Judicial Review and Democratization in Francophone West Africa: The Case of Senegal

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Abstract: The Constitutional Council of the Republic of Senegal (Conseil Constitutionnel, CC) was established in 1992 as a specialized institution for constitutional matters. Within its competencies lie the control of constitutionality of laws and international engagements, electoral matters as well as the settlement of conflicts between the executive and the legislative branch. Senegal has a long-standing reputation for being an "oasis of democracy" and is a rare example of political and social stability in the region. It has undergone two peaceful changes of power (2000 and 2012) and has avoided military or harsh authoritarian rule. Due to various constitutional amendments Senegal's constitutional regime, however, is characterized by its high instability. Thus far, the CC has kept faith with a very literal and restrictive approach of interpreting the limits of its powers. It is therefore often criticized for its lack of audacity. The paper argues that the context of its creation and deliberate limitation of its competencies initially didn't enable the CC to become a powerful player. While the CC did in some extent contribute to the democratization process in Senegal, notably in regard to parliamentary elections, many of its decisions appear to be in favor of the state president and the ruling party. This is particularly the case for the CC's ruling that approved former President Abdoulaye Wade's bid to run for a third presidential term in the 2012 elections. The decision was highly controversial, but despite large oppositional and civil society protests it was generally accepted and Wade was finally removed from his office by free and peaceful elections. These events changed the democratic consciousness of the country and also had an impact on the role and design of constitutional justice in Senegal.

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A. Introduction

Like many countries of the world, the Republic of Senegal established its Constitutional Council (Conseil Constitutionnel, CC)[2] in the early 1990s as an autonomous and special-

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2 See http://conseilconstitutionnel.sn/ (last accessed on 17 October 2017).

ized institution for constitutional matters. Thus, at first sight, the genesis of constitutional review in Senegal took place in the context of democratization.[3] A very specific historical and political context, however, requires a differentiated analysis.

B. Historical and political context

Early on, Senegal was considered an exemplary African democracy.[4] While its neighboring countries underwent decades of authoritarian rule, Senegal is one of the continent's few countries to have never experienced a *coup d'etat*. Instead, it stood out through continuity of constitutional rule and peaceful transitions of power. Despite the fact that there was no change of government during the first four decades following independence, Senegal's history is characterized by political and social stability that is unique for the region as a whole.[5] Senegal is a strictly Muslim Country.[6] Religion and state are separated,[7] yet the Muslim brotherhoods[8] and their religious leaders, the *Marabouts*, strongly influence the political and the economic sphere.[9] The military, on the other hand, that in many African states constitutes an important and potentially anti-democratic actor, has no elevated position in Senegal, and is instead controlled by civilian rule.[10]

I. Important historical and political events

One particularity of the country's political development lies in the fact that it had a permanent representative in the French National Assembly already from 1871 onwards. From

3 See *Kwasi Prempeh*, Africa's 'constitutionalism revival': False start or new dawn?, International Journal of Constitutional Law (2007); *Babacar Kanté,* Le constitutionnalisme à l'épreuve de la transition démocratique en Afrique, in: Carla Zoethout et al. (eds.): Constitutionalism in Africa – A quest for autochthonous principle, Deventer 1996.

4 See e.g. *Donal B. Cruise O'Brien*, The Senegalese exception, Africa 66-03 (1996), p. 458 f.; *Leonardo A. Villalón*, Democratizing a (Quasi) Democracy: The Senegalese Elections of 1993, African Affairs 93-371 (1994), p. 163 f.

5 On that point e.g. *Gérard-François Dumont/Seydou Kanté*, Le Sénégal: une géopolitique exceptionnelle en Afrique, Géostratégiques 25 (2009), p. 107.

6 The country is known for its religions tolerance, cf. on Islam in Senegal e.g. *Sheldon Gellar*, Senegal - An African nation between Islam and the West, Boulder 1995; *Christian Coulon*, Le marabout et le prince. Islam et pouvoir au Sénégal, Paris 1981.

7 In line with the inherited French Republican values, already the first constitution of 1959 opted for *Laïcité*.

8 The biggest brotherhoods are Mourides and Tidjianes. Their orientation lies between traditional African religions and Islam.

9 In previous times, the *Marabouts* gave clear recommendations to their faithful as to which way to vote in an election, the so called *Ndiguël*, see *Ismaïla Madior Fall*, Sénégal, Une démocratie 'ancienne' en mal de réforme, Rapport sur l'état de la démocratie et de la participation politique au Sénégal, Dakar 2012, p. 103 f.

10 *Bertelsmann Stiftung* (ed.), Senegal Country Report 2012, p. 25.

1883 onwards, the inhabitants of Dakar as well as those of three other towns (four *communes*) were granted French civil rights.[11] This enabled the evolution of a local political elite, and early on Senegal as a whole developed a basic democratic structure.[12] In addition to this, particularly close connections to France developed, and in comparison to other former colonies, the metropolis exerted a stronger influence on Senegal.[13]

During the "Year of Africa" 1960, Senegal gained independence[14] and replaced the first constitution of 14 January 1959[15], which had been adopted in the context of a federation with Mali, by the new constitution of 26 August 1960.[16] In 1963 a presidential system that persists until today was established with the constitution of 7 March 1963.[17] After independence the party of Senegal's first president, poet Leopold Sedar Senghor, *Union Populaire Sénégalaise* (UPS, later PS) dominated the political sphere. Only in 1974, the *Parti Démocratique Sénégalais* (PDS), the liberal party of the later president Abdoulaye Wade was accredited. This initiated a restricted liberalization of the party system.[18] With the nomination of Abdou Diouf as prime minister and the 1976 constitutional amendment, Senghor had created the preconditions that allowed Diouf to continue his line of politics and to act as his successor after stepping down in 1980.[19] The transition to Diouf brought about the complete liberalization of the party system. Towards the end of the 1980s, however, the country entered a deep crisis of legitimacy, the opposition became stronger, and the 1988 elections were contested. Attempts to resolve the political crisis led to the inclusion of the PDS and other opposition parties in the government in 1991, to a comprehensive reform of the electoral law and to a restructuring of the highest judiciary.

Abdou Diouf was defeated by Abdoulaye Wade in the 2000 elections. This first changeover of power after four decades of PS rule led to a new constitution that was adopted on 22 January 2001. Wade had come into power carrying the hopes of his supporters under the slogan "*Sopi*", which means change, but especially towards the end of his sec-

11 See *Herbert Baumann*, Die Verfassungen der frankophonen und lusophonen Staaten des subsaharischen Afrikas, Berlin 1997, p. 743.

12 Senegalese politicians thus learned about the logic of European politics in the French National Assembly*, Klaus-Peter Treydt/Nanténé Coulibaly-Seck/Saliou Konté*, Senegal- Politische Parteien und Parteiensysteme in Afrika, 2005, http://library.fes.de/pdf-files/iez/03280.pdf (last accessed on 17 October 2017), p. 5.

13 *Bertelsmann Stiftung*, note 9, p. 7.

14 Law N° 60-041 of 20 August 1960 "proclamant l'Indépendance de la République Sénégal".

15 Law N° 59-003 of 24 January 1559, in: *Ismaïla Madior Fall* (ed.), Textes constitutionnels du Sénégal de 1959 à 2007, Dakar 2007, p. 17 f.

16 Law N° 60-045 A.N., in: *Fall*, note 14, p. 33 f.

17 See *Ismaïla Madior Fall*, Evolution constitutionnelle du Sénégal. De la veille de l'indépendance aux élections de 2007, Dakar 2007, p. 43 f.; *Gérard Conac* (ed.), Les institutions constitutionnelles et politiques d'Afrique Francophone et la République malgache, Paris 1979.

18 A constitutional reform in 1975 allowed three (later four) oppositional parties, whose ideological orientation was however dictated.

19 Law N° 76-27 of 6 April 1976, in: *Fall*, note 14, p. 92.

ond term of office (2007-2012) the political climate deteriorated under his government because he concentrated power in the presidential office.[20] A planned constitutional amendment that clearly aimed at securing Wade's power failed due to unprecedented civil society protests. [21] Even though Wade's third presidential candidacy in 2012 again triggered massive popular protests and a legal debate, the CC found it to be valid (see section E.II.3. for more detail).

