into reality. They withdraw once the representation is over since the structure in question is called to last while they are only temporary. « *Men pass and the institutions remain* ». It is this meaning of State institution, which made the Professor to say () « *that an institution is an enterprise at the service of an idea, organized in such a manner that the idea placed at the origin of the institution has power and a duration bigger to that of the individuals for whom it exists*[143] ». Here, the notion of power is a duty. This understanding differs from that one which appears to have been adopted by President WADE, meaning the one where power is considered as a personal property of the one who exercises it and who puts « the State *at his service instead of putting himself at the service of the State* ». Liberal power has indeed difficulties in winning the soul of a democrat to the extent where, all that he used to denounce during the socialist regime (putting in place institution wasteful of state resources like the senate and the social and economic council, squandering of state resources for funding party activities … without any positive impact on the consolidation of democracy and well being of the population) becomes for him a source of perpetuation of his regime. These are testified by the meetings organized by the ruling party at the Presidential palace which go by the name: support movements for the President of the Republic or gathering against opponents of PDS, (ruling party). Besides mobilization of state means for partisan interests like the funds estimated to be millions collected by the government and availed to supporters who went to France to attend the award to the Head of state for the President Houphouët BOIGNY price in search for peace. This shows on the part of President WADE and his regime a negligence of essential concerns for the Senegalese people who, according to the last round of survey conducted by Afrobarometre in 2008 on the entire territory was summarized as follows: food security for 33% of Senegalese, economic management for 14% of Senegalese, health for 14% of Senegalese and unemployment for 11% of Senegalese.

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[142] Assane THIAM, »une Constitution , ça se révise! ». relativisme constitutionnel et État de droit au Sénégal,politique Africaine N°108,Décembre 2007.

[143] Thomas GOUDOU,l'Etat,la politique et le droit parlementaire en Afrique,Paris,Berger-Levrault,1987,P 29.

This lack of attendance to daily problems affecting the Senegalese is at the origin of a relative confidence which the citizens granted to public institutions mainly to the President of the Republic. The results of the above mentioned survey show that only 27% of the Senegalese people have total confidence in the President of the Republic.

These are various reasons which made the journalist Jupiter NDIAYE .in her contribution in the information website *seneweb* entitled: why are the Senegalese people annoyed with Wade and the liberals?

That « *if Wade beats the record of unpopularity and if the Senegalese people revolt against him, it is due to the pathetic off-handedness which characterizes his mode of managing power. The first political crime Wade committed was monarchism which was manifested once he acceded to power in Senegal. Elected on the basis of a moral contract, he spurned immediate aspirations of the Senegalese people by giving, once settled at the highest office in the land, priority to his comfort : redecorating the presidential palace, renewal of the motorcade of the President of the Republic, high budget for this and that etc. Without thinking twice, he rejoices at the sight political funds left behind for him by Diouf and says: « Our worries for money are over* » !

Thus, all what the Senegalese people acquired through the power of the ballot for more democracy and enhancement of the rule of law falls in the hands of a President who confuses the institution he embodies with his person.

It is here in the Senegalese context for the reign of the regime after the change of political power that the declaration by Pierre ROSAVALLON is relevant «*election does not guarantee that a government is at the service of the general interest nor it remains for it* [144]» .

The theory of the legal personality of the State whose benefits Professor HAURIOU noted: « *the notion legal personality is technically and socially beneficial and which translates its « institutionalization » means the state is at the service of object which goes beyond it* ».

Unfortunately, the constitutional state which according to Claude GOYARD is « *a State whose authorities, administrations, agents, from the highest level to the lowest rank of competences conform to the law* » is undermined in Senegal after the change of political regime by instrumentalization of the judicial power, guarantor of its effectiveness. In this Senegal after change of political regime, the law is said in line with political convictions and at the mercy of the standards of elite at the detriment of the weakest layers. This is the reflection of the surveys conducted by Afrobaromètre of round 4 aforementioned which shows that 55% of the Senegalese people who think that in this country the ordinary people who violate the law are often punished. And 46% of Senegalese citizens think that officials who violate often go unpunished.

b- Instrumentalization of the judicial power

The report made by the most warned observers on the operations of the judicial power is bitter but unanimous is that: the justice system in Senegal is sick. This pathology is closely related to the nature of relations it maintains with the executive power which does not hesitate to bring politics in the court room. And in accordance with a famous saying: « *when politics enters the court room through the doors, the law goes out through the window* ». These

[144] Pierre Rosanvallon La légitimité démocratique Impartialité, réflexivité, proximité; Coll. Points, Essais Paris, Éditions du Seuil, 2010.

hands on from the executive on the operations of the justice system make many decisions delivered by the courts: which according to the constitutional dictionary means the organ responsible for ruling on the law with the force of legal truth, lack credibility. Tangible examples of politicization of judicial matters and judicialization of some political issues are marks for the last ten years in this country.

Indeed, the Head of state was forced to say that he was disappointed by the management of the Late Abdou Latif GUEYE, former President of the NGO «Africa assists Africa » who was in charge of the implementation of the big program for assistance to people living with HIV/AIDS in anti-retrovirals so that he could be imprisoned for misappropriation of funds, before being freed for lack enough evidence. Following serious aggression suffered by Talla SYLLA opponent of WADE regime (leader of the party Jeff Jeel) which almost cost his life, while the justice system was only at two steps to arraign before the court the people incriminated by the police, the Head of state himself through a public declaration minimized the magnitude of the damages and the gravity of facts relating to the attempt of murder in this matter. The justice system knowing that the 'prince'' had just shown his desire understood the message and dropped the matter. The attackers who were identified as being part of the security of the president of the republic are still on the run. One of the biggest politico-judicial affair in the history of Senegal, is that of the construction site of THIES (town situated 70 km from Dakar, whose mayor is the former prime minister Idrissa SECK) showed the magnitude of submission of the judicial power and of some judges «very subservient » to the executive power. As soon as the Head of State publicly accused CICES (International Centre for External Trade of Senegal) his former office director and the ex-prime minister Idrissa SECK for overspending, the justice system hounded on him without taking into consideration the general principle of the law which the presumption of innocence. Thus, without respecting the rules of procedure he was incarcerated for seven months (between July 2005 and February 2006) before being freed under doubtful conditions. The High Court later acquitted him of this financial scandal which was the talk of the Senegalese people for many months. Still on the THIES matter, the entrepreneur Bara TALL head of the company JEAN LEFEBVRE Senegal with a reputation of a man of integrity, bidder of the majority in the markets, was imprisoned for several months without any solid legal base for refusing to collaborate with the new regime in its attempt of destabilization of the former prime minister Idrissa SECK. He was freed unconditionally[145].

Following the wanton destruction of the premises of the newspaper *24 heures chrono* in Dakar which had published information deemed hostile to the government of President WADE, a gang of hit men arrested at the time for having orchestrated the crime under the orders of a minister of the government close to the family of the President who they specifically named. The latter has never been worried by the justice system.

The same crimes were perpetrated a few months later in the premises of WALFADRJI radio television in Dakar. The offenders having claimed responsibility for the crime admitted to have acted under the orders of young religious guide who felt offended by the words of a journalist of the media house. They were summoned by the investigators never honored their summons and the matter after an amicable arrangement was dropped.

