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THE MANAGEMENT OF COVID-19 IN SENEGAL: BETWEEN HEALTH NECESSITY AND DESECRATION OF THE FUNDAMENTALS OF THE RULE OF LAW AND DEMOCRACY

*Moussa Diop**

Abstract

The global health crisis caused by the COVID-19 pandemic has directly called on the various governments of the world to take action. In Senegal, from the start of the spread of the virus, the national authorities made use of the powers conferred on them by the fundamental law, in particular the Constitution, for an expedited support to control the disease. A response mechanism was quickly put in place, allowing the President of the Republic to make use of his constitutional, legislative and regulatory prerogatives and the various ministers to endorse the implementation, each as far as he is concerned. The person, main vector of contamination, inevitably had to see the rights and freedoms which are recognised and guaranteed at the national level momentarily withdrawn for some and restricted for others. Very quickly, Senegalese citizens, accustomed to a normal legal order or the exercise of these rights and freedoms, find themselves faced with a new exceptional legal order and expropriator of citizen prerogatives drawn from democracy and the right-wing state. The rigour with which the Senegalese national authorities wanted to put this extraordinary legal regime into practice explains the many difficulties noted between the state and its own citizens. The deployment of defence and security forces to enforce the law has found fierce resistance on the part of the population, especially the youth and a significant number of injuries, arrests and convictions have been registered.

* Professor-Researcher at the Faculty of Legal and Political Sciences of the Gaston Berger University of Saint Louis of Senegal.

1 Introduction

The notion of crisis is understood as a sudden instability, causing at a given moment serious disruptions on a specific sector of activity that has always been directly associated with the economy¹ and politics.² Very recently, health, as a field of activity, seems to have wanted to claim its place on the dark picture of the history of crises.

The one that currently crystallises all the energies of the world is this time sanitary and knows no precedents in the rear-view mirror of the great upheavals that human health has known so far.³ The weakening of two fundamentals of life, which are being and having that this health crisis has caused, mobilises public authorities around the world to provide a response commensurate with the threat. Senegal, having taken its share of this great misfortune, has tried like all its other neighbours in the world to put in place a plan for survival and exit from the crisis.

The COVID-19 pandemic is a crisis which has not remained confined to the health field, on the contrary, it has caused others which are mainly economic and social.⁴ Consequently, it now covers a vast field of investigation in which it would be possible to get lost for anyone who wants to talk about it in a general way. Thus, work to target the different tools that have been put to the service of managing this crisis is necessary,

- 1 For a good literature on the economic crises that the world has experienced and their consequences, see A Rowley 'Two modern economic crises: 1846 and 1848?' (1986) 2 *Révolutions et Mutations au XIXème siècle, année 81*; P Martin 'The economic crisis: eternal return?' (2008) vol *Revue d'économie financière, année 47*; P Gilles *History of crises and economic cycles* (2009).
- 2 See for more details on political crises: J-M Vernochet 'Michel Winock. French fever: the great political crises. 1871-1968' (1986) 51 *Politique étrangère, année 349*; L Coste & S Guillaume *Elites et crises du XVIème au XXIème siècle. Europe and Overseas* (2014).
- 3 We remember the Spanish flu that caused millions of deaths at the end of the First World War, see VP Freour 'The origin of the Spanish flu virus of 1918 finally specified' *am-sante.lefigaro.fr* 29 April 2014. We also remember the great Black Death of 1348, but neither event equals the present pandemic in terms of human, economic and social damage.
- 4 The World Bank's forecasts regarding the impact of the pandemic on African economies are alarming. According to a study, economic growth in sub-Saharan Africa will fall from 2.4% in 2019 to a range between -2.1% and -5.1% in 2020, causing the first recession in the region in 25 years. On a social level, an optimistic scenario from this same study considers that well-being losses in 2020 would amount to 7% compared to a scenario without COVID-19 and this figure should increase to 10% if the crisis were to end. extend. See Report from the Office of the Chief Economist for West Africa. 'Assessing the economic impact of COVID-19 and policy responses in sub-Saharan Africa' April 2020, Vol 1.

and this present study is already moving towards a purely legal perspective, but also critical of the reaction of the powers Senegalese public facing the pandemic.

The present work focuses exclusively on the constitutional foundations of the reaction of the Senegalese public authorities to the global health threat, the deployment of which has been very simplistic with regard to constitutionally guaranteed fundamental rights and freedoms.

The COVID-19 pandemic seems to have changed the relations between law and medicine and has now allowed this influence to take the form of a single two-way lane. In Senegal in particular, the emergency legal system put in place to organise the response to the coronavirus disease has been strongly inspired by specialists in medicinal issues. Politicians, civil society, activist groups, religious and customary authorities, and citizens, all have praised health specialists to set up a quota plan.⁵

In practice, on the other hand, the topic focuses on the issue of the provision by the Senegalese national authorities of sufficient legal means to enable them to cope with the situation and their adaptation to the prevailing health crisis. While the first element, in particular the existence at the Senegalese national level of a legal framework capable of organising the response, does not suffer from any uncertainty,⁶ the second element relating to the adaptation of these means is much less obvious.

It should be noted that the legal system intended to apply to emergency situations is not really adapted to the current one. The state of emergency which was decreed and the law of 1969 on which the President of the Republic instantly relied for the modalities of its application relate more to situations of political crises and internal unrest than on health issues as is the case with this pandemic. Subsequently, a law adopted by the National Assembly on January 19, 2021 which extends the cases of exceptional regime to natural disasters is hardly more comfortable. Another question

5 The President of the Republic, on the occasion of his first message addressed to the nation on 23 March 2020, recalls the central place that health specialists occupy in this fight against the pandemic by citing them at the forefront of the fight. The guidance of health experts to contain the virus has therefore favoured the development of several series of constitutional, legislative and regulatory measures that could be described as Senegalese COVID-19 law.

