

**The Three Most Important Things About My Country's Legal System
That Others Should Know**

Dr. Ousmane Mbaye, Faculty of Law, University of Dakar Senegal

Talk about the three most important things in the Senegalese legal system is a difficult task. Not only because of the subject matter but more because of the choice which is to be made among the various and numerous distinctive features of the said system. In fact, a choice is in its essence discriminatory and even arbitrary since other elements as important as those ultimately chosen will be deliberately put aside. In order to minimize the inconveniences peculiar to each choice, we will try to extract the three points we are called to deal with from the brief but necessary introduction on Senegal as it follows.

Senegal is a Republic located in the western part of the African Continent. It is bounded by the Atlantic Ocean and other African countries (Mauritania, Mali, Guinea and Guinea Bissau). It is a developing nation of 76, 000 sq.mi, and 10.5 millions inhabitants. 95% of Senegalese are Muslims, 4% Christian and 1% are traditionalist. Senegal, a former French colony, became fully independent in 1960. Due to this colonial past (the influence of France) and in the context of comparative law, it belongs to the “civil law system” as distinct from the “common law system”, the two legal systems which prevails in the world. From 1960 onwards, Senegal is known and recognized worldwide as a very stable country, tolerant culture, largely free from ethnic or religious tensions, respectful of human rights and of cultural diversity. Considered as the leading country of democracy in Africa, Senegal is one of the few African States if not the only one that has never experienced a “coup d’etat” To end with this quick overview, let’s point out that Senegal has for a long time widened his diplomatic engagements with other developing nations particularly African nations to build the United States of Africa. From what has been already said, we may now extract the three important things which will constitute the body of our future writings: political stability, social harmony and the commitment to achieve African unity.

And this, in keeping in mind that they are grounded on suitable rules of law (respectively the Constitution, the Family law and some international treaties) specially enacted and enforced shedding by the way light on what is the specificity of the Senegalese system.

I) The Legal sources of political stability

In general terms, political stability we considered as a distinctive feature has its own requirements i.e. political mechanisms which work and political actors (government and opponents) who play the game because they feel the rules as being enough fair. In Senegal, the legal system seems to have met these requirements in generating through the years appropriate rules and a set of institutions capable of ensuring first the suitable working of public affairs and second the peaceful transition of power. In fact, elections duly scheduled take place periodically and laws organizing them have been elaborated and mutually accepted by all the political parties. Let us just recall the presidential election of March 2000 which saw the transition of the power to one political party to another. The opposition is not only recognized but more has a constitutional status i.e. is sanctified as an institution which has a key role to play in the life or the nation.

Constitutionally, Senegal is a secular Republic with three separate powers: a strong presidency, a bicameral legislature (National Assembly and Senate) and a reasonably independent judiciary. Far from being imposed, the strong presidency has its roots in the political history and is to be seen as a deliberate choice of the Senegalese legislator who deemed it more in accordance with the Senegalese mentality of power. Indeed, at the beginning of independence (from 1960 to 1962) Senegal had a parliamentary system with bicephalous executive in which a President and a Prime Minister had equal powers. The inevitable political rivalry between those two strong personalities led to a major crisis in the life of the young nation. Fortunately, this was put down without bloodshed but consequence had been drawn. An amendment in the Constitution consecrated an executive power between the hands of only one person: the President, who will see his powers consolidated, will direct Government actions and will be now elected by universal adult suffrage to a five year term. The last amendment of the constitution in 2001 has limited the presidential mandate to two terms.

Nevertheless, despite this strong presidency, there is an authentic check and balance system: a legislature elected separately from the president and exercising political control over the government and a judiciary namely the Constitutional Council which has the constitutional review and so playing the role of arbitrator between the former two cited. Thus, the President has the right to challenge laws voted by Parliament before the Constitutional Council, same for Parliament concerning decrees issued by the President. This High Court also ensures that presidential and parliamentary elections and referenda are lawful.

To end with, mention should be made here of the right given to individual citizens to challenge the constitutionality of executive and legislative acts before other high or ordinary courts than the Constitutional Council if such alleged unconstitutionality undermines their interests in private disputes.

II) The Legal sources of social harmony

To illustrate this second point, example will be taken from the Senegalese Family Law, part of the “civil law” covering the status of persons and their capacity to act at law, the nationality, the marriage and divorce, the parent and child legal relations, the law of succession etc...