Macky Sall won against the 85 year old incumbent in a final ballot and was elected Senegal's fourth president.[22] Wade accepted the outcome of the election without any objection and Sall, once in office, pledged again to end his mandate in 2017 instead of 2019 (this promise has been part of his presidential campaign) and to implement sweeping constitutional reforms. A National Commission for Institutional Reform (CNRI) was set up in 2013 and surprisingly proposed a whole new draft constitution of 154 articles,[23] which did however not receive the support of the government.[24] A more modest project of 15 changes to the constitution was finally proposed in 2016, including among others the shortening of the presidential term from seven to five years, that (after an advisory decision of the CC) was not applied to Sall's current mandate.[25] Subsequently a public legal debate followed on whether the CC's pronouncement was just an opinion and or a binding decision.[26] All other proposed changes to the constitution, including several modifications of the CC's institutional set-up (see below), were finally approved by 62 % of voters in a constitutional referendum led on 20 March 2016.

20 The Freedom in the World report 2009 for instance downgraded Senegal from two to three with regard to Political Rights and Civil Liberties and so from free to only partly free, https://freedomhouse.org/report/freedom-world/2013/senegal (last accessed on 17 October 2017); see also *Christof Hartmann*, Machtwechsel im Senegal – neue Chance für die Demokratie?, GIGA Focus Afrika 2 (2012).

21 The amendment would abolish the absolute majority of 50 % plus one votes required to win in the first round of election and to lower it to only 25 %. Additionally, it established the position of a vice president who would immediately take over upon the death or incapacitation of the president. Many saw this as an ostensible attempt to set his son, Karim Wade, up for his succession.

22 Wade won the first round of election with 34.81 % of votes, followed by Macky Sall with 26.58 %. For the final ballot on 25 March 2012 the other twelve defeated candidates supported Macky Sall and formed the alliance "*Benno bokk Yakaar*".

23 See https://www.africaresearchinstitute.org/newsite/blog/senegal-a-constitution-out-of-the-blue/ (last accessed on 17 October 2017).

24 The CNRI originated in the *Assises nationales*, a consultative body set up in 2008 by 74 organizations opposed to former president Abdoulaye Wade.

25 Decision N° 1/V/2016 of 12 February 2016.

26 See e.g. Controverse autour de l'interprétation de l'avis du Conseil constitutionnel: Les juristes recadrent Macky Sall et les 5 sages, http://www.leral.net/Controverse-autour-de-l-interpretation-de-l-avis-du-Conseil-constitutionnel-Les-juristes-recadrent-Macky-Sall-et-les-5_a165769.html (last accessed on 17 October 2017).

II. The influence of international role models and actors on judicial review in Senegal

Senegal's constitutional and judicial system was influenced by the former colonial power France.[27] It is important to note, however, that after independence almost all francophone states, including Senegal, chose a unitary judicial system with a *Cour suprême* at the top of the judicial hierarchy, rather than following the French model (that features a *Cour de Cassation* alongside a *Conseil d'État* and a *Cour de Comptes*).[28] Morocco's *Cour Suprême* that had existed since the year 1957 was considered a successful example.[29] Led by its desire for efficiency, Senegal also pursued a pragmatic path towards the establishment of the *Cour suprême.*[30] This court examined the constitutionality of laws and international obligations when appealed to by the state president. The court had three chambers; constitutional questions could only be dealt within plenary sessions.

In 1992, the highest judiciary became more specialized and followed the above mentioned French model.[31] In the same year, the CC took up its work. Kéba MBaye, a person of international reputation, became its first president.[32] In line with the reasoning entailed in the relevant laws, the CC was meant to serve as an essential instrument for protecting the rights and freedoms of all citizens. In this context, it becomes apparent that the transitions that were taking place in the region[33] (and beyond) – first and foremost in Benin with its national conference[34] – also had an impact on Senegal.

27 Thereto *Mamadou Badji/Olivier Deveaux*, De la justice coloniale aux systèmes judiciaires africains contemporains, Droit sénégalais n°5, Toulouse 2006.

28 A special feature of constitutional justice in Francophone Africa was thus in this first phase the establishment of unified judicial systems while keeping up the concentration of constitutional review rights, cf. *Ibrahima Diallo,* A la recherche d´un modèle africain de justice constitutionnelle, in: Annuaire international de justice constitutionnelle XX (2004), p. 93; *Yuhniwo Ngenge,* International Influences and the Design of Judicial Review Institutions on Francophone Africa, American Journal of Comparative Law 61 (2013), p. 433.

29 *Léopold Sédar Senghor,* Installation de la Cour suprême (speech of 14 November 1960), in: Editions Juridiques Africaines (ed.), Justice et Droit en Afrique, Dakar 2008, p. 23.

30 With decree of 14 November 1950, thereto *Benoît S. Ngom*, L'arbitrage d'une démocratie en Afrique: La Cour suprême du Sénégal, Paris 1989, especially p. 52 f.

31 Law N° 92-22 of 30 May 1992, text and reasoning in: *Fall,* note 14, p.138 f.: „La spécialisation n'est pas un simple choix d'opportunité; elle est devenue un impératif pour la sauvegarde même de l'institution judiciaire.".

32 Former president of the *Cour sûpreme* and until 1991 vice-president of the International Court of Justice in The Hague, this choice was consensual and ought to add to the legitimacy and acceptance of the institution, *Senghor*, note 28, p. 27.

33 See *Sory Baldé,* Juge constitutionnel et transition démocratique. Etude de cas en Afrique subsaharienne francophone, VIIIème Congrès mondial de l'Association internationale de Droit constitutionnel (ACCPUF), Mexico, 6-10 December 2010.

34 The *Conférence nationale des forces vives* of February 1990 could be considered, from some points of view, as having the same significance in Africa as the fall of the Berlin wall in Europe; *Babacar Kanté*, Models of Constitutional Jurisdiction in Francophone West Africa, Journal of Comparative Law 3-2 (2008), p. 159.

While some countries established constitutional courts with far-reaching competencies for the protection of basic rights, Senegal in its 1992 reform opted for a set-up that was close to the original French model: This was apparent in the establishment of a *Conseil* (rather than a *Cour*), and in the specification of its competencies, especially in the field of elections.[35]

III. Implications for the design of judicial review in Senegal

The decision to establish the institutionally rather weak CC (that will be described in more detail in the following) can be explained with reference to the background of the reform that established the CC. It was considered as an attempt by Diouf to strengthen the whole judiciary that had been weakened by the lack of trust the citizens had in it, especially with a view to the presidential elections scheduled for the following year. In addition, there are accounts stating that the relationship between the former president of the *Cour suprême* and the PS government was severely strained due to a controversial decision, which might have also been a motif for the reform.[36] The *Cour suprême* that had fairly far-reaching competencies in the field of elections was thus replaced by a rather weak CC. This indicates that the reform was not aimed at strengthening constitutional review powers.

The domestic political context was at the time dominated by the slowly growing opposition, discontent about the one-party system, and the reform of the electoral law (*Code Électoral*). It is therefore likely that the primary function of the CC was to guarantee the implementation of the newly adopted *Code Électoral*.[37] In view of its context of creation, the CC was first tasked with preventing the manipulation of democratic decision-making processes, i.e., with guaranteeing free and transparent presidential and parliamentary elections.

While in Benin, for instance, years of political instability (including *coup d'états*) and rogue regimes led to a constitution of high symbolic value and a powerful central constitutional court, in Senegal, at least up until the year 2012, there was no revolutionary impetus. Instead, the system of judicial review underwent a continuous development since the year 1960, and over the course of time became adapted to the political requirements, as was the case for other constitutional institutions. This provides evidence of the fact that the historical and political contexts that are characterized by political stability alongside constitutional

35 *Mouhamadou Mounirou Sy*, La protection constitutionnelle des droits fondamentaux en Afrique, Paris 2007, p. 129; *Babacar Kanté*, Les méthodes et techniques d'interprétation de la Constitution: l'exemple des pays d'Afrique occidentale francophone, in: Ferdinand Mélin-Soucramanien (ed.), L'interprétation constitutionnelle, Paris 2005, p. 155 f.

36 "Les dessous de la réforme", in: Editions Juridiques Africaines (E.D.J.A) (ed.), Justice et Droit en Afrique, Dakar 2008, p. 139 f.