6 Indeed, the Senegalese constituent has not confined itself to consecrating major principles with constitutional value, to recognising the rights and freedoms of citizens, to framing the relations between the various powers and to investing institutions with well-defined competences. It has also adapted exceptional circumstances provisions to be activated during moments of crisis at national level. See arts 52 & 69 of the Constitution of 22 January 2001.

raised by the analysis of this subject relates to the immunity of fundamental rights in this pandemic context.

The coronavirus disease has once again taught us that these rights and freedoms are not acquired at all times, they are subject to two different regimes. One which could be described as normal and in which the limitations of these by the public authorities are strongly regulated by the law and controlled by the judge, and another which would be exceptional and which would legitimize the extension of the power of limitation of these same rights and freedoms by public authorities⁷

A priori, two contradictory demands inevitably had to collide. These are, on the one hand, the need on the part of the Senegalese national authorities to put in place a legal mechanism to respond to COVID-19 and, on the other hand, the obligation of these same authorities to respect the fundamental rights and freedoms guaranteed to citizens by the Constitution.

The management of the pandemic is reviving the debate on the relationship between individual freedoms and rights/collective freedoms and rights, freedom/restrictions, respect/obligations. In the face of the crisis,⁸ it is clear that the measures that have been enacted such as confinement, control and restriction of travel, zeal for economic activity and the quarantine of certain people are particularly harmful to the exercise by citizens of their fundamental rights and freedoms.

Beyond the constitutional legitimacy⁹ of the measures taken by the public authorities, the restriction of individual rights and freedoms for the general national health interest is entirely understandable and must therefore receive the blessing of all the living forces of the nation, citizens and institutions¹⁰ included. However, it must be recognized that the sensitivity of the

7 See for the dual regime of protection of fundamental rights, A. Greene 'Separating normalcy from emergency: The jurisprudence of article 15 of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1768-1773.

8 A recent study has raised these sensitive questions, see in particular, F Bouhon et al *The Belgian State facing the COVID-19 pandemic: Sketch of an exceptional regime* (2020).

9 Indeed, almost everywhere in the world the constituents have established constitutional provisions allowing national authorities to be able to act legally under the banner of the exception as a regime of common law. In France for example it is article 61.1 of the Constitution, in Senegal it is articles 52 and 69, in other states such as in Belgium for example it is article 187 of the Belgian Constitution from 1831.

10 The French Constitutional Council itself has expressed explicit support for taking these restrictive measures of freedoms and rights in the general national health interest. It carried out a minimum check on the constitutionality of the law of 23 March 2020,

The question of these rights and freedoms considered today in all States which claim to be democracy and the rule of law as an irrevocably acquired legal heritage should indeed fuel numerous debates on the testing of human rights. man in general by the fight against COVID-19.

The appropriation of this sad news that is the coronavirus pandemic by academic circles¹¹ has challenged the various doctrines, especially legal in the sense of analysing, appreciating, criticising and contributing to the management by public authorities of the health crisis. It is in this perspective that this present reflection is launched, which tries to provide details on the situation in Senegal and the stifling of the fundamental rights of Senegalese citizens that it has caused.

The attack on this heritage in the organisation of the response to COVID-19 by the public authorities has been difficult for Senegalese citizens, who are deeply attached to these rights and freedoms. In the end, if the Senegalese constituent cannot be blamed for not providing a solution to situations such as the current pandemic, he has, on the other hand, made the sacrifice of fundamental rights and freedoms that he himself guarantees on the altar of health necessity.

2 The solution provided by the the Senegalese constituent in the face of COVID-19

The Senegalese Constitution of 22 January 2001 did not fail to provide for exceptional circumstances to deal with emergency situations of all kinds,

known as the COVID-19 law, specifying that: 'Given the particular circumstances of the case, there is no reason to judge that this law organic is adopted in violation of the procedural rules provided for in article 46 of the Constitution'. See, 'CC, decides.' n°2020-799 DC of March 26, 2020, Emergency organic law to deal with the COVID-19 epidemic. <https://www.conseil-constitutionnel.fr/decision/2020/2020799DC.htm> (accessed 10 April 2020).

11 In different countries of the world and particularly concerning our disciplinary field, which is Legal Sciences, reflections on the legal framework of the response of public authorities to the pandemic are being carried out with a view to their next publication. To name a few, see R Arnold 'L'état d'exception, nouveau régime de droit commun des droits et libertés? From terrorism to health emergency'; M Verdussen 'Democracy, rule of law and fundamental rights in the face of the COVID-19 pandemic: Crossed perspectives'; GA Lopez-Daza, 'The state of emergency in Colombia during the COVID-19 coronavirus pandemic'; M Carillo 'Considerations about the constitutional impact on the rule of law of the measures adopted in Spain against the COVID-19 pandemic' All these analyses are being published in the XXXVIth International Round Table, co-organised by the University of Aix-Marseille, the University of Toulon and the University of Pau and Pays de l'Adour on the theme: *L'état d'exception, nouveau régime de droit commun des droits et libertés? Du terrorisme à l'urgence sanitaire* (2020) <https://dice.univ-amu.fr/dice/ilf> (accessed 10 April 2020).

including health emergencies such as the current COVID-19 pandemic. As such, these said provisions have been activated to react to the health threat, which explains the establishment of an exceptional regime on the one hand and on the other, a kind of legislative vacation for the benefit of the executive for the needs of the emergency.

2.1 The introduction of an exceptional regime as an immediate response to the health crisis

The exceptional regime introduced by the Senegalese national authorities, which resulted in the state of emergency declared on 23 March 2020 to respond to the pandemic situation, meets all the requirements of the context. Its justification is strictly sanitary and its procedure highly legal.

2.2 The justification for the erection of the emergency regime: The health crisis

Senegal is a country that is not accustomed to an emergency regime. Since the official birth of the state in 1960 to the present day, only two such emergencies, both linked to post-electoral political unrests, have been registered.¹² The recent arrival of COVID-19 has imposed a third emergency regime linked this time not to security disturbances from political sources, but rather to a health crisis.