As stated above in the introduction, several ethnic groups with different religious beliefs constitute the Senegalese nation. This cultural and religious diversity among peoples we may meet in almost all the African countries is the result of colonialism. Colonialism considered here only as an historical factor did divide the African continent in the line of its immediate interests. The brutal dislocation of pre-existing coherent social entities has been followed by the artificial creation of new states regrouping small communities cut from their original wombs. The consequence in law was that there were multiple laws emanating from different sources as to the various ethnic groups which could be applied to persons living in those new territories. Was also to be included the law of the colonialist country. This latter being called “modern law” as distinguished to the first ones called “customary laws” or “traditional laws” or “indigenous laws”.

After the independences, the challenge faced by the new African states was the making of a coherent family law. For this, two options we think extreme were opened: either abolish the customary laws and enact a modern family law in order to build a homogeneous nation or choose to reconcile with African culture in codifying the customs and so reject the “modern

law". The first option had been the one of Ivory Coast, Guinea, Madagascar whereas Benin and Togo took the second one.

As for Senegal, a third option we deem an important think in our legal system was taken. It consisted in elaborating a family code in which customary laws (traditional and religious) and modern law would be put on an equal footing. Said differently and to make a daring parallel with the theory of international contracts, it comes as an "electio juris clause" since as a matter of fact Senegalese citizens can choose among these laws the one which will govern their private relations overall for marriage and succession. The family code came into force in 1974 and since then it works despite some minor criticisms. Make rules of law from different sources co-exist in a matter as emotional as the family law is the slightest cost to pay to preserve the unity of the family and respect the social diversity in a nation at work.

It seems that this option if not the best was at least the more reasonable. Indeed, if we observe the situation of countries which used the extreme options i.e. codifying exclusively modern law or codifying exclusively customary laws, we can see that serious problems arose in the application of their family codes. Two examples can be drawn first from Benin who decided in 2006 to enact a new code similar to the Senegalese code and second from Guinea where peoples continue up to now to abide under the customary laws officially abolished ignoring by the way the official "modern law".

III) The influence of international engagements in the Senegalese law system

For years behind, Senegal engaged with other African countries into two major international treaties which have had a deep impact in his legal system. As we'll see it, those treaties have substantially modified large areas of law specially the economic Law.

Before developing this peculiar point, it is useful in order to make things clear to recall that Senegal (a civil law country belongs to the group of countries which adopt the "monist" approach (not the "dualist") in relation to international treaties. This means not only that international treaties form a part of the Senegalese legal system, but also that they take precedence over national legislation.

The two treaties about are the OHADA (Organization for the Harmonization of Business Law in Africa) which aims at enhancing the economic integration and the UEMOA (West African Economic and Monetary Union) aiming at creating a Common Market in the West Africa area.

The OHADA treaty signed in 1993 by 15 African countries (West and Central Africa) among which of course Senegal has unified the entire business law of the member states. A series of uniform codes has been thus produced: a Uniform Bankruptcy Code, a Uniform Corporations Code, a Uniform Securities Code, a Uniform Arbitration Code and a Uniform Code for Accountancy.

The deadline for their application was for January 1st, 2000. In Senegal, as for other member States, the result has been that all the previous domestic legislation in touch with business world has been abrogated. Moreover a OHADA Court of Justice seating in Ivory Coast (a member State) plays now the role of highest appeal court in the field of business for all disputes arising in the member States. This Court is responsible for ensuring the provisions

contained in the Uniform Codes are properly applied by national courts. It rehears cases and has the power to quash decisions taken by these latter.

As for the UEMOA treaty, its provisions to build an Economic Union take precedence over domestic laws of member States (customs duties, customs legislation, tax law...). UEMOA law as community law consists of the so called "derived legislation", being the binding instruments adopted under the treaty (regulations, directives, and decisions). The result is that as these rules confer rights on individual UEMOA citizens, when these latter plead them before their own national courts, those rules of derived UEMOA law will take precedence over domestic legislations.

Those two treaties as we see it have strongly influenced the Senegalese law system in the field of Economic Law with a correlative loss of national sovereignty. Before the effective application of these treaties, they had been referred to the Constitutional Council in respect with national sovereignty prerogatives. The High Court had decided that those two particular international agreements complied with Senegalese Constitution since its preamble states that: "The Republic of Senegal will make all efforts to achieve African Unity".