

The Three Most Important Features of Senegal's Legal System that Others Should Understand

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Senegal's colonial experience (1886-1960)¹ has shaped the state's post-colonial institutions and laws. The constitutional regime, the judicial system and the state legislation have all drawn on the French model. As a matter of fact the French law and the Muslim law are the only sources of law used by the Senegalese legislator. Despite the official abolishment of customary laws, the latter still constitute the reference legal framework to the majority of the population who live in total ignorance of state laws. Due to this social reality, one cannot examine the legal system in Senegal without dwelling on its duality. On one side is the official system and on the other side is the so-called informal system, comprising indigenous African laws and beliefs. The indigenous customary laws and the indigenous justice system having survived all the legislative policies aimed at eradicating them, it is not possible to study the legal system in Senegal without discussing about the unofficial legal system. This paper will therefore examine these two sides of the Senegalese legal system in the light of the following three points: the constitutional regime (1), the judicial system (2) and the legislation (3).

1. The Constitutional Regime

In this section, we will begin by exploring the powers of the President under the post-colonial constitutions, and thereafter see how the discarded indigenous unwritten constitutions bring about a more rigorous system of checks and balances.

a. The Current Constitutional Regime

The first constitution of the independent state was modelled on the constitution of the 4th French Republic. It instituted a parliamentary regime that ended in 1962 following a political crisis. A new constitution, which introduced the presidential regime, was drafted and submitted to a referendum in 1963. In 2000, the ace opposition leader won the presidential election and decided to change the constitution. A new constitution was drafted and ratified through a referendum in 2001. As was the case with the former one, the new constitution was designed by experts appointed by the President and working under his instructions. This explains why both constitutions grant much power to the President.² However, the

¹ In 1855 the kingdom of Waalo, then headed by the *lingeer* (title of the female head of state) Ndatte Yàlla, is the first kingdom to be annexed by the French. Direct rule over most of Senegal is achieved in 1886, with the defeat of the armies of the last Wolof kingdom, Kajoor, and the death of its dammeel (title of the male head of state) Lat Joor.

² The President shall be elected by direct vote with the majority poll "*au suffrage universel direct et au scrutin majoritaire à deux tours*" (article 26) for a term of five years and for a maximum of two consecutive terms. He/she shall be head of State, head of his/her political party (if he/her wishes, art. 38), and chief of the executive. He/she shall be the sole decision-maker on national policies (article 42). He/she shall appoint and dismiss the Prime Minister (art. 49). He/she shall be elected for a five-year term and shall not be allowed to serve more than two consecutive terms. The President has the power to dissolve the National Assembly and call for new elections (after at least two years of legislature). The only way to dismiss a President from office and organise a presidential election is to charge him/her for treason before a special court (*la haute cour de justice*). The constitution does not define the acts that constitute treason and no president has so far been sued for treason. The fact is that the parliamentary majority has always come from the president's party. Moreover, a three-fifth

constitution of Senegal indicates that Senegal is a secular state with a democratic regime which applies the multi party system and recognises all the fundamental human rights and human rights conventions.

Article 88 of the Constitution states that the judiciary power shall be independent of both the legislative³ and executive powers. The judiciary power is exercised by the *Conseil Constitutionnel*⁴, the *Conseil d'Etat*⁵, the *Cour de Cassation*⁶, the *Cour des Comptes*⁷ and the Courts and Tribunals.

The constitution recognizes the existence of six “national languages” (Diola, Malinké, Pular, Sérère, Soninké, Wolof) but French is the sole official language (article 1). Consequently all legal texts, written laws, court decisions, official papers and documents, including the constitution, are written in French. Moreover, to be elected President one has to perfectly read, write and speak French (article 28). However, according to statistics released by the *Délégation Générale à la langue Française et aux Langues de France (Références 2006, p. 3)* only 10% of the Senegalese population perfectly read, write and speak French. 90% of the population are thus excluded from understanding the state’s laws. The fact that those laws are not inspired by indigenous laws and customs makes them even more foreign.

b. The discarded indigenous African constitutions

There used to be many traditional political arrangements in Africa, ranging from large kingdoms to acephalous or polycephalous societies. Nevertheless, common traits could be found in all the unwritten constitutions of the land that is now the State of Senegal. First of all, leaders were schooled and hereditary chiefs were inculcated with values to enable them represent the entire nation with impartiality at all times. A Wolof⁸ saying sums up that rule: *Buur du mbokk* (meaning literally: a king is not a relative, in other terms a leader should never be seen as someone who takes sides in favour of those related to him). Another Wolof proverb says it just as bluntly: *Njiit ndey ji séex la jaaxanaay ley tëddé* (a leader is a mother of twins,

majority of parliamentarians, in addition to a three-fifth majority of senators, is required to take a president before the Supreme Court of Justice (art. 101).).