Has the scale of the coronavirus disease reached such a level that justifies its qualification as a health crisis? A health crisis is defined as an event that has really affected or is likely to potentially affect a large number of people, with the harmful consequences, a constant and increasing deterioration of the public health system, and which can act negatively on the mortality rate to the point of reaching excess mortality.¹³

Based on World Health Organization (WHO) data by region,¹⁴ COVID-19 far exceeds previous mass infections that have been described

12 The first dates back to 1965 in relation to the political tensions between LS Senghor and Mamadou Dia, this event was significant insofar as, it was for the first time that we could speak of a coup d'état in Senegal, even if there was never bloodshed, the coup d'état was more institutional than military. The second was after the disputed presidential elections of 1980, pitting President Adbou Diouf against the opposition. A state of emergency was declared in both cases.

13 For more details on the concept of health crisis, see S Laporte 'Reflection on the notion of health crisis' (2008) 1 *Global Security* 79.

14 See the official figures on the WHO website 'Coronavirus disease 2019 (COVID-19) outbreak' <https://www.who.int/fr/emergencies/diseases/novel-coronavirus-2019> (accessed 21 September 2023).

as a health crisis. Humanity has certainly experienced hardships related to large-scale epidemics, we remember the great 'black' plague of 1348, the Spanish flu from 1918 to 1919, outbreaks of Ebola virus infections between 1976 and 2012, to name only a few. But these previous episodes have never really tested the resilience of a globalised and scientifically very advanced society, especially in medicinal matters.

This is the real difference between the COVID-19 pandemic and previous widespread infections that come close to it without really matching it. It is not only structural in its magnitude and speed of spread, it is also and above all institutional. The COVID-19 pandemic has laid bare the various domestic legal systems accustomed to dealing with small-wave, well-localised health situations.

It has shown total indifference to state borders, thus exceeding the capacity of a single state to provide an effective response to its quotas. Since then, international law and the institutions that allow its deployment in the various fields have taken charge of the situation. In particular, WHO has quickly established itself as a hard core around which all the actions to be implemented to respond to the threat must be coordinated.

This sovereign international institution in global public health quickly understood the short- and long-term consequences of this new disease on the economic and social fabric. Thus, it immediately began to encourage the various states of the world to activate the various legal levers at their disposal to set up a system aimed at eradicating or at least mitigating the effects of this new infection, which is beginning to reach a pandemic dimension.¹⁵

In Senegal in particular, the notion of health crisis, although not explicitly enshrined in the basic texts that underpin any action on the legal level, is nevertheless one of the events whose occurrence justifies the establishment of an exceptional regime such as the state of emergency.¹⁶ A more detailed interpretation of article 52 of the Senegalese Constitution

15 Indeed, it was one month after the declaration of the pandemic in Wuhan province in December 2019 that the WHO declared a state of global health emergency on 30 January 2020 and put each of the different states of the world in front of its responsibilities.

16 In relation to the COVID-19 pandemic, a state of emergency was declared for the first time on 23 March 2020 during a speech addressed by the President of the Republic to the nation. A decree 2020-830 of 23 March 2020 materialises it. It will be extended by means of a second decree 2020-925 of 3 April 2020.

of 22 January 2001 provides information on the various threats that may lead the President of the Republic to make use of his exceptional powers.¹⁷

It is not only situations of unrest related to internal political tensions or inter-state disputes that are covered by this constitutional provision. The Senegalese constituent speaks of ‘serious and immediate threats’ that would have direct consequences on state public order. As such, COVID-19 is of such a threat that it undermines the regular functioning of public authorities, institutions and the survival in general of the nation.

The justification for the introduction of an exceptional regime by the current health crisis situation is also based on another text developed to apply to the context of exceptional circumstances. This is Law 69-29 of 29 April 1969, relating to the state of emergency and the state of siege. This legislative text makes the effort to be a little clearer than the constitutional one as to the various turbulences that may justify the establishment of an exceptional regime such as the state of emergency.

Article 2 of that law cites ‘events which, by their nature and gravity, constitute a public calamity’¹⁸ as one of the grounds for establishing an emergency regime. It is in this register of notion of public calamity that we must classify certain unfortunate events such as nuclear disasters, ecological disasters and those related to epidemics such as the current coronavirus disease.

On the other hand, a recent text whose adoption is strongly inspired by the COVID-19 pandemic as well as the recent events linked to the explosion on December 19, 2021 of a gas well operated since the early 2000s in Ngadiaga in the Thiès region explicitly includes in its provisions the notion of health and natural crisis. This is law n°2021-18 of January 19, 2021, modifying the aforementioned law n°69-29 of April 29, 1969 which, beyond the exceptional regimes classically known

17 When the institutions of the Republic, the independence of the Nation, the integrity of the national territory or the execution of international commitments are seriously and immediately threatened, and the regular functioning of the public authorities or institutions is interrupted, the President of the Republic has exceptional powers. He may, after informing the Nation by a message, take any measure tending to restore the regular functioning of the public authorities and institutions and to ensure the safeguarding of the Nation. It cannot, by virtue of exceptional powers, carry out a constitutional review <https://www.sec.gouv.sn> (accessed ?).

18 A state of emergency may be declared in all or part of the territory of the Republic of Senegal, either in the event of imminent danger resulting from serious breaches of public order, or in the event of subversive activities endangering internal security, or in the event of events having, by their nature and gravity, a public calamity. Art 2 of Law 1969-29 of 29 April 1969.

at the Senegalese national level such as the state of emergency and the state of siege, establishes a third regime of exception which now governs the management of natural or health crises. This new law, as criticized¹⁹ as it may be, lays the foundations for better consideration of crises that undermine the survival of the entire nation, as is the case with the COVID-19 pandemic.

In old and new Senegalese texts, the character of public calamity of COVID-19 is more than proven, as such, some states of the world, still in the context of the management of the pandemic, have explicitly spoken of public calamity by declaring it through legal acts as an exceptional situation.²⁰ In the midst of the pandemic, when establishing an exceptional regime, the Senegalese national authorities also resorted to the law. The parallelism of the forms has obviously been observed, in fact, the magnitude of the situation explains the degree of normativity of the legal acts enacted to declare the state of emergency.