The matter of fire outbreak at the labor office of Dakar at the very beginning of the new regime which had led to loss of life and whose suspected sponsors were trade unionists close to the liberal regime, which was dropped also reinforces the doubt of independence

[145] He had even at the time refused to leave his office without getting the reasons for his detention. He finally accepted to come without satisfaction from the judges.

of the justice system and the certainty of the attempts of the « political power to gain favor from the justice system, or if not to control it »[146].

One of the last episodes of the long series of judicial scandals which dotted the 10 years of the liberal regime is that of the fire outbreak perpetrated at THIES during a meeting of the socialist party (the main opposition party to WADE regime which ruled Senegal for 40 years). Following this heinous crime, the leader of the young supporters of WADE, Mamadou Lamine MANSALY publicly acknowledged being the main instigator of this act. Cautions directed to leaders and opposition youth for possible reprisals in case of an attempt to quell the matter, ended by arm twisting the public powers which led to him being in prison for two months and released unsurprisingly.

These many scandals just to mention the few laid bare the flaws of the Senegalese justice system and emphasize on the hegemony that the executive exercises over the judicial power in Senegal and which worsened for the last ten years. Yet, at the edge of change of regime, with the commitments of the President of the Republic at the ceremony taken during the solemn ceremony of the beginning of the judicial year 2005 for courts and tribunals: « *I would like to assure of my desire as the President of the Republic to give you the means to fulfill this big mission which is entrusted to you by all citizens* », all seemed to be going well towards the establishment of the basis of the rule of law. With an independent justice system whose exalted mission is to judge objectively conflicts in accordance with the rules in force and to protect the citizens against violations of their rights and freedoms and against arbitrariness of public powers.

It is undoubted today that this is a two speed justice system which works in Senegal under the new regime. And that Senegalese judges « imprison citizens on orders and free them on orders [147]».This is testified by multiple cases of corruptions and misappropriations terminated or remain unpunished. This embarrassing situation clothes the foundations of the rule of law and undermines the image of this country which formerly had the reputation of a model of democracy in Africa.

[146] Alioune Badara FALL,le juge,le justiciable et les pouvoirs publics:pour une appréciation concrète de la place du juge dans les systèmes politiques en Afrique,in revue Afrilex N°2003

[147] Les propos sont du journaliste Sénégalais Abdou Latif COULIBALY,la gazette N° du

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ROLE OF THE SENEGALESE ADMINISTRATIVE JUDGE IN THE DEVELOPMENT OF THE RULE OF LAW

By **Omar Dia***

The constitution of 22nd January 2001 affirms the Senegalese desire to build a state governed by the rule of law and to realize this ideal not less than 17 articles are exclusively meant for rights and freedoms of citizens and individuals. Different mechanisms are put in place to protect rights and freedoms. These are sometimes constitutional with the control of constitutionality of laws, sometimes they are judicial, and sometimes they are administrative. We are interested in the latter aspect within the framework of this brief reflection. It is about what the Senegalese administrative judge does to protect rights and freedoms enjoyed by individuals in the Senegalese state governed by the rule of law. The analysis shall be done on two axes. In the first place, it will be a question of see the mechanisms implemented by the Supreme Court and the former State Council to safeguard the citizens from arbitrariness of the administrative power. (I) in the second place, we shall conduct a critical analysis of the Senegalese system for protection of rights and freedoms (II).

I. Consolidation of a control for protection of rights and freedoms

As a state in which the state is subjected to the law, the rule of law is a large scope for investigation and study. But here our concern is to emphasize on that which is concrete.

Thus if possible approaches abound, we prefer here to emphasize on rules of procedure since a constitutional state is above all a state where procedures known in advance reflect in social reality the desire of the administration (A) then we shall examine the substantial content of the actions laid by the administration to day (B)

A. Offer of procedural guarantees in the formation of the desire of the administration to the citizens

The Senegalese administrative judge does not cease from overseeing guarantees which laws and regulations as well as himself give to the citizens. The analysis of some of them will be illustrative of the importance of these guarantees. We propose to examine the rights to information, the reason for negative administrative acts. For the first point judge particularly and strictly sees to it that decisions of the administration are preceded by information to the benefit of the people concerned.

Thus in the matter of Abdou Fouta Diakhoumpa of 2004 in relation to the right to own property, when Abdou Fouta Diakhoumpa and Mama Diakhoumpa allotees of government lands situated in SALY- Carrefour, to their big surprise, they were dispossessed of the said parcels of land by the rural community of Malicounda following deliberations on 23rd June 1999 approved by the deputy prefect on 27th July 1999 through a decree on general

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dispossession of pieces of land situated in the area. Individual property is protected by the administrative judge by censuring the decision of the administration which is taken without informing the property owners. The State Council thus ruled:
« *Considering that it is clear that no element of the file establishes the accomplishment of the formality required in the matter, whether it pertains to notification to the concerned persons or advertisement of the contentious act or prior formal demand for purposes of being in conformity with the prescriptions required ;*

That there is here ignorance of the provisions of Article 9 of the Decree n°72-7288 of 27th October 11972 which govern the conditions of dispossession of government land for lack of or insufficient development;

That there is no document in the file to show the legality of the contentious deliberation and that it follows that this decision is to be annulled due to abuse of power on the matter concerning the applicants [148]… »

In an earlier decision, the Senegalese administrative judge termed as « substantial formality » another indirect means of information this time round for a citizen following a decision touching on individual property and the right to housing. It was about an order from the prefect of Dakar on evacuation within a given time limit from a building situated in Galandou Diouf Street due to its dilapidated state and the risk of collapsing without a formal demand from the mayor in accordance with the provisions of Article 130 of the Local Authorities code. The administrative judge addressed himself against the decision of the prefect, the police authority and the mayor by quashing the order of expulsion in the following terms:

« *Considering that there are no documents in the file to show that formal demand was served to the mayor, that this substantial formality had not been adhered to, it is therefore is justified to quash the order n° 59/PD of the prefect of Dakar dated 27th August 1999 for violation … of article 130 paragraph 2 of the local authorities code* ».[149]

These brief examples show to what point the judge takes himself as the guarantor of an administrative procedure for conservative decision making in his daily control of administrative action. This control is built on special character when it pertains to giving reasons for negative administrative acts. The obligation weighing on the administration to give reasons of law and fact which are behind his decisions are not new. Already in the matter of Cheikh Anta Diop[150], and even long before this order, the High Court like the Supreme Court would censure the decision of the supreme authority in Senegal, the Head of State for failure to give reasons for an act prohibiting a political party.