37 *Babacar Kanté*, Les compétences des Cours constitutionnelles en matière de fonctionnement des institutions-Introduction de la problématique, Congres Mondiale de l'Association des Cours Constitutionnelles ayant en Partage l'Usage du Français, 2006, p. 3.

instability[38] were not conducive to the development of a "strong" constitutional review in Senegal.

C. Institutional foundations

I. Model

Legal foundations of judicial review in Senegal – apart from the constitution of 24 January 2001 (in the following SConst), last amended through law N° 2016-10 of 5 April 2016 – can especially be found in the new organic law *loi organique* N° 2016-23 of 14 July 2016 (in the following L.O.) that relates to CC and replaced law N° 92-23 of 30 May 1992 as well as its internal rules of procedure, the *Règlement intérieur* of 6 January 1993.[39] Regulations regarding the competencies of the CC are furthermore included in the electoral law *Code Électoral* (in the following C.E., articles of the C.E. are marked with the addition LO. if they have an organic nature, if not with the addition L.) in form of law N° 2017-12 of 18 January 2017.[40]

Despite current modifications to the institutional set-up, the CC, in large parts, still resembles the institution that was established in 1992. The CRNI report had proposed the shift to a *Cour Constitutionelle* with extensive powers (Art. 107 f. of the CNRI report), which was, however, not included in Macky Sall's final propositions for the constitutional referendum in 2016.

In line with Art. 88 SConst, judicial power is exercised by the CC, the *Cour suprême* (in 2008, the *Cour de Cassation* and the *Conseil d'État* were reunited to form a *Cour suprême* for reasons of efficiency[41]), the *Cour des Comptes*, and the lower courts. There is no separate chapter dedicated to the CC, and as part of the judicial authority it is not accorded autonomous status.[42] While the CC is the first institution on the list, neither the constitution nor the L.O. clarifies its relationship to the highest courts.[43] However, due to the binding nature of its decisions the CC is situated at the top of the judicial hierarchy.[44]

38 *Babacar Kanté,* Le Sénégal, un exemple de continuité et d'instabilité constitutionnelle, in: Revue juridique politique et économique du Maroc 22 (1998), p. 145 f.

39 http://www. conseilconstitutionnel.sn (last accessed on 4 August 2018).

40 Some laws are accessible at www.gouv.sn and http://www.jo.gouv.sn (last accessed on 4 August 2018).

41 Law N° 2008-34 of 7 August 2008.

42 Which is untypical for the region, see *Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (ACCPUF),* L'indépendance des juges et des juridictions, Bulletin Nr. 7, 2006, p. 69; *Sory Baldé*, La convergence des modèles constitutionnels. Etude de cas en Afrique subsaharienne, Paris 2011.

43 Cf. however Decision N° 7/C/9 of 10 March 1998.

44 See also *Kanté*, note 33.

II. Composition of the Constitutional Council

One of the major changes of the constitutional reform of 2016 concerned the composition of the CC. Up to the year 2016, all five members of the CC had been nominated by the state president, which had always casted doubts on the independence of the institution. The CC is now composed of seven members nominated for a period of six years by the state president: A president, a vice president, and five judges (Art. 89 SCons). Of these seven members, two are appointed by the state President from a list of four persons nominated by the President of the Senegalese Parliament, the *Assemblée nationale*. They can only be nominated once. Rotation takes place once every two years. The new member first completes the current mandate and can then be nominated for another mandate of six years.[45]

Members of the CC are chosen from judges who served as first president, Attorney General, President of Chamber or First Advocate General at the *Cour suprême*, President or Attorney General at a *Cour d'appel* as well as law professors, State inspector and lawyers, provided they have at least twenty years of seniority in the public service or twenty years of practice of their profession (Art. 4 L.O.). Contrary to the former provision, since 2016 there is no limitation for the latter non-judicial professions. In fact, the vast majority of members have so far been judges. University professors, especially constitutional lawyers, have only sparsely been represented – a point that has been repeatedly criticized by scholars.[46]

Members cannot be suspended from office, apart from by their own free will, or in the case of permanent physical inability and with the approval of the CC. Except for instances in which they are caught in the act, they can only be prosecuted if the CC agrees. The office of a constitutional judge is incompatible with certain political offices and activities.[47] Apart from this, the general regulations relating to the status of judges also pertain to constitutional judges.[48] There are no dissenting opinions, the principle of collegiality is meant to guarantee the judges' independence and protect them from external influences.[49] Like the other members, the president of the CC is nominated by the state president. In case of a voting tie, his vote is decisive. He is responsible for the administration of the CC, manages the available resources, and acts as his colleagues' employer. The CC can only hold meetings if all members are present, except for instances in which a maximum of two members is prevented from attending at short notice. This situation has to be formally acknowledged by the other members (Art. 23 L.O.).

45 Art. 5 L.O.

46 A varied composition is mostly preferred, e.g. by *Sy*, note 34, p. 85.

47 Listed in Art. 6 L.O.

48 *ACCPUF*, note 41, p. 129, regulated in Law N° 2017-10 of 17 January 2017 *portant Statut des magistrats*.

49 *ACCPUF*, note 41, p. 149.

D. Competencies of the Constitutional Council

Title XI "*du pouvoir judiciaire"* in conjunction with the regulations of the L.O. lists the CC's titles of competency. Expansions of competency therefore require a constitutional amendment. The CC can only become active after a procedure has been formally initiated. There is no power to act on own initiative, the so-called "*auto-saisine*".[50]

Only since the constitutional reform of 2016 Art. 92 section 2 SConst explicitly accords to the state president the essential right to ask for advisory opinions of the CC *(avis).*

I. Competencies of judicial review

Abstract judicial review according to Art. 92 section X alternative 1, Art. 74 SConst
The CC examines the constitutionality of laws and international obligations.[51] Following the French model, this is first and foremost a preventative control prior to the coming into force of a legal norm (*a priori*). The state president or alternatively a group making up one tenth of the representatives of the *Assemblée nationale* is entitled to lodge appeals. Representatives' right to appeal had been introduced in 1978 in the context of the political liberalization described above.[52] The review can be mandatory or optional. It is optional for regular laws. These are only submitted to the CCin case the state president or one tenth of the members of the *Assemblée nationale* lodge a complaint.

The question which laws are subject to a mandatory review process and have to be submitted to the CC for examination prior to coming into force has repeatedly caused controversy. Up until the adoption of the constitution of 2001, the review of organic laws (that lay down in detail the competences and the organization of the constitutional bodies and thus complement the constitutional text) was mandatory.[53] The constitution of 2001, however, withdrew this important competency – that up until then constituted a large share of the CC's case law – from the CC. Since then, the number of decisions has decreased significantly (cf. section F.I.), which in turn influences the public reputation of the CC. Scholars also harshly criticized this turn of events.[54] The most recent constitutional reform of 2016 reintroduced the mandatory control for organic law in Art. 78 SConst.

50 As for instance in Benin and currently established in Burkina Faso, see *Anne Winter,* Judicial Review and Democratization in Francophone West Africa-Country case study Burkina Faso, in this issue.

51 In line with Art. 96 section 1 SConst these have to be ratified by a law of the *Assemblé nationale*, which can be reviewed by the CC (as ordinary law). In the absence of a contrary provision it is thus a case of facultative control, *Sy*, note 34, p. 104.

52 In view of the actual power balance, the right to lodge appeal to the *Cour suprême* was conferred to a group of 15 delegates.

53 This was already introduced by the constitution of 1963 (Art. 67 section 2).

54 *Sy,* note 34, p. 104 f.; *Doudou N'Doye*, La Constitution du Sénégal du 22 janvier 2001 commentée, Dakar 2001, p.130 f.; *Fall*, note 16, p. 117.

The review of the rules of procedure (*Règlements intérieures*) of the *Assemblée nationale* is mandatory. Already in 1999, the CC filled this competency through its case law by on the one hand substantiating the term *Règlements intérieures* procedurally and substantively (decision of 25 February 1999), and on the other hand emphasizing the mandatory nature of the review (decisions of 1 April and 5 May 1999).[55] Since 2016 Art. 62 SConst explicitly accords the status as organic law to the rules of procedure of the *Assemblée nationale*.