3 The process of consecration of the emergency circumstances regime

With regard to emergency circumstances in Senegal, article 52 of the Constitution of 22 January 2001 confers on the President of the Republic full powers to take all appropriate measures in the event that the institutions of the Republic, the independence of the nation, the integrity of the territory and the fulfilment of international commitments are seriously and imminently threatened, leading to the interruption of the regular functioning of public authorities.

However, it is important to note that in Senegal, even if the national authorities have shown a firm will to take charge of the management of the health crisis, there is a certain mismatch between the ways and means used and the issues related to the context that are more health than security.

In Senegal, the analysis of the methods and means implemented to establish the emergency regime, in order to deal with the pandemic, presents a scenario different from that of some states that have served

19 Indeed, this law, which renders the old law of 1969 obsolete, was intended to attract a lot of criticism to the extent that it considerably strengthens the powers of public authorities, which are already very extensive, by allowing them to circumvent the legislature to establish a system of exception and thus restrict the rights and freedoms of citizens. The Senegalese opposition stood up as a shield against the adoption of this law by trying to amend it in vain.

20 This is the case in Angola with Presidential Decree 142/20 of 26 May 2020, establishing the state of public calamity or Bolivia dated 28 July 2020.

as a model in terms of legislation and administration, such as France.²¹ Have the Senegalese national authorities preferred the ease offered by the existence of an emergency law already in force since 1969 to the vicissitudes linked to the triggering of an emergency procedure for the adoption of a law adapted to the pandemic context?

There is every reason to believe that the ease of use, and perhaps a concern for saving time and resources,²² motivated the choice of the Senegalese national authorities as to the method and procedure used to deal with the situation. The President of the Republic has simply resorted to the procedure laid down in article 52 of the Constitution, including his exceptional powers in times of crisis in general.

This said procedure was literally followed by the President of the Republic who, on 23 March 2020, sent a message to the nation²³ and immediately began to take measures to deal with the threat. Paragraph 2 of article 52 was practised by the President of the Republic as indicated in his letter and the presidential decree and then the ordinance were the preferred procedures for the establishment of the emergency regime.

However, as mentioned above, the existing legal framework (article 52 of the Constitution, the 1969 law on the state of emergency) was not adapted to the context of health but more in the name of security. Further, article 2 of the decree of 23 March 2020 proclaiming the state of emergency which reactivates articles 3 to 14 of Law 69-29 of 29 April

- 21 The process of establishing the state of emergency in France is both rigorous and varied in normativity. The procedure of art 16 of the Constitution was not triggered, the French national authorities preferred to adopt a law to react to the pandemic. We know that in terms of emergency regimes, the France is not lacking in legislative texts (see in this regard, the law of 3 April 1955 on the state of emergency and those of 9 August 2004 and 5 March 2007 on the health emergency), but the French authorities are part of a logic more health than security have preferred to adopt a new law in accordance with the requirements of the time, in particular Law 2020-290 of 23 March 2020 known as the 'COVID-19 law'.
- 22 Indeed, the Senegalese national authorities have taken the easy way out by taking advantage of the existing legal framework to manage the situation. If in France a so-called COVID-19 law adapted to the situation was adopted in time in a context of cohabitation of two chambers (the Senate and the Assembly), a fortiori in Senegal where only one chamber exists (the National Assembly) and composed mainly of deputies from the ruling coalition. In such a context, passing a law should not encounter difficulties, especially since it would have nothing political, it would have exclusively health objectives.
- 23 See the speech of the President of the Republic on the occasion of a message addressed to the nation on 23 March 2020 on the official website of the Government: <https://www.sec.gouv.sn/actualit%C3%A9/message-de-sem-le-pr%C3%A9sident-de-la-r%C3%A9publique-macky-sall-d%C3%A9claration-d%E2%80%99%C3%A9tat-d%E2%80%99urgence-dans> (accessed ?).

1969 on the state of emergency has only created chaos at the national level.

The security rather than health considerations that prevail in this law explains the clashes noted here and there between the police and the populations throughout the territory, sometimes even leading to popular uprisings against the authority.²⁴ However, the urgency prevailing at the national level cannot accommodate lengthy and uncertain procedures such as those required in certain bodies, particularly the legislative one.

In order to respond to the speed of urgency, procedures and deadlines must give way to immediately enforceable decisions, and a delegation of powers to the executive had to be carried out.

4 Constitutional delegation of powers to the executive for emergency purposes

Faced with unforeseen major upheavals, the urgency that must be put forward to deal with the situation does not allow it to go through parliament, which naturally follows a long and often difficult procedure for adopting decisions. The speed and efficiency required by this emergency often explains the concentration of power in the hands of the executive. In Senegal, this was the case, there was a kind of legislative vacation for the benefit of the President of the Republic on the one hand and his Government on the other hand.

Faced with large-scale events that have occurred in an unpredictable manner such as the current COVID-19 pandemic, the President of the Republic must normally govern by ordinance. This means that the President of the Republic will be for a while, the holder of legislative power since he is empowered by the holder of this same power as the National Assembly to take measures that are normally the domain of the law.²⁵

24 We remember the behaviour of young people from certain neighbourhoods of Dakar and its suburbs who, in the midst of a curfew, showed a notorious mistrust of the police, which led to several series of arrests and pre-trial detentions.

25 Article 77 of the Senegalese Constitution of 22 January 2001 states: 'The National Assembly may authorize by law the President of the Republic to take measures that are normally within the domain of the law. Within the limits of time and competence set by the enabling law, the President of the Republic issues ordinances that enter into force as soon as they are published but lapse if the ratification bill is not submitted to the National Assembly before the date set by the enabling law. The National Assembly may amend them on the occasion of the vote of the law of ratification'.

However, this governance by ordinance, as has happened in some countries,²⁶ has been in the case of Senegal, a constitutional provision relatively applied throughout the emergency regime introduced. Either out of necessity related to urgency, or to take advantage of the procedural facilities offered by the decree, the President of the Republic proceeded by decree for the most part of the flagship measures intended to contain the pandemic.