Indeed, the judge is more and more demanding reasons for unilateral administrative acts when on the one hand, they affect a public freedom or an individual or collective right and, on the other hand when these acts have a negative effect. Jurisprudential precedents are many: In the matter of Seydou Mamadou Diarra, on an application filed by a refugee on Senegalese territory to contest police action taken by the Minister for Interior, the Senegalese

[148] CE n° 30 /4 29 July 2004 Abdou Fouta Diakhoumpa et Mama Diakhoumpa c/Conseil rural de Malicounda et Etat du Sénégal (inédit)

[149] CE 17 août 2000, Bada Diouf et autres c/ Etat du Sénégal in Bulletin des arrêts du Conseil d'Etat 2000, p 12 et suivants

[150] TPI, Dakar 7 April 1981, Ministère Public c/Cheikh Anta Diop in J. M Nzouankeu les Grands arrêts de la jurisprudence administratif sénégalaise. In this matter the High Court of Dakar ruled that' « in terms of Article of 812 para. 3 of the civil and commercial obligations code, the refusal of registration must be accompanied by reasons for the same, that however, in this particular case, it can be said that the reasons for this decision are not given given its implicit character, that consequently, it is manifestly illegal while it is the basis of the proceedings directed against Mr. Diop »

administrative judge rejected the basis of the minister's doctrine on the legality of negative actions taken by the administrative police:

« *considering that the said order the Minister for interior is restricted to target the necessities of public order to justify the action taken against the applicant without any element contained in the decision itself, or in a document attached herein giving information on the said necessities, while the decision contested as a police action must be accompanied with reasons especially that it is not favorable to the applicant since it deprives him of the benefits related to his status as a refugee* »

Here, the judge protects both the right to settlement as provided under Article 14 of the Universal Declaration of Human Rights which guarantees to « any person » ... facing persecution « to seek for asylum and get asylum in other countries ».[151] and mainly paragraphs 3 and 4 of Article 12 of the African Charter on Human and Peoples Rights which provide that any person can in case of persecution « seek and get asylum in a foreign territory, in accordance with the laws of each country and with international conventions » and on another level any foreign person legally admitted «on the territory of a state party to this Charter can only be expelled by virtue of decision taken in conformity with the law[152]», individual freedom like that of movement protected by Article 13 of the same declaration.

This jurisprudential position on the reasons for police action arose again later in the matter of Bruno Batrel of the State Council. On 25th August 2003 the former seized the State Council to obtain annulment for abuse of power of the order n°004214 of 25th June 2003 issued by the Minister for Interior, for his expulsion from the territory of the Republic of Senegal. The judge quashed the expulsion action due to lack of reasons for the same by ruling: « C*onsidering the order n°004214 of 25th June 2003 by the Minister for Interior announcing the expulsion of Mr. Bruno BATREL from the territory of the Republic of Senegal does not contain reasons for the action* ;

Considering that, it pertains to a police action not favorable to the applicant, the Minister is supposed to indicate the elements of fact and law upon which he bases his order;

That vague reference to necessities of service which no element in the file establishes, do not allow the judge to exercise his control;

That it therefore follows that the decision before this court is quashed… ; »[153]

From the study of these jurisprudential examples we can notice that giving reasons has become a condition of legality for administrative acts at least when they concern police actions and that they are negative, that is to say each time they are susceptible of being an obstacle to the enjoyment of rights and freedoms by citizens. The matter LD/MPT versus Senegal is relevant to enforce this conviction. In this matter the Prefect of Dakar had banned the demonstration planned for 30th June 1999 by the Senegalese opposition. The democratic league thinking that the demonstration is a public freedom subjected to simple reporting to the authorities and consequently the Prefect of Dakar did not have powers to ban it, on the one hand there is no « risk of disturbance of public order » and, on the other hand, no « sufficient means necessary for maintenance of law and order ». The judge upheld the arguments advanced by the applicants on the lack of reasons for the action of banning the public freedom of demonstration to quash the prefectural action:

[151] See *Universal Declaration of Human Rights of 1948 in Editions Juridiques Africaines, 1996, p 126*
[152] See *African Charter on Human and Peoples' Rightsn of 1981 in Editions Juridiques Africaines, 1996, p 133*
[153] CE. 22 April 2004, Bruno Batrel vs Sénégal (inédit)

« Considering that by generally and absolutely banning the demonstration planned for 30th June 1999, without giving reasons for which the ban is founded, the prefect does not enable the State Council to exercise its normal control[154] ». This normal control enables judges to oversee the conduct of facts incriminated and then see if yes or no the assessment or the qualification which the administration gives to the facts was correct. It is also to censure in a better way the desire of the administration that the administrative judge demands for reasons for the action.

The duty of giving reasons for negative administrative acts goes beyond the police action as attested by the State Council on 27th April 1994 when Messrs Ousmane Kane Kamara, Babacar Mboup and Ibrahima Sy were sacked for being accused of « escorting six trucks loaded with prohibited goods from Gambia to Guinea Bissau through Senegal », the administrative gave a new impetus on giving reasons for negative administrative actions.

Indeed according to the State Council « as long as it imposes a sanction, the decision must be accompanied with reasons for it[155] »; the administrative judge characterizes the decision in a better way by saying: it must be « concrete, that is to say contain wordings of considerations of law and fact which constitute its basis[156] ».

Consequently, it must neither be general nor vague nor inexistent. Certainly it follows that, administration can longer unroll strategies for circumventing so as to avoid giving information on why such or such a decision was taken against the concerned persons if it is not with precision which must clothe every decision on sanction from the administrative authority as long as it is linked by the jurisprudence of the administrative judge.

Moreover, it is useful to observe that giving reasons is optional even if the incriminating action is negative. This emerges from the Order of 27th November 2008 by the Supreme Court of Senegal where the administrative chamber of the court considered that «… in the meaning of Article L 216 of the employment code, the minister ruling on hierarchical appeal, is not under any obligation to give reasons »[157] .

B. A control more and more substantial of the content of unilateral decisions taken by the Administration

Along its development, administrative dispute does not cease to evolve towards a substantial control on the rights and freedoms of individuals. The former State Council played a major role in this tendency. Here, we are going to propose some concrete example. They are in relation to the basic principle which is equality then to rights acquired by those under the Administration.

If we consider the principle of equality[158] between citizens, it appears that the administrative

[154] CE 25 November 1999, LD/MPT vs Sénégal in State Council case law reports, 1999, p4 and following pages

[155] CE. 27 Avril 1994, *Ousmane Kane Kamara, Babacar Mboup et Ibrahima Sy in Bulletin des arrêts du Conseil d'Etat 1994 Op. Cit. Supra*

[156] Idem

[157] CF. CS. Arrêt n ° 23 du 27 Novembre 2008, Société 3F SARL c/Etat du Sénégal (inédit)

[158] Alain Touraine remet en exergue la centralité de ce principe dans la démocratie moderne : « l'égalité pour être démocratique doit signifier le droit de chacun de choisir et de gouverner sa propre existence, le droit à l'individuation contre toutes les pressions qui s'exercent en faveur de la moralisation et de la normalisation ». C'est dire qu'on en présence d'une notion à géométrie variable. Voir A. Touraine, Qu'est-ce que la Démocratie ? Paris, Fayard, 1994, 458 p

judge oversees adherence to the principle in its different versions. « Equality of citizens » ;[159] « equality to access public employment » ; [160] « equality to access public duty » ;[161] « equal access to public education and to higher education » ;[162] « equality for sanctions »[163] etc. Since the beginning of administrative justice in Senegal, the judge interprets this principle in favor of the citizens.