Concrete review according to Art. 92 section 1 alternative 3 SConst: "l'exception d'inconstitutionalité"

The introduction of a concrete judicial review in 1992 constituted an at this point in time exceptional competency in the francophone context[56]: In the context of a lawsuit pending at the *Cour suprême*, it grants each party to the proceedings the right to claim that an already valid legal regulation violates his or her constitutionally guaranteed rights and freedoms. Due to this, citizens can (in theory at least) assert their constitutionally guaranteed rights even after the coming into force of a law. This *a posteriori* control was enlarged by the constitutional reform of 2016 that introduced the possibility of concrete control also for procedures pending at a *Cour d'Appel* (currently Dakar, Kaolack and St. Louis, Thies, Ziguinchor).

In case the outcome of certain proceedings depends on the constitutionality of a law or an international treaty, these high jurisdictions – in line with Art. 22 L.O. – are obliged to call on the CC and suspend the proceedings. If the CC declares the regulation to be unconstitutional, it cannot be applied.

II. Control of elections and referenda

Art. 29-35, 51, 60 SConst in conjunction with the regulations of the Code Électoral (*C.E.)*

The CC oversees the orderly conduction of elections and referenda. With regard to these, it has both consultative and judicial competencies. It is mainly responsible for national elections, i.e. for presidential and parliamentary elections. Even in instances in which other courts are involved, the constitutional judge is considered "highest judge of the elections", since according to the constitutional distribution of competencies and the *Code Électoral*, it has the final say.[57] The CC's competencies comprise two points in time: Prior to the election during the registration of candidatures (Art. 29, 30 – 34 SConst), and after the provisional announcement of the results by the *Commission nationale de Recensement des votes* (CNRV) according to Art. 35 SConst.

55 Thereto *Sy*, note 34, p. 108.

56 The *question prioritaire de constitutionnalité* was only introduced in France by the constitutional reform of 23 July 2008.

57 *Sy*, note 34, p. 138.

The CC accepts candidatures for the presidential elections (Art. 29 SConst, Art. LO.118 C.E.), examines these, puts together a list of all candidates, distributes colours, acronyms, and symbols for the electoral campaign, and decides upon complaints against accepted candidates (without time limit, Art. LO.122 C.E.). Each presidential candidate can challenge the orderly process of the election by contesting it before the president of the CC within 72 hours after the publication of the provisional results (Art. 35 section 2 SConst, Art. LO.140 C.E.). The CC decides within five days of the contestation having been lodged (Art. 35 section 4 SConst, Art. LO.143 C.E.). In case no contestation has been lodged, the CC announces the final election outcome without delay (Art. 35 section 3 SConst). Its decision (based on the electoral protocols it has received, Art. L.86, LO.137 C.E.) entails the final confirmation or the annulment of the electoral results (Art. 35 section 4 SConst, Art. LO.139 C.E.).

The registration of candidatures for the *Assemblée nationale* at first falls under the competency of the Ministry charged with elections. In case a candidature is invalid, the Ministry has to contest it before the CC within a span of three days. After this period of time has run out, the candidature has to be accepted. The CC reaches its decision within three days (Art. LO.178 C.E.). The decisions of the Ministry can be contested before the CC within 24 hours by representatives of electoral lists (Art. LO.180, L.175, L.176, L.179 C.E.). The CC reaches a decision within three days. The CNRV announces the provisional electoral results of elections to the *Assemblée nationale*. In case no candidate contests their orderly nature, the CC announces the final results within five days (Art. LO.189 C.E.). Alternatively, it decides about complaints within a span of five days (Art. LO.193 C.E.). Moreover, in case the administrative office of either the *Assemblée nationale* or the state president contests the orderly nature of the elections, the CC can declare the mandate of a representative to be invalid, provided that his or her ineligibility or incompatibility becomes apparent after the public announcement of the results, after the time limit for contestations has run out, or during the exercise of the mandate in a case foreseen by the C.E. (Art. LO.194, LO.158 C.E.).

The registration of candidatures for the election to the newly established *Haut Conseil des Collectivités Territoriales*, a consultative assembly to represent local authorities, also falls under the competency of the Ministry charged with elections, Art. L.207 f. C.E. The decisions of the Ministry can be contested before the CC within 24 hours by representatives of the electoral lists (Art. L.211, L.208, L.209, L.210 C.E.). The CC reaches a decision within three days. The CNRV announces the provisional electoral results of elections of the *Hauts conseillers*. In case no candidate contests their orderly nature, the CC announces the final results within five days (Art. L.223 C.E.). Alternatively, it decides about complaints within a span of five days (Art. LO.224, LO.193 C.E.).

The CC also decides if the status of an independent candidate (introduced for local elections only by the 2016 reform) is contested (Art. L.170, L.242, L.278 C.E.).

Finally, referenda fall under the CC's field of competency. According to Art. 51 SConst, the state president has to request an advisory opinion from both the CC and the president of

the *Assemblée nationale* before a constitutional amendment or a draft law can become the subject of a referendum (Art. 51 section 1 and 2 SConst). In line with Art. 51 section 3 sentence 2 SConst, the CC announces the results of the referendum to the public. The CC interpreted its competencies pertaining to referenda in a restrictive manner.[58]

III. Control of allocation of powers and responsibilities among organs of the state

Conflicts between executive and legislative lawmaking (Art. 92 section 1 alternative 2, Art. 76, Art. 67 section 1, Art. 83 SConst)

According to Art. 92 section 2 SConst and Art. 1 L.O., the CC is responsible for conflicts over competencies between executive and legislative lawmaking.[59] The state president or the prime minister can appeal to the CC in order to determine the legal or regulatory character of a given subject matter (Art. 76 section 2 SConst). Art. 67 SConst lists those fields and basic principles that ought to be regulated or further specified by law. According to Art. 76 section 1, all those fields that do not belong to the realm of legislation have regulatory character. Legal texts qualifying for this can, according to Art. 76 section 2 SConst, be changed by decree – provided that the CC has declared that they have regulatory character. If over the course of the legislative proceedings it becomes apparent that a proposed law or a motion for amendment does not fall under the legislative realm, in case of disagreement, the CC called upon by the state president, the *Assemblée nationale*, or the prime minister decides on within eight days (Art. 83 SConst).

Different to other countries in the region, Senegal has not established an explicit supervisory function with regard to the orderly functioning of state institutions. This is unsurprising, given Senegal's democratic tradition and the fact that its institutions were at no point in time incapable of carrying out their assigned tasks.[60]

IV. Constitutional amendments

Apart from its consultative competence in Art. 51 SConst, the CC has no explicit competence to review constitutional amendments and persistently rejected their substantive review in its case law.

However, constitutional amendments play an important role in Senegal, so that some commentators refer to the Senegalese "constitutional fervour".[61] This concerns not only smaller changes, but constitutional amendments frequently introduce new institutions, then

58 Decision N° 6/C/2000 of 2 January 2001; see *Kanté*, note 34, p. 162.

59 In addition, the CC, in line with Art. 92, ruled over conflicts of jurisdiction between *Conseil d'État* und *Cour de Cassation* (until the reintroduction of the *Cour suprême* in 2008).

60 *Kanté*, note 33, p. 162.

61 *Fall*, note 16, p. 150.

abolish them, and reintroduce them shortly afterwards.[62] The 2016 reform added to the "eternity clause" in Art. 103 section 7 SConst. Apart from the republican form of government, the election mode as well as the length and number of presidential terms now can no longer be subject of constitutional amendments.

V. Other competencies

In addition to this, the CC swears the state president into office (Art. 37 SConst), declares his withdrawal from office, his prevention, or his death (Art. 41 section 2 SConst), and, in line with Art. 52 SConst, is responsible for the exercise of the state president's emergency laws. If rights in line with Art. 52 SConst are exercised after the *Assemblée nationale* has been dissolved, the fixed election date can according to section 6 sentence 2 not be postponed, apart from instances in which the CC declares this to be necessary in the event of *force majeure*.

The CC's scope of control regarding the compatibility of state actions and basic rights is limited.[63] The entire control of regulations and court decisions is left to the specialized courts.[64] Especially the *Cour suprême* plays an important role in the protection of basic rights. In addition to this, the so-called *contrôle de conventionalité* (review of the conformity of national law with international conventions), as is the case in France, carried out by ordinary courts in Senegal. This raises the question whether they might not make up for the shortcomings of constitutional review and thereby constitute serious competition for the CC.[65]

E. Scope of review, legal consequences, and implementation of decisions

I. Binding nature and implementation of decisions

Under Art. 92 section 4 SConst, there are no legal remedies against the decisions of the CC. They are binding for all public authorities as well as all administrative agencies and courts, and are published in the official gazette (Art. 25 L.O.). They are therefore grounded in legal authority and valid *erga omnes*.