Even before triggering the article 77 procedure, the President of the Republic issued a number of decrees to respond to the necessary emergency situation. Decree 2020-781, signed on 18 March 2020, was the first to be enacted by the President of the Republic. The main purpose of the latter was to make the procedure for meeting the needs of the various institutions to be met through public procurement more flexible.

This decree derogating from the public procurement code for expenses related to COVID-19 has been the subject of many diatribes. The opposition, civil society and many activist groups have cried foul over this measure, which concerns an economic field (public procurement) hitherto characterised by a constant disagreement between the Government and the various forces of the nation. This decree is now at the origin of many scandals²⁷ relating to the acquisition through public contracts and the distribution of food intended for the poorest populations as part of the confinement of Senegalese citizens to contain the disease.

Some public contracts have been awarded to contractors currently holding public office as a member of the president's party in the National Assembly. Others were offered to entrepreneurs who do not have proven skills or experience in the areas covered by these markets. The dual nationality that these entrepreneurs hold, most of whom are of Lebanese origin, has also triggered a wind of rebellion and renewed nationalism on the part of several Senegalese who believe that these markets should primarily go to nationals exclusively.²⁸

26 The case of Switzerland is instructive in this respect, since the Federal Government has hitherto governed by ordinance. The Federal Council adopted its first ordinance on 28 February 2020 (PR 2020 573), on 13 March 2020 (RO 2020 783), it adopted its second ordinance, a third on 20 March 2020 (RO 2020 847), then a fourth on 27 March 2020 (RO 2020 1099).

27 These disagreements on the way in which these public contracts were awarded and then distributed to the population have recently earned the Minister to be summoned by OFNAC to respond to the various accusations and draw an account in relation to the budget allocated to him for the accomplishment of this mission.

28 PA Seck 'Senegal – AFRICA WEST – P173838 – Senegal COVID-19 Response Project – Procurement Plan (English)' (2021) <http://documents.worldbank.org/>

A second decree 2020-830 of 23 March 2020 was enacted to proclaim the state of emergency, in order to bring the population to practice containment and thus reduce the outbreaks of contamination. The implementation of this decree by the security forces has been coloured by numerous police blunders seriously undermining the rights and freedoms of citizens. This is the case, for example, with the failure of law enforcement agencies to observe the constitutional principle of the inviolability of the home, the irregular practice of police custody, the violation of the right to defence, acts of torture and degrading treatment of citizens still on the street during curfew hours, and the like.

In the process, drawing the consequences of the decree of the state of emergency on periods of free movement within 24 hours, a third decree, 2020-875 of 25 March 2020, reorganising working hours in public administrative services was enacted. The expiry of the first period of state of emergency under conditions of accelerated spread of the virus justifies the signing on 3 April 2020 of a fourth decree, 2020-925, extending the state of emergency throughout the national territory.

The President of the Republic has therefore made great use of his decree power to put in place almost the entire system relating to the pandemic quota plan. Governance by ordinance, which in the prevailing context would normally be the legitimate legal process, has been relegated to the background. The few presidential orders that have been issued that relate to the fight against the pandemic at the national level and are all related to the economic field,²⁹ with the exception of one, Ordinance 005-2020 of 30 April 2020, which is institutional in nature and concerns the reorganisation of the functioning of departmental, municipal and city councils.

[curated/en/775391615292424510/Senegal-AFRICA-WEST-P173838-Senegal-COVID-19-Response-Project-Procurement-Plan](https://www.unhcr.org/refugees/en/775391615292424510/Senegal-AFRICA-WEST-P173838-Senegal-COVID-19-Response-Project-Procurement-Plan) (accessed 21 September 2023).

29 See for more details on these regulatory texts intervening in the economic field, Ordinance 001-2020 of 8 April 2020 providing for derogations from dismissal and technical unemployment during the period of the COVID-19 pandemic; Ordinance 002-2020 of 23 April 2020 on tax measures to support businesses in the context of the COVID-19 pandemic; Ordinance 003-2020 of 23 April 2020 on the duty-free admission of import duties and taxes of sanitary materials and equipment intended for the fight against the COVID-19 pandemic; Ordinance 004-2020 of 28 April 2020 amending the forecasts and authorisations of revenue and expenditure of the general budget; Ordinance 006-2020 of 15 May 2020 increasing penalties for violations of the provisions taken in the land transport sector to combat the COVID-19 pandemic; Ordinance 07-2020 of 17 June 2020 amending Law 2019-17 of 20 December 2019 on the Finance Act for the year 2020.

As mentioned above, knowing that the constitutional transfer of legislative power to the executive during periods of exceptional circumstances such as COVID-19 does not only involve the President of the Republic, it would be interesting to look at the Government's contribution to the action plan drawn up by the latter and materialised by administrative acts in the form of decrees and ordinances.

5 The Government's response to the implementation of presidential initiatives

The presidential decree signed on 23 March 2020 is brief, in accordance with the reasons for its enactment, the decree includes three main articles. The third specifies that [t]he members of the Government are responsible, each in so far as it is concerned, for the application of this decree'. This third article, which concludes this decree, which is very stingy in terms of provisions, is part of a constitutional logic. Indeed, it is quite normal and legitimate for the President of the Republic to appeal to the various ministers for the execution of the measures he has taken. The justification for this presidential referral to the government team is based on articles 42, paragraph 4, and 53, paragraph 2,³⁰ of the Constitution of 22 January 2001.

In short, the President of the Republic orders and decrees (article 43), and the Government coordinates and executes (article 53). In this mission of the Government to implement the action plan defined by the President of the Republic, it is important to specify that not all ministers have been solicited at the same level and with the same rigour. Unlike in France where the Prime Minister³¹ was the General in charge of war by investing himself with the competences of the Minister of Health and the Interior, in Senegal it was the Ministers of Health (for the coordination of health actions with the medical teams), the Interior and to a lesser extent that of Land Transport who carried the torch. From a legal point of view, the Minister of Health and Social Action, although at the heart of the

30 They provide: The President of the Republic determines the policy of the nation. 'The Government conducts and coordinates the policy of the Nation under the direction of the Prime Minister. He is responsible to the President of the Republic and to the National Assembly under the conditions provided for in Articles 85 and 86 of the Constitution'.