As a jurisprudential illustration, there is the order on National association for motor handicapped persons of Senegal. While it pertained to failure to admit a person with motor disability in public duty precisely because of his disability, the Senegalese administrative judge adopted an interpretation of the principle of equality which is in favor of the interests of the handicapped, that is his admission to public duty despite his paralyzing disability. Thus of course « …the administrative authority can , without ignoring the principle of equal access to public employment, institute for general interest, some restrictions to the principle by fixing conditions imposing necessary and acceptable subjections in respect to the objective targeted by the regulation »...[164] but on condition that the judge does not detect « a wrong application » of legal and regulatory provisions.

Indeed, the exercise of a control of the material accuracy of facts « enabled the State Council to appreciate the fact that, for Boubacar Fadiya who suffered polio, to limp and to use a crutch to facilitate his movements, does not constitute a disability known to be incompatible with the duty of a teacher ».[165]

Mr. Fadiya was also authorized by the administrative judge to exercise the duties of a teacher despite his disability.

Nevertheless, it would be wise to consider that the administrative judge does not hesitate from supervising the principle of equality while at the same time trying to soften his firmness as long as he is standing up against the administration. His reservations for interpretation in the matter of Prosper Guéna Nitchen and others are significant in this point of view:

«*considering that if the administrative authority is supposed to respect the general principles of the law, in this particular case equal access for all to higher studies, a principle arising from the Universal Declaration of Human Rights mentioned in the Preamble of the constitution and which stands up against her, it should be noted that equality is not synonymous to standardization, it can, under the control of the judge for abuse of power and subject to commitments made, regulate the conditions for the exercise of the right to have access to university education and fix the amount of registration fees by applying a differentiated pricing based on general interest and the objective situation of the applicants in like manner as the Senegalese can enjoy the legal provisions of Article 8 of the Decree 70-1135 on the status of the University of Dakar* ».[166]

In the same vein, in the matter of La Compagnie des Mines du Cayor of 22nd April 2004,

[159] CS 23 Mars 1966 Samba Ndocoumane Guèye in Grandes décisions de la jurisprudence administrative sénégalaise Op. Cit. Supra ; CE 27 Juillet 2000, Momar Diop et autres c/ Etat du Sénégal in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra

[160] CE 29 juin 2000, Association Nationale des Handicapés Moteurs du Sénégal c/Etat du Sénégal in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra

[161] CE 26 Avril 1995, Alla Ngom et Boubacar Ndiaye c/Etat du Sénégal in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra

[162] CE 31 Août 1994, Prosper Guéna Nitchen et autres c/ Université Cheikh Anta Diop in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra

[163] CE. 29 Novembre 1995, Melle Fatimata Bintou Diallo in Bulletin des arrêts du Conseil d' Etat, Op. Cit. Supra

[164] CE 29 juin 2000, Association Nationale des Handicapés Moteurs du Sénégal c/Etat du Sénégal in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra.

[165] Ibid

[166] CE 31 Août 1994, Prosper Guéna Nitchen et autres c/ Université Cheikh Anta Diop in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra

the judge granted once more a bigger discretionary power to the administration within the framework of interpretation and application of the principle of equality. The applicant observed that an inter-ministerial order authorizing mining ignored the constitutional principle of equality of citizens before the provisions of the aforementioned decree in that the application of SOECO did not get favorable opinions required; the judge after referring to the provisions of Article 2 of the decree ruled in these terms: «t*hat it follows from the provisions of Article 32 of the abovementioned decree that the application for opening and mining of the permanent quarry must compulsorily receive approval from the heads of department consulted*; » i*n conclusion*

« *That this formality is necessary but not enough for the authorization to be granted; » consequently « … the last paragraph of Article 32 of the same decree leaves a freedom for assessment by competent authorities when they are in the presence of concurrent applications or one application; That by granting SOECO the authorization for opening and mining the quarry of Diack the authorities in question did not ignore the principle of equality of citizens before the law, nor the provisions of the Article 32 as pertains to the means ;*

It therefore follows that the means are wrongly founded…; ».[167] From these jurisprudential backgrounds, it follows that the application of the principle of equality presupposes a variable and susceptible interpretation of degree. In this regard, constitutional laws do not always prohibit equality without a possible infringement. Discrimination is also a form of equality in some occasion. However, some forms of discriminations are formally prohibited. What the Senegalese constitutional council wanted to mean in its decision n° 1 /C/ 2007 on equality when it ruled that it « arose from the first article … that any discrimination based on sex is expressly excluded, that the principle of equal access to power although of constitutional value would not depart from this rule ». The Council interprets the first Article of the Constitution to conclude that the constitutional principle of equality must be understood as not to justify that sexual criterion can be used to establish equality between citizens. With the principle of equality, we are in the presence of what Georges Vedel called « a concept functionally avoidable but strained by a subjectivity which cannot be evacuated[168].

If as a result the discrimination is not very much pronounced the judge both administrative and constitutional adopts a low profile and leaves the decision at the discretion of public authorities. If on the other hand the discrimination is unjustified, the judge does not put on gloves to tackle the matter.[169] Thus in his decision relating to the status of judges, the constitutional council sanctioned the discrimination between judges from the former National School of Administration and Judiciary and state agents recruited as security constituting an unacceptable attack to the principle of equality.

The attack on this principle is so serious, manifest, so disproportionate, so inappropriate that the constitutional judge tosses aside his diplomatic language to use severe terms like « gap », « iniquity » or even « arbitrary situation », the exemption granted to this new recruits in the body of judges as to their length of service, training-only six months of internship-, their appointment to permanent position without the certificate issued after two years of training, their appoint to positions in the judiciary without the opinion of

[167] CE. Arrêt N° 09/04 du 22 avril 2004, Etat du Sénégal c/Ministre de l'Economie et des Finances/ Ministre de l'Energie et de l'Hydraulique/Chef du service régional des Mines de Thiès (inédit)

[168] G. Vedel, « Doctrine et Jurisprudence Constitutionnelle », RDP, 1989, p 15

[169] Voir M. Ngaïndé, le Conseil d'Etat du Sénégal et le principe de l'égal accès des citoyens à un emploi public : à propos de l'arrêt du 29 Juin 2000, Association nationale des handicapés moteurs du Sénégal contre Etat du Sénégal, Arrêt n° 12, Afrilex n° 3, 2003, p 193

the Higher Council of the Judiciary leads to the judge to consider that « such gaps and discriminations … are susceptible to give rise to iniquities and arbitrary situations to the principle of independence of judges guaranteed by the Constitution and to the principle of equality recognized by the Constitution, by reference to the Declaration of Human Rights of 1789, whose article 6 provides that all citizens are equally admissible to every dignity, position and work in accordance with their capacity and with the Universal Declaration of Human Rights of 1948 which , in Article 21 paragraph 2, affirms that any person has the right to have access in conditions of equality to public functions of his country ».[170] Through this recital, the constitutional judge addresses out rightly the excessiveness of the violation of the constitutional principle of equality by Article 4 repealing and replacing Article 69 of the organic law on the status of the judges.[171] Similarly but with a lot of courtesy, the Senegalese constitutional judge notes that « a triple difference between the members of the electoral college of senators « is manifestly exorbitant ». It pertains to Article 116 paragraph 8 of the electoral code which organizes senatorial elections.