In those cases in which the CC decides that the law under review contains a specific regulation that is in breach of the constitution, and that is inseparably tied up with the law in its entirety, the respective law cannot be publically announced (Art. 19 L.O.). In those

62 The office of the Prime minister, for instance, was abolished in 1963, reintroduced in 1970 abolished again in 1983 and finally reintroduced in 1983. The same happened to the *Conseil économique et social* or the Senate.

63 Cf. *Kanté*, note 34, p. 156.

64 As in France, this is why Grewe here speaks of a rather sparsely concentrated and more diffuse type of constitutional review: *Constance Grewe*, Die Grundrechte und ihre richterliche Kontrolle in Frankreich, EuGRZ 2002, p. 212.

65 *Kanté*, note 34, p. 165; for France also *Grewe*, note 63, p. 212.

cases in which the CC decides that the law under review contains a specific regulation that is in breach of the constitution, yet does not hold that this regulation is inseparably tied up with the law in its entirety, the law can be publically announced (by the state president) without the respective regulation, given that the state president does not request a renewed reading by the *Assemblée nationale* (Art. 21 L.O.). In the case of decisions in which the CC declared a regulation to be unconstitutional under the condition of a constitution-conform interpretation (*réserves d'interprétation*, in more detail below), those contents that the CC draws on in its decision are binding.

If an international agreement is considered unconstitutional, it can only be ratified after the text of the constitution has been adapted (Art. 97 SConst).

If, however, an initial request of the *Cour suprême* or a *Cour d'Appel* in form of the concrete control of the *exception d'inconstitutionalité* is communicated, then the *Cour suprême* has to suspend the proceedings until the CC has reached a decision. If the CC declares the regulation under review to be unconstitutional, then it can no longer be applied (Art. 22 L.O.).

The CC's decisions are generally accepted and enforced.[66] This became especially apparent in the wide-spread acceptance of the initially strongly contested decision of the CC regarding Wade's third candidature.[67]

II. Scope of review

The norms of reference for judicial review in Senegal comprise the *bloc de constitutionalité* that is in turn made up of the constitution and its preamble, which the 2001 constitution officially declares to be part of the constitution. This amounts to a codification of the important jurisdiction of the French *Conseil constitutionnel* of 16 July 1971 that accorded constitutional character to the preamble.[68] The measure of examination thus entails the content of the preamble that in turn refers to the international instruments for the protection of human rights.[69] These are therefore considered to have constitutional status. The compatibility of laws under review with the rules of international law does not have to be examined by means of a special control of "conformity with international norms" that the Senegalese constitutional judge denies (and that therefore falls under the responsibility of the special-

66 *Sy*, note 34, p. 442 f.

67 Even the priory harshest critics restrained themselves in the aftermath of the decision; see below.

68 E.g. *Grewe,* note 63, p. 209 f.

69 As listed in the preamble: "Le peuple du Sénégal souverain [...] affirme son adhésion à la Déclaration des Droits de l'Homme et du Citoyen de 1789 et aux instruments internationaux adoptés par l'Organisation des Nations Unies et l'Organisation de l'Unité Africaine, notamment la Déclaration Universelle des Droits de l'Homme du 10 décembre 1948, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes du 18 décembre 1979, la Convention relative aux Droits de l' Enfant du 20 novembre 1989 et la Charte Africaine des Droits de l'Homme et des Peuples du 27 juin 1981."

ized courts).[70] Instead, the examination takes place in the context of the overall process of judicial review. In practice, the CC draws on this only sparingly. If it bases its decisions on a principle or a regulation, it carefully references them and apparently uses them to bolster its line of argumentation.[71]

Like in France, organic laws do not belong to the CC's norms of reference.[72] The CC has confirmed this unequivocally.[73]

However, the scope of review also comprises certain basic principles that have constitutional status, the *principes à valeur constitutionnelle*.[74] These allow the constitutional judge to reach a balanced assessment in case there are two conflicting constitutional guarantees. As early as 1995, the CC based its line of argument in two decisions on the safeguarding of public order and on the protection of public welfare, and accorded constitutional status to these principles.[75]

III. Methods of interpretation and the formation of principles

The CC has a narrow understanding of its own role. It is sometimes accused of not making use of established methods of interpretation like the interpretation in conformity with the constitution (*technique des réserves d'interprétation*). Even though a literal interpretation is most common, there are also elements of systematic, logical, and historical methods of interpretation in the CC's jurisprudence.[76] The method of constitution-conform interpretation allows for prosecuting breaches of the constitution without sanctioning the laws with invalidity. This technique of constitutional review has an important role and special relevance in the African context, in that it has both a psychological and a pedagogical function, and can contribute to the pacification of conflicts between different state organs.[77] It is therefore not surprising that African courts often resort to this method.[78] Without considering in any detail the sometimes far-reaching methods of interpretation that other constitutional courts in the region use, in view of the fundamentally restrictive stance of the CC, the technique of *réserves d'interprétation* can be considered an important element of judicial review in

70 E.g. in his decision N° 91/C/2005 of 12 February 2005.

71 *Sy*, note 34, p. 385, illustrated by using the notion "*au surplus*" which means in addition.

72 *Sy*, note 34, p. 108.

73 Decision N° 1/C/98 of 24 February 1998: *considérant* 4: "que le CC ayant une compétence d'attribution […] ne range parmi les matières relevant le Règlement intérieur de l'Assemblée"; see *Sy*, note 34, p. 397.

74 The CC sometimes also calls them " *objectif*", i.e. aims or "*exigences*", i.e. demands with constitutional status, *Sy*, note 34, p. 397.

75 Decision N° 3/C/95 of 19 June 1995 and decision N° 3-4/C/96 of 3 June 1996.

76 *Diagne*, note 96, p. 384; *Sy,* note 34, p. 420 f.

77 *Diagne*, note 96, p. 370 f.

78 *Kanté*, note 34, p. 165; *Diagne*, note 96, p. 371; *Sy*, note 34, p. 402 f.

Senegal. The greatest weakness of this technique in the African context, however, lies in the lack of dialogue between constitutional judges and simple judges.[79]

F. Jurisprudence / Judicial Practice

I. Number of decisions relating to the respective fields of competency

According to the author's own research (at the time of the study)[80] the Senegalese CC issued a total of 108 decisions between 1993 and (September) 2013. Out of these, 24 refer to parliamentary elections, 20 to presidential elections, one to senate elections, and two to the review of referenda. In the context of its preventative abstract review competency, four of the CC's decisions related to parliamentary rules of procedure, 27 to organic laws, eleven to simple laws, five to constitutional amendments, and one to international agreements. Six decisions were issued in the context of concrete review *par voie d'exception d'inconstitutionalité*, and seven constituted (consultative) advisory opinions. There has so far been no case law relating to the demarcation of competencies between state organs.

Due to its role in the Senegalese state order and its limited access criteria, the total number of cases is lower than that of other courts in the region.[81]

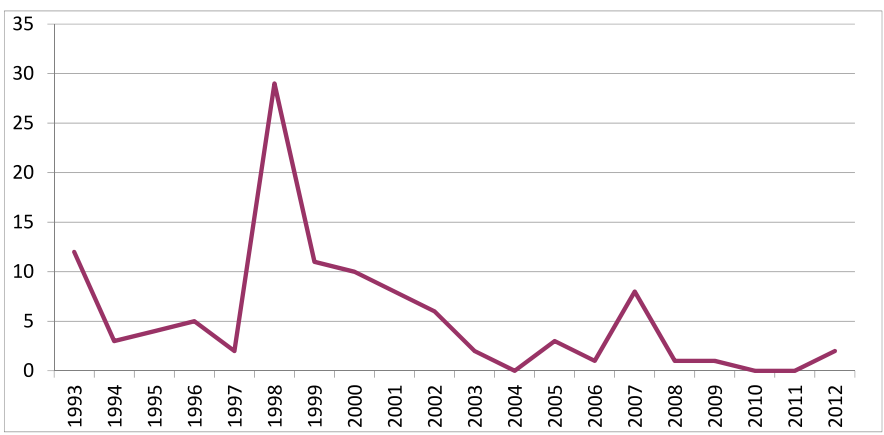

Figure 1 – Number of CC decisions since its creation

79 *Diagne*, note 96, p. 395.