31 With the so-called COVID-19 law in France, there has been an extension of the Prime Minister's general police powers. On the report of the other ministers, it has taken a dozen series of measures ranging from restrictions or bans on the movement of people and vehicles to measures to control the prices of certain products, through bans on leaving home, quarantines of infected people, among others ... See concerning these various measures, Article L 3131-15 of the Public Health Code taken on the basis of the law of 23 March 2020 known as the COVID-19 law.

pandemic, has been less of a contribution in terms of measures taken. Instead of acts held by ministers such as decrees, the latter has essentially proceeded through communiqués and information bulletins as part of its mission to implement the action plan put in place by the President of the Republic. This attitude on the part of the Minister of Health can be explained in two ways.

On the one hand, it must be understood that the Ministry of Health is a technical and scientific ministry whose essential job is to serve as a liaison for the various health experts to either provide a remedy to the crisis that is raging, or to inculcate in the populations the health conduct to be taken to mitigate or even stifle the progression of the contagion. On the other hand, it could also be explained by the fact that the Ministry of Health is not a ministry of authority that has general police powers and the material and human resources to prohibit a certain number of behaviours and ensure strict compliance with them.

As part of the management of the current pandemic, even its health recommendations for the population have been able to go through the Minister of the Interior who has brought them into existence in the form of obligations and prohibitions. The more formal and legally framed reaction of the Minister of Land Transport was not long in coming. Indeed, two days after the publication of the decree of 23 March 2020 proclaiming the state of emergency, the Minister of Land Transport issued an order to this effect.

This decree 008231³² was signed on 25 March 2020 with the aim of introducing restrictive measures in the land transport sector to combat the current pandemic. The land transport sector is one of the most sensitive areas as potential hotbeds of acceleration of the pace of the spread of the virus, especially in states such as Senegal where public transport covers almost 80 per cent of the travel needs of populations. It remains the only order so far taken by the Minister of Transport in its field to react to the call of the President of the Republic to counter the pandemic.

Of all the ministers primarily concerned by the COVID-19 response system put in place by the President of the Republic, it is the Minister of the Interior who has mainly assumed the role of war captain. There are three

32 See this Order 008231 of 25 March 2020 through which the Minister goes into detail about restrictions and prohibitions in public land transport in the Official Journal of the Republic of Senegal of 26 March 2020. As in the case of the Minister of Health, who does not have the material and human resources to implement his recommendations, the Minister of Transport also calls on the Ministry of the Interior through the territorial command for the execution of this order (see art 14 of this Order).

main reasons for this. First of all, the quota plan defined by the President of the Republic applies *a priori* at the national level and it is the Minister of the Interior who is responsible for ensuring the implementation of the policy of the President of the Republic not only at the central level, but also in the decentralised and decentralised sub-levels.

As such, article 1 of the Presidential Decree signed on 17 April 2019 through its various paragraphs is explicit on the extent of the competences of the Minister of the Interior.³³ Secondly, the fact that the entire implementation of the COVID-19 response plan rests with the Minister of the Interior is due to the fact that it is almost composed of prohibitions that people are required to observe. The curfew imposed from 20h00 in the evening, the compulsory wearing of masks, the prohibition of gatherings and demonstrations, the prohibition of overloading public transport, the prohibition of movement from one municipality to another throughout the territory, for example, are all measures whose respect is the responsibility of the Minister of the Interior.

Finally, he is the only minister to have material and human resources capable of efficiently and effectively ensuring the response plan, the implementation of which is for the President of the Republic a mission of national general interest. The above-mentioned decree establishing its powers places at its disposal the police and gendarmerie forces, but also the defence forces if necessary so that it can carry out its missions in the best conditions. But in the context of this fight against the pandemic, it should be noted that the Minister of the Interior, either out of patriotism or political obedience to his mentor, the Head of State, and, at the same time being general secretary of his political party, has particularly shone by his responsiveness.

Of all the members of the Government, he was the first to enact measures in the direction of the fight against COVID-19. Indeed, even before the proclamation of the state of emergency on 23 March 2020, the Minister of the Interior had already, through an Order 007782 of 13 March 2020, taken measures to prohibit gatherings and demonstrations, thus ahead of the President of the Republic whose subsequent measures have not called into question those of his Minister of the Interior.

33 See Decree 2019-775 of 17 April 2019, relating to the powers of the Minister of the Interior in its article 1, paras 1 to 10 <https://www.sec.gouv.sn/d%C3%A9cret-n%C2%B0-2019-775-du-17-avril-2019-relatif-aux-attributions-du-ministre-de-lint%C3%A9rieur> (accessed 22 September 2023).

Subsequently, still as part of the implementation of the guidelines of the President of the Republic for the fight against the pandemic, the Minister of the Interior issued many other decrees, some of which establish new prohibitions and others renew prohibitions already previously imposed.³⁴ Has the Senegalese constituent, by providing a solution for exceptional circumstances such as those related to the current pandemic, not caused another problem? The question arises insofar as a number of democratic achievements have been in decline under the exceptional regime introduced.

6 The sacrifice of democratic gains for the COVID-19 health emergency

‘Necessity makes law’, the adage goes. This old adage³⁵ sums up in a way the inevitable impact of Senegalese COVID-19 law on constitutional gains relating to the rule of law, democracy and human rights. In terms of human rights, particularly and more specifically in Senegal, we recall the words of the President of the Republic on the occasion of his first address to the nation: ‘I order the defence and security forces to be ready, for the immediate and strict execution of the measures enacted throughout the territory’. In this respect, the use by the authorities of their general police prerogatives has not been without repercussions on respect for human rights. It has led to the calling into question of certain fundamental rights on the one hand and the suspension of certain fundamental freedoms on the other.