It was that some elected members of the electoral had two voting rights while the others only had one, others voting rights because they were elected twice, among them is a representative, the Senegalese constitutional judge therefore inferred that « Article 116 paragraph 8 violates the principle of equality of vote, by providing that voting is always equal, give each voter the some electoral power ».[172] In this particular case, there is also a disproportion which is clearly noticeable. For an election, a holder of a voting right cannot in any way have two possibilities of voting while the others are been deprived of the same. Such an advantage risks falsifying the game and even the stake of the election concerned.

The other example chosen within the framework of this work resides in the proportionality as the condition of legality of administrative actions and as a means of protecting the citizens. An administrative action which respects all the conditions of legality can be declared illegal because of putting into question individual fundamental rights. The control of proportionality calls for three observations. It is a control of appropriateness; an administrative action enacted must be allowed to succeed the objective assigned to the action; it is a control of necessity, the administrative action must not exceed that which is necessary to achieve the objected targeted; it is a control of balance, if the action is necessary, whether it is appropriate with goal sought, it must be in proportion with the disadvantages it is susceptible to create.

Here there is a balancing-up of the charges brought about by the implementation and the advantages created by the attainment of the objective to be targeted. The modalities for the exercise of control of proportionality essentially consist of the control of the manifested error of evaluation.[173] This control is the direct consequence of the discretionary power attributed to the Administration by the constituent, by the legislator or by the administrative judge himself. This discretionary power only leads to sanctioning of infringements to the law in case of disproportion. In addition to this there is the interpretation of certain legal rules and principles to censure the excessive disproportion of the implementation of these rules and principles.

Jurisprudential examples are legion here. Three examples will enable emphasis on this form

[170] CF. Considérant n°7 de la décision CC n° 2-C- 94, 27 Juillet 1994 in Editions Juridiques Africaines, 1994, 98 p

[171] Pour cette loi, voir JORS n° 5445 du 4 Juin 1992 p 259 et s.

[172] CF. Considérant n°11 de la décision CC n° 3-C-98 du 5 Mars 1998, JORS n° 5790 du 12 Mars1998, 438p

[173] Voir P. M. Sy, Senegalese State Council and the control of manifest error of assessment : commentary on the order of the State Council of the Republic of Senegal of 27 october 1993 between the International Committee of Red Cross and Senegal in Senegalese Review of Criminal law, 1997-1998, p 171 and relevant pages

of protection for the citizens. Firstly, in the matter of Senghane Ndiaye judged by the State Council of 1995 where Ndiaye had committed the offence of finding himself in a different place from the one he was supposed according to the order of mission which been given to him by his superiors and this offence inflicted upon him a sanction in this regard for « indiscipline classified as unacceptable in a body of elites ».

The State council declaring the sanction as inordinate and termed it as a manifest error of assessment and quashed it. Indeed according to the judge « …it follows that … from the analysis of the elements of the file, that in respect to the facts retained against Senghane Ndiaye, the sanction imposed upon him is disproportionate and that the administration committed a manifest error of assessment ».[174]

Secondly, for what pertains to the right to a career as a civil servant as provided by Article 21 of the Universal Declaration of Human Rights,[175] the judge considers that an action of demoting a civil servant is illegal because it is excessive. Accused of being in possession of counterfeit gold in India, Salif Fall was a diplomat in the Senegalese diplomatic mission in India who travelled to Hong Kong with the permission of the Ambassador of Senegal to whom he was attached. The judge admitted there was a professional misconduct by Mr. Fall but considers afterwards that « *not establish without manifest error of assessment, an action of demotion which in respect to the scale of sentences constitutes a severe sanction imposed against an officer who, for the whole of his career, has always satisfied his superiors by his work* ».[176]

Lastly in a more recent jurisprudence, the State Council ruled, concerning landownership[177], « that a verification, even summary, of the respective value of the titles (land) invoked would have enabled the State representative to ensure maintenance of order by enlightening the parties on their rights without taking the contentious decision which proves not to adapted to the facts which provoked it »[178] while it was a question of bringing to an end troubles brought about by a confrontation between two citizens who were in possession of the same piece of land allocated by a local authority to two different people in flagrant violation of the provisions of the Decree n° 72-1288 of 27th October 1972 in relation to allocation and dispossession of government lands.

This brief analysis of Senegalese administrative jurisprudence sufficiently shows the trend of activity taken by the former State Council and currently by the Supreme Court of Senegal to protect individual rights and freedoms. However, it must be observed that jurisdictional work comprises enormous gaps which are also an impediment to the exercise of administrative justice for full protection of rights and freedoms. This is what we are going to analyze herein.

II. Constraints to a satisfactory protection of rights and freedoms by the Senegalese administration

[174] CE 30 Septembre 1995, Senghane Ndiaye Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra

[175] 1. According to this article « Every person has the right to participate in the management of public affairs of his country, either through representatives who are freely chosen.
2. Every person has the right to have access, under conditions of equality, to public functions of his country.
3. The will of the people is the foundation of authority for public powers; this will must be expressed through fair elections which must be held at regular intervals through universal suffrage and through secret ballot or according to an equivalent procedure ensuring the freedom of the election ». See the Universal Declaration of Human Rights in Editions Juridiques Africaines Op. Cit p 127

[176] CE. 29 April 1998, Salif Fall vs/ Senegal in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra

[177] Which was protected by article 12 of the Constitution of 7th March1963 in Editions Juridiques Africaines, 1996, 146 p ; see also Constitution of 22 January 2001 in JORS n° 5963 of Monday 22 January 2001, 772 p

[178] CE. 25 June 2000, Groupement Féminin Keur Séga vs Senegal in Bulltein des arrêts du Conseil d' Etat 2000 Op. Cit. Supra

If the control of administration reveals today in Senegal the real reasons for satisfaction as earlier indicated, it should be noted that it is wholly exempted from reprimand. Far from it, different inadequacies of legal or extra legal nature constitute as many weaknesses of the administrative justice as the mechanism for protection of rights and freedoms within the framework of a true constitutional state.

It is also appropriate to examine technical constraints of the Senegalese administrative justice (A) and then see which are the socio-cultural constraints which prevent this justice from giving the fullness of its power in Senegal (B).