80 Mainly based on the collection of *Ismaïla Madior Fall* (ed.), Les décisions et avis du Conseil constitutionnel du Sénégal, Dakar 2008, and the official journals of the Republic Senegal (J.O.S.) as well as the decisions accessible at www.accpuf.org (last accessed on 4 August 2018).

81 *Fall*, note 8, p. 60.

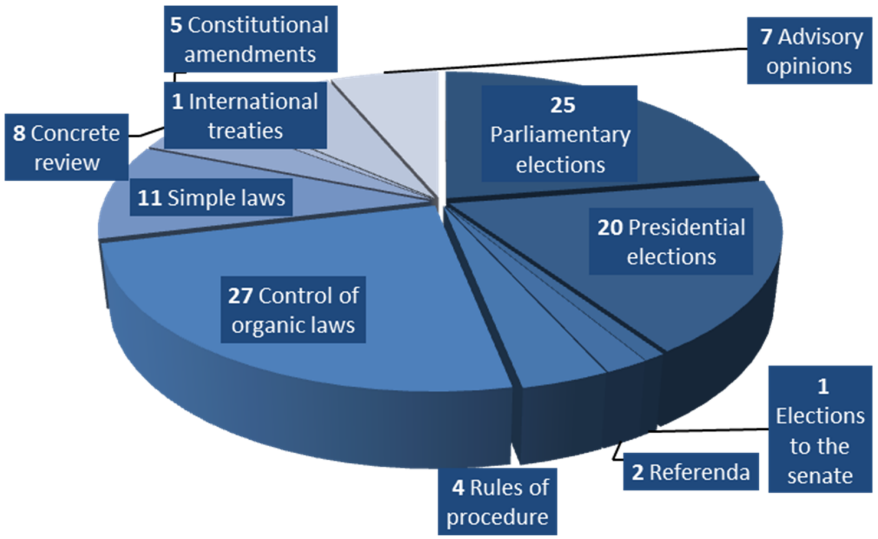

Figure 2 – Number of CC decisions by field of competency

II. Role during the last elections and resolution of political conflicts

As figure 2 indicates, electoral conflicts make up over half of all proceedings before the CC. Since the creation of the CC, Senegal held presidential elections in the years 1993, 2000, 2007, and 2012, as well as parliamentary elections in the years 1993, 1998, 2001, 2007, and 2012. In comparative perspective, however, judicial review plays a minor role in Senegalese elections.[82] Following the reorganization of electoral law in 1992, the CC was accorded only limited competencies, with many tasks being relegated to the specialized courts.

In the following, a number of selected decisions that contributed to the resolution and pacification of electoral crises will be discussed in some more detail. This section first focuses on the CC's difficult task to prove its independence and build up its authority as the highest judge during the electoral process (1.). This is followed by a discussion of the pragmatic case law practice of *influences déterminants* that results from this (2.), and an analysis of the ambivalent role of the CC during the country's most recent political crisis (3.).

82 See *Ismaïla Madior Fall/Mathias Hounkpe/Adele L. Jinadu/Pascal Kambale,* Organes de gestion des élections en Afrique de l'ouest-Une étude comparative de la contribution des commissions électorales au renforcement de la démocratie, Dakar 2011.

1. Independence and Authority of the Constitutional Council as the highest Authority during Elections

The constitutional judge in Senegal is without doubt confronted with especially great expectations during electoral periods, since he is expected to issue an authentication, i.e., a guarantee of the genuineness of the results and the electoral outcome.[83] In his role as *juge des elections*, he is particularly visible for both the domestic population and the international community. A prior vice president of the CC, Prof. Babacar Kanté, has repeatedly deplored that the activity of African constitutional courts is often assessed with reference to a single criterion: its independence vis-à-vis the current government in its announcement of the results of presidential elections.[84]

In the context of the 1993 elections, shortly after its foundation, the CC had to deliver the "truth of the ballot box" as the culmination of a turbulent period to an excited and expectant yet somewhat naïve and unprepared public.[85] It basically had to emerge as a loser from this. On 2 March 1993, so on the day of the CC's first relevant decision (more detail below), Keba Mbaye withdrew from his office as president of the CC. In his letter of resignation to president Abdou Diouf, he allegedly referred to his disappointment about the fact that the consensual *Code électoral* that had been worked out under his chairmanship "did not succeed in changing the attitudes of actors to unconditionally accept democratic rules", and about his "misapprehension of the democratic maturity" of the country.[86] The turbulent nature of these elections certainly had an influence on the CC's authority and reputation[87], and made its early beginnings and its later fight for recognition and authority more difficult. In its **decision N° 6/E/93 of 2 March 1993**, the CC had to clarify a situation not foreseen in legislation when, due to the blocking of the CNRV, the initial results of the presidential elections of 21 February 1993 could not be announced to the public. The CC granted the CNRV a period of 72 hours for announcing the results, and also declared that in order to guarantee the functioning of institutions, the principle of granting the CNRV the right to announce the initial results could be suspended. In addition to this, it announced that after the time period had run out, it would in its role as the sole authority eligible to do so examine all contestations of the electoral process and would announce the final results. In its **decision N° 7-12/E/93**, the CC ultimately rejected the complaints lodged by four presidential candidates who had lost the election and announced the final outcome of the election

83 *Ndéye Maguette Mbengue*, L'expérience du Conseil Constitutionnel du Sénégal, in: ACCPUF (ed.), Le rôle et le fonctionnement des Cours constitutionnelles en période électorale, Bulletin Nr. 5-2, 2005, p. 185.

84 For instance in the preface for *Sy*, note 34, p. 13.

85 *Mbengue*, note 82, p. 185, who also points out the great role of media in elections and the need for efficient communication strategies.

86 http://www.seneweb.com/news/Societe/ephemerides-demission-de-feu-keba-mbaye-de-la-presidence-du-conseil-constitutionnel-les-raisons_n_15096.html (last accessed on 17 October 2017).

87 *El Hadj Mbodj,* La mise à mort du rabat d'arrêt, in: E.D.J.A. (ed.), Justice et Droit en Afrique, Dakar 2008, p. 153.

with Abdou Diouf, who had won 58.4 % of all votes, as the victor. Shortly after its establishment, and different from most of its later jurisprudence, the CC emphasized its far-reaching competencies in the field of elections, as well as its exceptional standing vis-à-vis other state organs implicated in the elections, like the CNRV.[88] Even though the CC in this instance resolved a potential crisis situation and secured an orderly electoral process, the image of an institution that subordinated itself to the government dominated public debate, as is usually the case when contested electoral results are confirmed.[89]

In its **decision N° 2-4/E/2001 of 26 March 2001**, the CC prohibited a coalition that included the party of president Abdoulaye Wade to use his photograph on their electoral campaign posters. By drawing on unwritten constitutional *principes généraux*, see above, the CC showed that, when considered necessary, it can distance itself from its own (restrictive) jurisdiction and contribute to political stability and democratic consolidation.[90] Due to the fact that the CC in this instance decided against the newly elected president, this decision is often referred to as an example of its independence.[91] This important judgement had been preceded by **decision N° 1/E/2001 of 23 March 2001**, in which the CC declared the minister of the interior's rejection of a list of candidates of the opposition party PS to be invalid and allowed an addition to the list.

In the aftermath of these decisions, an interesting exchange of letters between Wade and the CC ensued. In his letter N° 0003 of 28 March 2001, Wade stated "in his role as guardian of the constitution" (Art. 42 SConst) that the judgment of 26 January 2001 was unconstitutional, since his coalition had – contrary to the requirements of Art. 8 of the *Règlement intérieur* – not been informed of the appeal, and had therefore been incapable of exercising its right to defense under Art. 9 SConst.[92] In the following, the CC responded to both points in its *Note relative à la decision rendue par le Conseil constitutionnel […] et la letter […] du Président de la République* of 30 March 2001[93], and explained in detail why none of the norms referred to by Wade were applicable to the present case. Wade responded in a second letter[94] that sets out his legal opinion on the subject matter (as a lawyer with a doctoral degree). The main points of conflict were the contradictory character of this type of conflict over electoral law, and the relations between the different norms contained in the constitution, the *Code électoral*, and the *Règlement intérieur*. This exchange was particularly interesting in that it indicated a new and transparent form of democratic debate, as well as the

88 *Ameth Ndiaye*, in: Fall, note 79, p. 58 f.