³ The National assembly is composed of deputies who are elected by direct vote (*au suffrage universel*). 65% of senators are directly appointed by the president while the remaining 35% are elected representatives of local councils. (art. 60-1). The parliamentary term of office is five years.

⁴ The *Conseil constitutionnel* rules on the constitutionality of laws voted by parliament. All of its five members are appointed by the President of the Republic even though he can not dismiss them (they serve a single six-year term).

⁵ The *Conseil d'Etat* is the last court of appeal for administrative law related matters. It also serves as a last court of appeal for the decision taken by the *Cour des Comptes*.

⁶ The *Cour de Cassation* is the last court of appeal on civil and criminal matters. The last court of appeal for business matters covered by the Uniform Acts of the OHADA is the Common Court of Justice and Arbitration.

⁷ All the members of the *Cour des Comptes* (a Court of Magistrates working as qualified accountants for the state) are appointed by the President of the Republic. (article 92)

⁸ All the African legal terms and proverbs are in Wolof. Wolof is the most widely spoken language in Senegal. Wolof is also an ethnic group.

who lies on her back to enable both babies have equal access to her breasts). All leaders, chiefs or kings were designated by an electoral college or a larger assembly (depending on the size of the territory)⁹. The selected leader had to be the most qualified for the job (in Wolof *ki gënë mat*). The decision-making process was collective with emphasis on consensus (*waxtaan ba jubbo*), relayed by proverbs such as: *ñakk déggôo amul ñakk waxtaan a am* (Wolof saying, literal meaning: “Disagreement does not exist as such, it is just lack of communication”). *Diisoo* (taking the counsel of all involved in a matter, “la concertation”) was the rule and any leader who failed to seek and heed the advice of the crown’s or state’s council (the electoral college) could be deposed. Incompetence was also valid ground to oust a king. That process is called *folli* in Wolof (*folli*, “to depose someone”, is the opposite of *fal*, “to elect someone”). (Boulègue, 1987, 65-71; Diop 1987, 52; Dieng, 1993, 69)¹⁰.

In the Wolof and Seereer¹¹ pre-colonial kingdoms, a female head of state, the *lingeer*, was designated each time a new king was elected (Dieng, 1993, 15). Her political power was greater than that of the king (B. Diop, 24 ; Samb, 36-37 ; Barry, 1985, 263, 275). Women were also made governors (i.e. a provincial chief appointed by the king). Women governors bore the title of *jee*. (Dieng, 1993, 381, 451)

The traditional political system based on the election of all representatives and executive officers, and holding them accountable, is still in place in various parts of Senegal. The best known for its liveliness is the lebu people democratic organisation in the region of Dakar. Traditional authorities and Muslim leaders remain the unofficial but very real powers the population relate to (Gellar, 1982 ; Guéye, 2006, 323-334).

2. The judicial system

The unification of the judicial system was done exclusively in favour of the French judicial organisation, with the abolishment of the indigenous justice system (a). Given the alien nature of procedures and rules as well as the language of the courts (French), there is deep mistrust towards state jurisdictions, with the population generally tending to steer clear of them (b).

a. The Unification of the Judicial System using the French System as a Model

In colonial days, customary law jurisdictions were set up alongside French law jurisdictions. Customary law jurisdictions had competence to hear cases of civil, commercial and criminal litigations¹² concerning people of indigenous status. The French law jurisdictions had competence to hear litigations concerning European citizens or those of similar status. These “expatriate” jurisdictions were also open to natives who opted for the application of French law. After the country became a sovereign State (4 April 1960), the judicial system was harmonized based on a simplified French model. The colonial customary courts were

⁹ “*Fal na ñu buur*” (we have elected a king) is the correct way to say, in Wolof, that there is a new king in office.

¹⁰ The fact is that all the words used today to emphasize good governance policies, democracy and gender consciousness, exist in the Wolof legal vocabulary (as well as in the other national languages) proves that Senegal’s constitution needs not be in French for it to enshrine the democratic principles of government that can as well be exhaustively expressed in Senegalese national languages.