A. Technical complexities

The statement of Professor Babacar Kanté, concerning constitutional judges, is, in many respects, valid for the administrative judge. He noted that « effectively in their approach … it is a literal interpretation of the law which is privileged there in but it totally in line with the constituent jurisprudence of the Council which adopted a minimalist position in matters of jurisdiction ».[179] The control of an administration action becomes therefore, as Madjiguène Diagne wrote, a control which is superficial, literal and formal.[180]

This minimalist control does not offer guarantees to safeguard neither the intangibility of rights of the citizens vis-à-vis the administration nor to impede the harmful action of the latter so as to protect the former against arbitrary abuses. There is lack of jurisdiction for the administrative judge invoked in sensitive issues like electoral matters. During the parliamentary elections of 1998, the *Parti Africain pour la Démocratie et le Socialisme,* (AND JEFF /PADS, had its application thrown out by the State Council for lack of jurisdiction. The marxist party wanted to quash the prefectural order « n° 012 of 23rd May 1998 on delocalisation of polling stations for parliamentary elections of 24th May 1998 in the district of Sindian in violation of Article L62 of the electoral code which only gives jurisdiction to the Minister for Interior of establishing polling stations ».[181]

The State Council easily declared that it had no jurisdiction to hear this electoral dispute under pretext that « it arises from the provisions of Articles LO185 and LO 188 of the electoral code that the dispute of legislative elections lie under the jurisdiction of the Constitutional Council. »[182] This lack of jurisdiction is an easy solution to get rid of the issue before it. This is in particular true that the administrative judge rescinded this solution during the parliamentary elections of 2007 when he censured the Decree of the President of the Republic on distribution of seats with no regard the criterion of population strength.[183]

Other weaknesses mark out the control of the judge. The same applies to unacceptability in huge numbers and at the least opportunity.[184] If we consider the case Mamadou Thiam of 2004, we will make a religion for ourselves: the applicant was disputing the results of

[179] B. Kanté, « Les Méthodes et techniques d'interprétation de la Constitution : l'exemple des pays francophones », in l'interprétation constitutionnelle, (Soucramanien), Paris, Dalloz, 2005, p 162

[180] ND. M. Diagne, Les Méthodes et les techniques du juge administratif sénégalais, Thèse, Dakar, 1995, 523 p

[181] CE. 27 janvier 1999, Landing Savané, Bakary Coly et Adn JEFF /PADS c / Etat du Sénégal in Bulletin des arrêts du Conseil d' Etat 1999 Op. Cit. Supra

[182] Idem

[183] CF. Arrêt du Conseil d' Etat LD/MPT, Parti Socialiste c / Etat du Sénégal (inédit)

[184] In this regard, Madjiguéne Diagne notes with accuracy that the administrative judge is more careful in his interpretation of admissibility of the appeal for abuse of power. See M. Diagne, La contribution du Conseil d' Etat sénégalais à la construction de l' Etat de Droit in Revue administrative, 2001, p 482

his son Ousmane THIAM for the admission examination to Certificate of lower Secondary school education (BFEM),for July 2003 , organized by the Jury of Centre CEM unit 19 of Parcelles Assainies ; the council rejected the means for lack of indications which is highly unlikely because it is not possible for someone to seek the services of an advocate to seize the judge without saying the grievances for which he wants to seek redress.

But the administrative did not feel embarrassed to declare the application inadmissible

« …*that the correspondence through which the applicant seized the State Council does only contains statements and a proposal relating to the organization of a special session of examination for his son with a jury composed of examiners of his choice ;*

That his application does not give any precision or specification concerning the violation by the Jury of the rules governing the organization of examination unsuccessfully sat by Ousmane THIAM;

That in the absence of formulation of conclusions or means for purposes of quashing the decision of the jury the subject of the grievance, the applicant ignored the provisions of Article 15, 2° of the organic law N°96-30 of 21st October 1996 on the State Council ;

It therefore follows that the appeal of Mr. Mamadou THIAM is declared inadmissible »[185]; This control is the result of the mechanical application of laws while he should have implemented his investigatory power as he succeeded in a long jurisprudential continuity[186] of which the last is the decision made in 2009. The implementation of the investigatory power of the Supreme Court enabled the latter to quash an order issued by the Mayor of Dakar on evacuation of a building which threatened to collapse due to material inaccuracy of facts alleged by the mayor.[187]

Moreover, the judge invoked mild breaches to the procedure of referral so as deprive the applicant of his right to have access to administrative justice. This was the case in the matter of Association Sportive and culturelle Sonam.

The Association on 16th August 2005 had seized the State Council for purposes of quashing a decision for abuse of power for a report n°005 of 1st August 2005 of 1st August 2005 through which the appeals board of the Senegalese Football Federation quashed the decision n°22 of 21st June 2005 of C.C.S.R.Q. which had awarded a match won against A.S.C. Médiour. The administrative judge refused to hear the matter due to non payment of the deposit of 5000 francs CFA and failure to serve the application to the Senegalese Football Federation whose decision was contested : thus « … it follows from the provisions of the organic law n°96-30 of 21st October 1996 on the State Council, amended by the organic laws n°99-70 and n°99-72 of 17th February 1999 that the applicant is supposed under penalty of forfeiture to serve the other party through the court bailiff within a time limit of two months after referring the matter to the State Council ; … that the review of the file and procedure documents reveal that the applicant has neither paid the fine nor served the application to other party ; …it therefore follows that his appeal is forfeited ; »[188]

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[185] CE. Order n ° 18, 24 mai 2004 Mamadou Thiam contre Etat du Sénégal (inédit)

[186] Voir Amadou Alpha Kane, Doudou Kane etc. in Annales de 1973 africaine ou Grands arrêts de la Jurisprudence administrative sénégalaise Op. Cit. Supra

[187] CS Arrêt n° 16 du 9 Juin 2009, Adja Aïssatou Thiam et Cie c/La Mairie de Dakar (inédit)

[188] CE. Arrêt n ° 40, 30 novembre 2005, Association Sportive et Culturelle SONAM c/ Fédération Sénégalaise de Football (inédit)

At the defense of the judge, we will retort that it is the law which provides as such and the law bides the judge. But the judge interprets the law, this being the case, he should have gone beyond some obstacles put on his feet by the law maker. The legal principles he addresses and applies, even in the absence of the law, have the same positive value as the written law in broader sense of the term. The jurisprudential decision becomes a legal rule according to the formulation of Eisennmann: interpret the law, is to complete it ; the judge creates it... »[189] He creates starting with administrative law.

In any event, these cases as analysed above are suggestive of disappointments which a citizen can be confronted with before the administrative judge. But the most ridiculous still remains the refusal to admit collective appeals[190] even if they are filed by political or trade union organizations which have a legal personality. These organizations protect material and moral interests of workers within the framework of the laws of the Republic among which is the Fundamental law. This gives the workers the right to « join a trade union » and to « defend their rights through a trade union activity ».[191]

Among the means of the « trade union activity », we are convinced; there are jurisdictional appeals like the one exercised before the administrative judge. Preventing them from seizing the judge is to mortgage the access to justice. And this, in as much as these appeals would have constituted guarantees for the freedom of association without exposing the worker to unjustified or inappropriate sanctions. Already in its order of 1981, Unique Union of Teachers of Senegal (Syndicat Uniques des enseignants du Sénégal) (SUDES) while the unionists contested the ministerial orders n° 15418 of 16 November 1978 and n°15675 of 22nd November 1978 from the Minister of public service on integration of primary school teachers in a body of teachers, the Supreme Court rejected without other forms of the proceedings of the appeal since « the orders contested are administrative acts of individual character » consequently « they would only be subject to an appeal for abuse of power by SUDES to the extent where the latter would act on behalf of the parties concerned by virtue of a special mandate … »[192]