89 *Stéphane Bolle*, Les juridictions constitutionnelles africaines et les crises électorales, in: ACCPUF (ed.), Les cours constitutionnelles et les crises, 2009, p. 94.

90 *Kanté,* note 34, p. 167; *Alioune Sall*, in: Fall, note 79, p. 418.

91 ACCPUF, note 41, p. 160.

92 Released in the pro-government daily *Le Soleil*, 10 April 2001, reprinted in *El Hadj Omar Diop/Cedric Milhat*, Élections législatives sénégalaise du 29 janvier 2001, Afrilex-Revue d'étude et de recherche sur le droit et l'administration dans les pays d'Afrique (2001).

93 In *Diop/Milhat*, note 91.

94 In *Diop/Milhat,* note 91.

relevance of these events for the CC's authority, and for the principle of the separation of powers.[95]

2. Conflict resolution through the formula "Influences déterminants et de la majorité confortable"

The pragmatic approach that focuses on the gap between the number of votes and the question whether possible irregularities might have influenced the outcome of the elections can be found in the jurisdiction of many African constitutional courts.[96] If the outcome is narrow, then even minor irregularities can result in the election being judged invalid. In case of a broad gap, the constitutional judge can hold that these did not have a decisive influence and can validate the election regardless of minor irregularities. This means that two conditions have to be cumulatively met in order for an election to be annulled: A decisive influence on the authenticity of the results, and a narrow gap between the votes each of the candidates gained.[97] Similar to the situation in Senegal, the jurisdiction of many African constitutional courts shows a tendency towards treating the complaints lodged by unsuccessful candidates with due respect, while at the same time requiring unequivocal evidence of the fact that the subject of complaint decisively influenced the outcome of the election.[98] Due to this, elections are rarely annulled.[99]

The CC has found *irrégularités regrettables*[100] in several of its decisions, but has not sanctioned these. This was the case in its **decision N° 4** and **5 E/2007 of 10 March 2007**, in which the CC had to decide upon the complaints of two candidates who had been unsuccessful in the presidential elections. While President Wade for a long time enjoyed great popularity[101], the political climate had deteriorated due to an increase in repressive measures against the opposition. In view of the importance and sensitive nature of its task, the CC very carefully worked through the key points of complaint (e.g. the allegation that electoral protocols had not been officially sealed, that in the administrative district Mbacké the electoral list that had been signed by all voters who had been present had not been sent on, that votes cast abroad were incomplete).[102] While it recognized irregularities in the electoral process, it ultimately came to the decision that these did not have a decisive influence on

95 See *Diop/Milhat,* note 91.

96 As for example in Benin or Madagascar, *Luc Sindjoun*, Les grandes décisions de la justice constitutionnelle africaine, Brussels 2009, p. 550.

97 *Bolle*, note 88, p. 93.

98 *Bolle*, note 88, p. 93.

99 For these cases see *Bolle*, note 88, p. 97 f.

100 Already in decision N° 7-12/E/93 of 13 March 1993.

101 Wade won the presidential elections on 2 February 2007 in the first ballot with the absolute majority of votes and a voter turnout of 73 %.

102 *Fall*, note 79, p. 518.

the outcome of the election, and therefore rejected the complaints.[103] In spite of this, the opposition remained convinced that the election had not taken place in an orderly manner, and this led to the boycott of the next parliamentary elections, and ultimately to a crisis of legitimacy affecting all democratic institutions.[104] The CC was unable to prevent this.

3. The Conseil Constitutionnel and the Senegalese Spring

The question whether Wade's candidature was legitimate dominated the domestic political debate since 2009. At the center of the discussion was Art. 27 SConst that stipulates that a state president may only be reelected once. Wade himself had introduced this rule in the plebiscitary constitution of 2001. His first term of office, however, had started in year 2000. Due to this, he now referred to the prohibition of retrospective legislation. According to his line of reasoning, his first mandate ought not to be counted. Both the government and the opposition commissioned a number of constitutional experts to examine this question.[105] Proponents of a third term in office argued that the prohibition of retrospective legislation as a fundamental principle of the rule of law could only be breached by an explicit regulation, if at all.[106] The transitional rule contained in Art. 104 SConst played a decisive role: "The current state president exercises his office until his term of office runs out. All other rules contained in this constitution apply to him." The interpretation of sentence 2gave rise to controversy: Even if sentence 1 clarified that the duration of the mandate did not apply to Wade (and therefore did not apply retroactively), was sentence 2 explicitly intended to include the term of office lasting from 2000 to 2007 in the maximum number of mandates?

The CC's decision was awaited with unparalleled suspense. During the weeks preceding the decision, and especially on the day it was reached, mass demonstrations took place in front of the CC's office. In its **decision N° 3-14/E/2012 of 29 January**[107] the CC had to engage with the expected complaints against Wade's candidature. While the CC fell short of issuing an extensive justification, it drew on the argument that Art. 104 sentence 1 ex-

103 *Considérant* 24: "n'est pas en l'espèce de nature à altérer les résultats du vote"; *considérant* 35: „même si l'organisation du scrutin laisse apparaitre quelques lacunes et insuffisances, les requêtes… ne sont pas fondés.".

104 Thereto *Karsten Dümmel,* Senegal: Die Opposition boykottiert die Parlamentswahlen. Das Land zwischen drei Wahlen, 2007, http://www.kas.de/wf/doc/kas_10794-1522-1-30.pdf?07090414250 1 (last accessed on 17 October 2017).

105 Including French constitutional laywers such as the university professors Guy Carcassonne, Michel de Guillenchmidt and Jean-Yves de Cara. The latter even performed in a televised debate to defend their arguments against to Senegalese professors of law, see *Filip Bubenheimer,* Der Präsident, der nicht gehen will, http://verfassungsblog.de/der-prsident-der-nicht-gehen/2012 (last accessed on 17 October 2017).

106 Cf. the complaints made in the decision of 29 January 2012, see below and the compilation at http://www.la-constitution-en-afrique.org/article-le-president-a-t-il-le-droit-de-se-representer-en-2012-72137871.html (last accessed on 17 October 2017).

107 Accessible at http://www.la-constitution-en-afrique.org/article-le-conseil-constitutionnel-agent-du-continuisme-98162102.html (last accessed on 17 October 2017).

presses the will of the constitutional legislator to not apply the new constitutional order to the first mandate. This first mandate could therefore not be affected, apart from if that had been explicitly intended. The fact that only Art. 104 sentence 1 SConst explicitly refers to the first term of office therefore meant that the constitution leaves this term of office out of its considerations regarding all other questions. In addition to this, the mandate as such could not be separated from its duration, so that the excluded mandate could not be counted. Moreover, Wade's declaration that he would be unable to stand for a third term of office was not legally binding. According to this, the period from 2007 to 2012 was his first term of office.

Despite the overall welcome tendency to resolve the conflict with legal means and within the remits of the law, it ought not to be forgotten that the subject matter at hand was not merely the clarification of a judicial question, but instead the candidature of a president currently in office. This ought to only be declared invalid for good reasons and without reason for doubt.[108] The subject matter at hand was the admissibility of a candidature as a precondition for a democratic and open-ended decision-making process. Should not in case of doubt the freedom of candidature outweigh other considerations?[109]

While violent protests did take place after the announcement of the decision, the maturity of the actors involved, especially those belonging to the opposition, became apparent in that they trusted in the outcome of the election and did not boycott it.[110] During the inauguration of Macky Sall, the president of the CC took a stance with regard to the decision and the harsh criticism. He stated that the CC had fulfilled its constitutional task in a "responsible, unwavering, and independent manner, irrespective of untruths, acts of aggression, threats, and accusations."[111]

In this context, it is interesting to note that after the CC's decision, scholars directed their attention in a different direction, and used this as an occasion to engage with fundamental questions and structural problems regarding e.g. the role of public debate[112] and the

108 *Ismaïla Madior Fall*, Présidentielle de 2012: de la constitutionnalité de la candidature du Président sortant?, http://www.la-constitution-en-afrique.org/article-le-president-a-t-il-le-droit-de-se-representer-en-2012-72137871.html (last accessed on 17 October 2017).