7 Calling into question certain fundamental rights

The need for a COVID-19 response mechanism and the obligation to respect guaranteed constitutional rights and freedoms are two requirements that are difficult to reconcile. Obviously, the implementation of the first would inevitably undermine the integrity of the other. The state of emergency with a curfew decreed by the President has bypassed certain categories of rights hitherto sacred. This is the case for certain so-called

34 This is the case among these measures: Order 009137 of 12 April 2020, prescribing the mandatory wearing of masks in certain public places, Order 011592 of 10 July 2020, prescribing the mandatory wearing of protective masks in public and private places, Order 024066 of 5 October 2020, extending the Order of 10 July 2020, prescribing the mandatory wearing of protective masks in public and private places, Order 008207 of 24 March 2020, temporarily prohibiting traffic, etc.

35 Consecrated on the occasion of the old case of the lady Ménard who had stolen bread so that her family would not die of hunger. This case, which is now enshrined verbatim in French law since 1994 (see art 122-7 of the Criminal Code) and confirmed by case law (see CC, Decision 2018-717/718 QPC of 6 July 2018) is a judgment rendered by Judge Magnaud, President of the Court of Château-Thierry, on 4 March 1898.

second-generation rights, some of which may be based on the concept of equality on the one hand and others on that of social justice, on the other.

7.1 Rights based on the concept of equality impaired

Of all the constitutions that independent Senegal has known, that of 22 January 2001 remains for the moment the most advanced in terms of consecration of rights and duties for citizens.³⁶ An entire Title II relates to ‘fundamental rights and freedoms and duties of citizens’. Article 8 of Title II provides:

The Republic of Senegal guarantees to all citizens’ fundamental individual freedoms, economic and social rights and collective rights. These freedoms and rights include: ..., the right to education ... the right to health ...’

But the observation is that the COVID-19 pandemic seems stronger than these constitutional provisions guaranteeing these rights, including the right to education and the right to health strongly shaken by the health crisis.

7.2 The right to education

It is important to note that in Senegal, there is no constitutional provision that enshrines a prohibition of any suspension of the Constitution as is the case in some States such as Belgium.³⁷ If that were to happen, it would lead to a pure and simple desacralisation of the latter insofar as the national authorities would be obliged to derogate from this rule and this is exactly what happened in terms of meeting the needs of the pandemic. With regard to the right to education, articles 21, 22 and 23 of the Constitution devoted exclusively to education have been suspended.

The right for ‘all children, boys and girls, in all places of the national territory ... to access school’ enshrined in article 22, paragraph 2, has been emptied of all its content. The ‘access to school’ of holders of the right to education in general (children, girls and boys, pupils, and students) has remained a mere constitutional expression that no longer has any effective reality. The decision of the President of the Republic to close schools

36 See, IM Fall ‘Constitution of 1963 and Constitution of 2001: Continuity or rupture?’ (2007) 1 *Nouvelle Annales africaines* 311; IM Fall ‘Economic, social or cultural freedoms: Continuity or change?’ (2007) 1 *Nouvelles Annales africaines* 337.

37 As is the case in Belgium with art 187 of the Belgian Constitution adopted in 1831 which specifies that: ‘The Constitution may not be suspended, in whole or in part’.

(preschool, primary, secondary and higher education) on 14 May 2020 has had enormous consequences on learners.

In Senegal in particular, 3 660 526 learners in total, all sectors combined, were directly affected.³⁸ For the latter, especially in African countries where an adequate framework for education and training is still a quest, this situation has fostered a disruption of learning, thus depriving children and other learners of their opportunities for development and improvement. Distance learning that was proposed as an alternative was also not up to the task.

If we stick to the official figures, which are very optimistic,³⁹ this solution should be the remedy for the continuity of teaching. However, in practice, the rate of internet penetration does not necessarily correspond to that of actual internet access. Today, in Senegal, phones, computers and other devices are widespread, however, access to the internet remains for the most part a serious problem in urban areas, especially in rural areas. A situation that calls into question or at least suspends for the moment this constitutional provision which imposes as a right, 'access to school for all children, girls and boys in all places of the national territory', in particular article 22, paragraph 2. The same fate was reserved for the right to health during the period of the health crisis.

7.3 The right to health

What about the right to health, which, like the right to education, is a constitutional privilege guaranteed to citizens under article 8? It should be noted that the coronavirus disease has stolen the show from all the others who are constantly evolving in Senegal and has caused countless collateral damage. The communication and speeches of the Senegalese national

38 For the preschool sector: 246 677 learners, including 128 947 girls and 117 730 boys; For the primary sector: 2 142 227 learners including 1 125 200 girls and 1 017 027 boys were affected; for the secondary sector: 1 086 743 learners including 563 720 girls and 523 023 boys were affected; for the tertiary sector: 184 879 learners including 74 878 girls and 110 001 boys were affected. See for more details, UNESCO 'Impact of COVID-19 on education' (25 May 2020).

39 The internet penetration rate in Senegal is 81.08 per cent according to the dashboard that was drawn up by the Internet Observatory of the Regulatory Authority of Posts and Telecommunications of Senegal, on 30 June 2020. See <https://www.artp.sn> (accessed 15 August 2020). In the same perspective, in 2018, the Director General of this Agency said on the occasion of the official opening of the 5th African Internet Summit that the number of internet users in the country has reached 9.6 million people, or 88.6 per cent via mobile. See S Vidzraku 'Senegal: The number of Internet users reached 9.6 million people' *La Tribune Afrique* 8 May 2018 <https://afrique.latribune.fr/africa-tech/2018-05-08/senegal-le-nombre-d-utilisateurs-d-internet-a-atteint-9-6-millions-de-personnes-777869.html> (accessed 22 September 2023).

authorities on the degree of contagiousness and the speed of spread of COVID-19 have resulted in desertion from the hospital environment by citizens, most of whom live with diseases not yet treated. The fear of catching the virus while going for treatment, then being stigmatised because of this disease that in the common mentality remains shameful has gained ground among the population and has encouraged many sick people to hide at home with traditional medicine as an alternative solution.