The weaknesses of administrative justice in Senegal experience a point culminating to slowness of judgment procedures and the option for the administration to implement the decisions of justice, including administrative. In the first place, at the beginning in some matters a very long time would pass between the filing of the appeal and the judgment for the same. Through an appeal filed by Mrs. Fall in 1980 to contest the withdrawal of benefits granted by the Administration was heard and determined in 1985 that is five years after being filed before the administrative judge.[193] This explains the relevance of reprieve for the implementation of administrative decisions[194] but since some time now the judge is demonstrating some rigorous parsimony.[195]

However since the reform of 1992, we witnessed efforts of shortening the time limits for hearing and determining matters presented before the administrative judge. Thus the application filed by Guy Alain Preira against the National Board of Accountants of Senegal in 2004 was heard and determined within two years that is in 2006.[196] Nevertheless it remains

[189] M.M Sy, Le Conseil Constitutionnel et la Démocratie, Mémoire de DEA, Toulouse I, 1998, p 50
[190] Voir ce point D. Sy, Droit administratif, Dakar, CREDILA, 2009, p 45 et suivantes
[191] L'article 25 de la Constitution sénégalaise du 22 janvier 2001 Op. Cit. Supra
[192] CS 25 Mars 1981, SUDES in les Grandes Décisions de la jurisprudence administrative sénégalaise Op. Cit. Supra
[193] CS 25 juin 1985, Dame Fall in Grandes décisions de la jurisprudence administrative sénégalaise Op. Cit. Supra
[194] Voir Conseil d'Etat 29 Octobre 1997, El Hadji Serigne Tacko Fall in Bulletin des arrêts du Conseil d' Etat Op. Cit. n° 75
[195] Voir CE 26 Juin 1997, Baïdy Bâ in Bulletin des arrêts du Conseil d' Etat Op. Cit. Supra
[196] CE. 9 mars 2006, Guy Alain Preira c/Ordre Nationale des Experts Comptables et Comptables Agrées (inédit)

that two years is still too long bearing in the stakes to be considered.

As for the implementation of administrative justice decisions, the situation is scandalous to the extent where the Administration can deliberately refuse to implement jurisdictional decisions which condemn it to respect such or such individual right pronounced by the administrative jurisdiction. Such an eventuality reduces to nothing any hope of a constitutional state. It is simply equivalent to inexistence of justice. Nevertheless, the judge does not remain unmoved, and this is promising, before such a deficiency. Indeed in several decisions, he tends to have respect for the authority of the thing judged is the Administration tends to exceed it.

It is for this reason that he thwarted the desire of the Minister for health to give a second authorization set up another chemist in violation of the distance of 500 meters between two chemists,[197] and after the cancellation of the first authorization, by expressing that « *the decision quashed could [198] only be repeated on a different legal basis* ». In other words, the administrative authority could not take a decision which goes against the thing judged attached to the decisions of the State Council. Such an attitude of the administrative jurisdiction is more than beneficial. In any event, its action far from being satisfactory for reasons which are not legal but also extra legal (B)

B. Sociological complexities

Beyond legal constraints, the efficiency of administrative justice is filled by other considerations of socio-cultural nature. Also having access to the judge is not systematic. Better still, it is in many ways very random.[199] Several pitfalls stand in the way of potential justiciables.

First, an overwhelming majority of Senegalese are not recognize the state controlled justice system which delivers justice on behalf of the people. Other factors govern their relations with the State: that of submission before an administrative state which always enjoys humiliating its own citizens.[200] This explained by the fact that for many Senegalese, this administrative justice system is completely foreign to them. Human rights which are the justification of the rule of law and administrative justice which is one the multiple guarantees of the former are imported products to the Senegalese territory and not recognized by those they are supposed to protect. Many outside « official Senegal » consider human rights as a manifestation of western imperialism and a path towards loss of cultural identity if it is not purely and simply cultural adaptation. This corresponds to the reality for the larger part of the population.

To say the truth, the dignity on the block on which human rights and as such the rule of law, are erected is a cultural concept whose epistemological and theoretical principle like practical deployment is localizable and within space and in time. Their axiological content is the product of a culture which followed an historical path which is not in any way similar to what other cultures experienced under other horizons and simultaneously. In as much as

[197] CE 25 Août 1993, Jean Esplan c/ Etat du Sénégal in Bulletin des arrêts du Conseil d'Etat de 1993, Op. Cit. Supra

[198] CE 31 Mai 1995, Dorothée De Souza in Bulletin des arrêts du Conseil d'Etat de 1995 Op. Cit. Supra

[199] P. Sy, l'Accès à la justice, UGB, Thèse, 2010, 320 p

[200] Le régime de Senghor procédait à des séances de saupoudrage de paysans qui n'étaient pas en mesure de rembourser leurs dettes contractées vis-à-vis de l'Etat.

Mallarmé and Balzac[201] had beautiful words, in the kitchen they would have been idiots, in as much as the gallant human rights of the West are sub-human in Bamenda in Cameroon, in Djolof in Senegal or even in Kandahar in Afghanistan. Human rights are the expression of human subjectivity. They are neither spatial nor timeless. And the constitutional state, which formalizes them, is a « State of special values » as Dominique Rousseau wrote.

Alain Touraine emphasizes on this subjectivity by applying it a specific right, equality, and to an internal level but which can be extended to the international society, in so far as this name has a meaning. For the French sociologist, equality to be democratic must mean the right of each one to choose and govern his own existence, the right to individuation against all pressures which are exercised for the benefit of moralization and normalization ».[202]

Similarly for rights to be universal, they must give the possibility for each one to govern himself according to his own culture and judge his administration according to his own references of justice. It follows that the system of protection of individual rights and freedoms practiced through the Supreme Court just like the State Council not long ago are unsuitable, even incompatible to believes, ethos, morals and ethics of the most Senegalese people. Rights as mechanisms which ensures its dissemination are totally beyond the Senegalese people. Consequently, there is no doubt that they remain inefficient if not unoperational under our latitudes.

If Senegal protected her own values, the control whether social or jurisdictional would be more efficient. Pre-colonial Africa had to experience development of special rights and establishment of a control mechanism of these rights.

Professor Cheikh Anta Diop[203] took into account the African conception of man and his prerogatives in the African society of ancient time to show that civilization which is glorified by the West, and which knew his point of completion with the advent of human rights, constitute in reality a decline of humanity? he also wrote :

«*Patriotic feeling is, above all, a feeling of national pride. The individual is subordinate to the community, since his individual good depends on public good; therefore private law is subordinate to public law. This does not mean that the individual is a negligible quantity and that these southern civilizations as opposed to northern ones , make very few cases of human unities , human personality* »

He adds :

« it is quite possible that Egyptian citizens crashed under their weight taxes and chores at the time of construction of pyramids but it has never experienced this intrusion of the state in its private life ». It is possible to cite in the history of Egypt and Ethiopia and Sub-Saharan Africa, the only case where state authority would imposed to expose children because they were born with deformities or for birth control. On the contrary, respect for human life was such that after Herodote, when a nubian citizen was sentenced to death, the State was content with giving him the order of killing himself, but his own mother therefore supervised, through patriotism and civism, the implementation of the sentence, took over

[201] L'allusion renvoie à Molière dans ses « femmes savantes ».
[202] A. Touraine, Qu'est-ce que la Démocratie, Fayard, 1994, p 36 et suivantes
[203] C. A. Diop, L'Unité culturelle de l'Afrique. Domaines du patriarcat et du matriarcat dans l'Antiquité classique. Paris, Présence Africaine, 1959, p137-139

the matter herself if her son was able to cheat death ».[204]

Any extravert system is, by definition destined for failure because of being consubstantially deprived of motivations which will make it function appropriately. The system of protection of rule of law is of foreign origin in Senegal and in Africa generally. This foreign origin leads to civilization confrontation between state controlled legal order of western origin and local legal order of African origin. As witnessed by the decisions delivered respectively by the Supreme Court of Senegal and the Constitutional Court of Benin. The Supreme Court of Senegal was seized by a part of the Community of Léboue to contest the validation of the election of El Hadj Bassirou Diagne by the Minister for Interior as the Grand Sérigne of Dakar and the Senior Chief of Lébou community.