109 *Fall*, note 107, p. 5.

110 Even if it was beforehand supposed that this could lead to a loss of credibility, http://liportal.giz.de/senegal/geschichte-staat/ (last accessed on 17 October 2017).

111 *Cheikh Tidiane Diakhaté*, Pourquoi j'ai validé la candidature de Wade, http://www.leral.net/Cheikh-Tidiane-Diakhate-Pourquoi-j-ai-valide-la-candidature-de-Wade_a33611.html (last accessed on 17 October 2017).

112 See *Alioune Sall,* Interprétation normative et norme interprétative: à propos des décisions du Conseil constitutionnel, http://www.la-constitution-en-afrique.org/article-interpretation-normative-et-norme-interpretative-a-propos-des-decisions-du-conseil-constitutionnel-98568798.html (last accessed on 17 October 2017).

responsibility of legal scholars in a democracy[113]. Even though many had adopted clear position prior to the decision, and had engaged in heated debate, the intrinsic complexity of judicial review and the difficult context were acknowledged.[114]

G. Self-understanding and public perception

The role and tasks of constitutional courts in democratic settings are only partially determined by their constitutional status and the scope of their authority to review laws. The political and cultural contexts within which they exercise this authority, as well as the extent of public support, are of similar importance.[115] Senegalese civil society has relatively little trust in the judicial system, since it doubts its independence[116] and is in particular critical of its proximity to the state president who still has far-reaching competencies with regard to the nomination of judges.

The CC has a narrow and objective understanding of its own role, limits itself to the preservation of the constitutional order, and focuses on its role as a guarantor of the rule of law.[117] This has been frequently criticized both in the academic literature[118] and by the press. The CC, so far, bases its restrictive interpretation on the competencies it has been accorded by the constitution and the rules of procedure (*compétences d'attribution*). If approached with a question that cannot be subsumed under either of these competencies, it declares itself to be incompetent. The CC's formula in these instances remains the same, irrespective of how far the question is removed from its realm of competency.[119] These frequently criticized *déclarations d'incompétence*, however, are often concerned with the review of constitutional amendments, as well as with questions that clearly do not fall under its realm of competency. The CC's approach is similar to the French approach to exclude

113 *Fatou Kiné Camara*, Du rôle et des responsabilités du juge et des juristes dans une démocratie - Réflexions suscitées par la décision du Conseil constitutionnel du 27 janvier 2012, http://ddata.over-blog.com/1/35/48/78/S-n-gal/camara-responsabilite-juristes.pdf (last accessed on 17 October 2017).

114 *Sall*, note 111, p. 1; *Fall*, note 107; different however *Moussa Samb*, De l'art de (mal) juger - Propos d'un juriste privatiste sur l'arrêt du Conseil constitutionnel du 29 janvier 2012, http://www.elhadjmbodj.org/article/index.php?action=articleiread&tokena=79&token=1423220793&tokenn=1422275717 (last accessed on 17 October 2017), who criticized the decision mainly for its, in his opinion, insufficient and incorrect reasoning.

115 *Rainer Grote*, Der Beitrag der Verfassungsgerichtsbarkeit zur Sicherung von Grundrechten, Demokratie und Entwicklung- Einschätzungen aus Afrika, Asien, Lateinamerika sowie Mittel-, Ost- und Südosteuropa, Konrad-Adenauer-Stiftung, Sankt Augustin 2010, p. 20.

116 *Bertelsmann Stiftung*, note 9, p. 5.

117 See *Kanté*, note 34.

118 See to the critics *Kanté*, note 34.

119 *Fall*, note 16, p. 76.

amending laws from any judicial control.[120] It is therefore interesting to note that the decisions of certain African constitutional courts standing in the francophone tradition, however, show divergent tendencies, and have engaged in substantive review of constitutional amendments.[121]

The attempt of the Senegalese constitutional judge to protect the will of the sovereign legislator uncovers a core problem of contemporary African democracies that lies in weak public representation, amounting to a lack of an effective counterpart to the executive. Due to the inequality between the different actors, it is unsurprising that the hopes and expectations aimed at constitutional courts and their balancing function are particularly great. It is therefore questionable whether and under what conditions a constitutional court like the Senegalese CC can actually meet these expectations.

H. Final assessment

I. Conclusion

In view of the CC's genesis and the analyzed decisions, the CC has fulfilled its original role. It yet has failed to develop this role further through its case law. As seen, this is largely to be explained with a lack of legitimization. If a constitutional court is expected to courageously expand its realm of competency and thereby overstep the existing legal scope, as has frequently been demanded from the CC, then this requires that the court and its standing enjoy particular public support, which is not the case in Senegal.

Furthermore, the constitutional development in Senegal is shaped by the reduction of the constitution to its organizing function. This led to constitutional instability and to a loss of legitimacy of the Constitution.

However, as mechanisms of judicial review cannot be static, they instead have to follow political and historical developments. Even though due to its history, the CC used to be an institution "at the periphery of democratic dynamics"[122], its formalistic stance and its tendency towards closure may have led it to neglect the changes that the country has undergone since the year 1992. This especially includes what crucial role is expected of it by political actors and civil society despite the wide-spread criticism.

120 In this view, a judge cannot and must not control constitutional amendments, what would mean constituting a *gouvernement de juges*; *Luc Heuschling,* Krise der Demokratie und der juristischen Demokratielehre in Frankreich, in: Hartmut Bauer/ Peter M. Huber/ Karl-Peter Sommermann (eds.): Demokratie in Europa, Tübingen 2005, p. 65.

121 For instance decision N° DCC 06-74 of 8 July 2006, of the Cour Constitutionelle of Benin; decision N° 01-128 of 12 December 2001 of the Cour Constitutionnelle of Mali; cf. thereto *Lisa Heemann*, Judicial Review and Democratization in Francophone West Africa - Country case study Mali, in this issue.

122 *Fall*, Les révisions constitutionnelles au Sénégal. Révisions consolidantes et révisions déconsolidantes de la démocratie sénégalaise, Dakar 2011, p. 76.

II. Future perspectives: A new beginning for judicial review in Senegal?

The 2011/2012 political upheaval has changed Senegal's democratic culture. Most relevant was the prevention of the "constitutional coup" in June 2011. This was "one reform project too many", and gave rise to the birth of constitutional patriotism in Senegal.[123] This movement has hence accorded new legitimacy to the constitution.[124] Moreover, the character of the public and academic debate and the proven trust in the democratic institutions has also decisively advanced the process of democratization.

Not only did Macky Sall's electoral promises[125] point to a fundamental reform, but it is also considered a national consensus that has emerged from the work of the *Assises nationals* in 2008.[126] However, the proposed far reaching institutional changes with regard to the CC have only been partially implemented.

As seen in section B. the method for nominating judges, that had been controversial from the outset, was changed. While there is no overall solution how to guarantee institutional independence by the design of the nominating method and also procedures that allow for the participation of different institutions have shown their limitations[127], this change could improve the reputation of the constitutional judges and increase public trust in the institution. It is moreover a welcome development that the CC's consultative competencies were expanded. Due to a lack of explicit competency, the CC had so far often declared preliminary enquiries to be inadmissible.[128] By participating in controversial acts prior to their adoption, it could, however, not only contribute to reducing institutional crises, but also strengthen public trust in the law's conflict resolution potential.[129]

Even if the 2016 constitutional reform finally fell short of expectations, an unprecedented public and political consensus has led to an institutional strengthening of judicial review in Senegal. It remains to be seen how these developments and the new institutional set-up will alter the role and activity of the CC.

123 *Fall*, note 8, p. 78.

124 *Fall*, note 8, p. 78.

125 *Macky Sall*, Le chemin du véritable développement, http://www.la-constitution-en-afrique.org/categorie-10197864.html (last accessed on 17 October 2017).

126 The PDS government was also invited to participate, but refused to do so; cf. http://www.dakaractu.com/Reforme-des-Institutions-de-la-Republique-Les-Acteurs-des-Assises-nationales-interpelles-_a43848.html (last accessed on 17 October 2017).

127 *Kanté*, note 33, p. 171.

128 For instance, Abdoulaye Wade requested the opinion of the CC before prolonging the parliamentary mandates, but it declared itself incompetent, decision N° 1/2005 of 7 September 2005.

129 *Kanté*, note 33, p. 172.