¹¹ Seereer is one of the ethnic group of Senegal and a national language.

¹² A decree of April 30, 1946 gave exclusive competence to the French law jurisdictions in all criminal law matters with regard to all the inhabitants of the colonial territories.

abolished. The Muslim judge or Cadi retained an advisory role in inheritance matters (because of the Muslim inheritance law in the Family Code). Subsequent reforms (1984, 1992, 1999) only brought the judiciary organisation closer to the French model. A supreme court of justice in business matters, the CCJA (Common court of justice and arbitration), has been created by the OHADA (Organisation for the Harmonisation of Business law in Africa), in 1996. Its seat is in Abidjan, Ivory Coast.¹³

In order to bring justice nearer to the people, Houses of justice were created in France. The same institution has been successfully brought to Senegal (Decree 99-1124 of November 17, 1999 relating to the houses of justice, mediation and conciliation). The success of the houses of justice (so far only three of them are operational) is due to the fact that they are based on a spirit of consensus and amicable dispute resolution methods.¹⁴

The fact is that the legacies of the colonial period: the prison system¹⁵, the retributive justice concept and the Western official language contribute to the negative perception of the state's judicial system¹⁶ (Samb, 2006). The perception of the judiciary as a closed and obscure system creates mistrust and even the fear of going to court. Consequently, when brought before the court, many litigants resort to getting protection by offering bribes or seeking the protection of influential Muslim or political leaders. Such practice exacerbates the already negative perception of the official justice system thereby promoting recourse to justice away from state courts.

b. The Prevalence of the Indigenous Justice System

In the indigenous justice system the administration of justice is an instrument of peace and harmony. Therefore the emphasis is put on seeking non traumatic solutions to conflicts by promoting amicable dispute resolution processes. Consequently, informal mediation (*dox-diggante, defar, jubale*) is thriving in business disputes as well as in family matters. In latter, the mediators can be family elders, the village chief or a spiritual leader. In business the mediators are usually fellow business men or women, traditional authorities or spiritual leaders. (Guéye, 2006)

3. The legislation

Customary laws are officially abolished in all fields in favour of the one law, one justice system. Customary law has very marginally survived in the Family law which allows marriages to be celebrated in a traditional or religious way (however before and after its

¹³ For more on the OHADA and the CCJA, see, http://www.aict-ctia.org/courts_subreg/ohada/ohada_home.html (last visited August 31 2007)

¹⁴ For more see official website (in French) <http://www.justice.gouv.sn/maisonsdejustice/historique.htm> (last visited (August 31, 2007).

¹⁵ According to the Final report on the justice sector project programme, June 11, 2004, all the prisons are in a very bad condition given that most of them date back to the colonial times. Only 2 of the 38 existing prisons were built to be used as such. (E.g. The prison of Thiès is a former explosive warehouse of the French Army, and that of Kaolack is a former stable). In mid-April 2003, there were 5887 prisoners for a capacity of 2972, implying an overpopulation of 98%.

¹⁶ The failure of state jurisdictions to meet the people's aspirations for fair trial and security has been analysed in the Final report on the justice sector project programme, June 11, 2004, which states that "One cannot but acknowledge that for a great majority of the population, justice does not fulfil its role, it is: slow¹⁶, expensive, complex, inaccessible, inequitable and sometimes unsuited to the socio-cultural environment."

celebration the marriage is ruled by statutory laws only). The Family Law also has a section called Muslim inheritance law but there is no similar section for Indigenous inheritance law. (Camara, 2006)

Although the first sentence in the Preamble of the current Constitution affirms the attachment of the Senegalese people to their cultural values which constitutes the cement of national unity, none of the statutory laws relates to indigenous African norms or values. State laws draw solely on the French law, while the Family law also builds on Islamic jurisprudence. This tendency to ignore indigenous African laws was remarked on by Menski:

“While many allowances are made for African Muslims in the name of religion, African people are almost everywhere treated in a colour-blind, culture-neutral fashion that denies their value systems adequate legal recognition.” (Menski, 2006)

As a consequence of their lack of roots in the African socio-cultural environment, the written-in-French Senegalese state laws remain unknown to most Senegalese, who continue to manage their business and life according to indigenous laws.

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