For the applicants, Bassirou Diagne is a usurper; he is not elected in accordance with the rules of Léboue tradition. Consequently the order by the Minister for Interior is marred by hijacking of power and accuracy of material facts. The court ruled that « the ministerial order in this matter which is simply limited to taking note of a situation decided by customary instances of the Community of Leboue, which has jurisdiction in the matter, is not susceptible to appeal for abuse of power as it is not a grievance[205] ».This is not true: the act of validation is contestable in view of the benefits the State grants the Grand Sérigne due to his status. The truth, is two legal truths are in conflict here and that administrative justice cannot resolve because it is entering in another system of social and ethical life. Since then, the State withdrew its recognition for Bassirou Diagne in favor of regime in 2000 before rehabilitating him but in competition with another Grand Sérigne.[206]

The decision of the Constitutional Court of Benin of 19th February 2002 in the matter of EGBAKOTAN II takes the same direction as the Supreme Court of Senegal of having a break between state controlled justice system and local justice system. The application targeted royal power. Mr. Boris Gbaguidi filed a complaint before the Constitutional Court against King EGBAKOTAN II; according to the applicant for a crime or a misdemenour, it was for the King and his court to decide on the punishment to impose on the guilt one. For thefts, the King would ask his subjects to catch the thief, once caught he is taken to the Royal Palace to undergo real and humiliating corporal punishment. The applicant argued that such kind of punishment is against the requirements of a constitutional state. Indeed nobody should be allowed to do such actions; we are therefore in violation of the Constitution of Benin. Especially its preamble which states that justice is delivered in the name of the people of Benin.

The King supports on his part that actions like, theft, rape, incest are prohibited in the Kingdom of DASSA-ZOUME and by the customs of DAASHA; it is therefore normal that those found guilty to tied by ropes and corporal punishment. The constitutional court declared that the King of DAASA-ZOUME acted against the Constitution.

According to the Court « considering that the monarchy is neither an institution of the republic, nor of the constitution, nor does the law give jurisdiction to royal power in matters pertaining to justice… that the king takes advantage of the custom, inflicts bodily harm and inhuman and degrading treatments to people in the cause of his action is unconstitutional because it violates Article 18 of the constitution, that acting as they do, even to prevent more

[204] Citant Fustel de Coulanges, p 139
[205] CS arrêt n° 60 du 1er Avril 1989 in Editions Juridiques Africaines, Dakar, 1996, p13-14
[206] Grand Sérigne Ibrahima Diop puis à son décès Massemba Koki Diop

cruel punishments, King EGBAKOTAN II and his court are violating the Constitution ».[207]

It follows from the jurisprudential examples that two forms of rule of law fed by two different understanding of justice and equity, and if you wish, frontally incompatible are concomitantly to the work in Africa.

The second constraint which weighs on the efficiency of administrative justice is financial in nature. Justice is expensive. It is not free, it is paying and being paid. It follows that those who do not have money do not have access to administrative justice.

In a constitutional state, rights are in real sense privileges and not prerogatives

Human rights are not defined as "all prerogatives recognized and guaranteed by the society to which every individual can aspire due to his affiliation to the community ». This definition does not affect the study on human rights and consequently, the rule of law? Do human rights constitute prerogatives placed at the discretion of man? Non! Derived from Latin « praerogativa » from 1235 which, referring to Roman centuries, includes the idea of voting. Prerogative is a privilege accorded to the latter to be the first to vote. Then the term meant advantage, honor, privilege, gift, option enjoyed by beings of a certain species or of a state given at the exclusion of many others. The idea of « prerogative » involves both the idea of power and exclusivity. It presupposes that we have a certain capacity to enjoy these rights personally. Does this mean they are human rights? The answer to this question undoubtedly is no. Indeed, to enjoy the rights which human rights advocate, there is need for an intermediary: the purse. The wallet full of euro, dollar, yen, rouble or even Franc CFA is the most credible guarantee for the enjoyment of human rights. It is a clear falsehood that the constitution or whichever law or international convention guarantee human rights.

Tell me of one person for whom the Universal Declaration of Human Rights paid for his higher education even if Article 16 of the Charter recognizes the equality of access to the education in line with merit. Even in the public service, this stipulation is controversial because it puts conditions which exclude the number of learners to access higher education. How many prescriptions did the Senegalese Constitution of 22nd January 2001 pay for the patients of Le Dentec Hospital in Dakar or those of Kaolack Hospital although Article 8 of the Constitution of 22nd January 2001 guarantees to each Senegalese citizen the right to health? How many vehicles did the Inter-|American Convention of Human Rights distribute to Chileans to apply the freedom to go to Andean space?

One of the most important rights for effectiveness of true constitutional state is a dream for the majority of the people: having access to the judge. Many drop a judicial action because they do not have the means to pay the fees for justice, whether it is to pay for services of an advocate or incase of loss of the trial, pay the expenses involved?

Also « remoteness of justice » due to poverty is an obstacle to the enjoyment of the so called human rights although Universal Declaration of Human Rights like the African Charter on Human and People's Rights grant this right in an egalitarian manner to all to the extent that human rights justice is a discriminatory distributive justice as opposed to egalitarian commutative justice if it is not egalitarian. Incidentally, the constitutional state is a state

[207] CC 19 Février 2002 in wwwaccapuf. fr

with a variable geometry and administrative justice which is one of the guarantors is a justice of the privileged.

Further « the respect and consolidation of a constitutional state in which the state and the citizens are subjected to same legal rules under the control of an independent and impartial justice system »[208] are an incantation hoax of the Senegalese constituent.

In a nutshell, administrative justice is not more than judicial justice, does not allow maximum protection of rights and freedoms guaranteed to the citizens within the framework of the Senegalese legal system.

The protection of the rule of law passes necessarily through an adequate and useful control of all administrative powers.

From the head of state to the lowest level of administrative hierarchies, no decision of the administration must escape this control contrary to what we observe in the jurisprudential activity of different administrative jurisdictions that Senegal experienced since her independence.

The problems which hinder the system of protection must be removed in the respect of the spirit of the Senegalese people: it is of no use to put in place mechanisms for protection of rights whose beneficiaries are not aware or are simply ignorant of them.

[208] Preamble of the Constitution of Senegal Op. Cit. Supra