This has increased the development of many other diseases such as malaria, tuberculosis, and sickle-cell disease, which are more deadly than the coronavirus. Today, it is difficult to obtain figures from national health authorities who seem more concerned about the pandemic, precisely on the number of deaths linked directly or indirectly to these aforementioned diseases. But most of the people who have succumbed to the coronavirus were only indirectly affected, this virus has come to finish the work that other diseases had already begun in their bodies. This same fear, accentuated by the mobilisation of almost all health workers around COVID-19, which has taken away Senegalese citizens' constitutional right to health, has also had many repercussions on women's health, including contraception. In the opinion of Dr A Diop, an upsurge in abortions was noted during the COVID-19 pandemic, due to poor access of patients to health facilities and consequently to their contraception.⁴⁰

As a result, many pregnancies were drawn out, and many cases of natural abortions followed due to the lack of follow-up of women and others who remained clandestine because they were born of unwanted pregnancies. Even if the Senegalese law, in particular 2005-18 of 5 August 2005, relating⁴¹ to reproductive health punishes in its article 5, abortion for reasons other than therapeutic and especially when it is practiced clandestinely, the impossibility or difficulty encountered by many Senegalese women to enjoy their constitutional right to health could be served as mitigating circumstances. Education and health were not the

40 See the words of Dr Abdoulaye Diop, boss of the Neste Clinic, in the program 'Priorité Santé' on Radio France Internationale (RFI) on Friday, 25 September 2020, on the occasion of the eve of the celebration of International Contraception Day on 26 September 2020. RFI 'Women's issues: contraception' 24 September 2020 <https://www.rfi.fr/fr/podcasts/20200925-questions-femmes-la-contraception> (accessed 22 September 2023).

41 A law imbued with Senegalese religious and cultural ideologies and very controversial in the eyes of human rights defenders that qualifies it among the most restrictive in the world. See for more details on this debate, the Joint Mission Report of FIDH, RADDHO & LSDG 'I don't want this child, I want to go to school: The prohibition of voluntary termination of pregnancy in Senegal' http://www.tv5monde.com/cms/userdata/c_bloc_file/10/10381/10381_fichier_rapport-fidh-senegal-ivg-2014.pdf (accessed 22 September 2020).

only rights to suffer from the introduction of the emergency regime, other categories of rights based on the concept of social justice were seriously undermined.

8 Rights based on the concept of social justice impaired

The closure of mainly private preschool, elementary, secondary and higher schools, the closure of hotels, bars, restaurants and nightclubs, tourist and commercial venues, the suspension of hearings, and the prohibition of transport from one region to another, have been disastrous on the fundamental rights of the right to work and the right to effective justice.

8.1 The right to work

At the Senegalese national level, the consequences of the COVID-19 crisis have been unprecedented on the economic and social fabric with companies in constant and growing difficulties, leading fathers and mothers to lose their jobs. The Senegalese economy in general has been drastically affected, which has contributed to an increase in the unemployment rate in the space of just two months between the declaration of the pandemic at the Senegalese national level on 2 March 2020 and the effectiveness of the measures to introduce the exceptional regime between March and April 2020. According to official statistics from the ANSD, 60.9 per cent of enterprises experienced a decline in production, of which 83.7 per cent were medium-sized enterprises, 59.7 per cent were small enterprises and 37.6 per cent large enterprises. The lack of liquidity and financing of enterprises, the decline in production and sales directly linked to the difficulties encountered by economic units has led to a reduction in the staff of these enterprises to the tune of 28.5 per cent of the staff.⁴²

Of course, the repercussions of this situation were quick to manifest themselves within households. Still in the opinion of the National Agency of Statistics and Demography (ANDS), 36 per cent of heads of household have stopped working with the installation of the pandemic, including 30 per cent for reasons directly related to COVID-19. In the same perspective, 85 per cent of households have seen their incomes fall with a deterioration in minimum living conditions.

42 For more details on the alarming figures related to the consequences of COVID-19 at the Senegalese national level, see the executive summary of the Report of the survey on the post-COVID-19 investment intentions of formal companies, established in August by the National Agency of Statistics and Demography of Senegal: <http://www.ansd.sn> (accessed 5 September 2020).

The small family well-being that households were coping with before the arrival of COVID-19 has eroded with the inability of nearly six out of ten households to obtain basic necessities and nearly a quarter of households to access medical care,⁴³ further demonstrating the challenge to the right to health developed above. However, the efforts made by the Senegalese national authorities to take economic measures to mitigate the damage are to be commended.

The situation could have been worse if the President of the Republic had not ordered a ban on the dismissal of private sector employees and the payment of salaries below 70 per cent of the average net salary.⁴⁴ If we move the analysis of the impact of COVID-19 to another field, we will quickly realise that it has also put in pain another fundamental right that is that of effective justice.

8.2 The right to effective justice

Article 9 of the Senegalese Constitution of 22 January 2001 refers to the ‘right to defence at all levels of procedure’ and states in article 91 that: ‘The judiciary is the guardian of the rights and freedoms defined by the Constitution and the law’. But both principles have been severely tested by the pandemic, and Senegal has not been the only country to have to suspend the effective application of certain constitutional provisions protecting rights. In France, for example, and particularly on this aspect of effective justice for citizens, numerous violations of the right to effective justice guaranteed by constitutional norms have been noted.

This is the case with the extension of pre-trial detention,⁴⁵ the rejection of interim releases,⁴⁶ the violation of the presumption of innocence,⁴⁷

43 For more details on these figures, see the Report of the National Agency of Statistics and Demography from 3 June to 19 July 2020: ‘COVID-19, monitoring the impact on household well-being’ Bulletin 01 (September 2020) http://www.ansd.sn/ressources/publications/Rapport_mensuel_HFMSWE.pdf (accessed 10 September 2020).

44 See on this point, art 3 of Ordinance 001-2020, adjusting measures derogating from dismissal and technical unemployment during the period of the COVID-19 pandemic. OJ, Special 7300 of 9 April 2020.

45 Indeed, Ordinance 2020-303 of 25 March 2020, adapting the rules of criminal procedure, indiscriminately extends the duration of pre-trial detention for a period of 2 to 6 months. This is a serious violation of the right to effective justice. See M Hajdenberg ‘The obsession with punishment’ *OIP* 7 December 2017 (for more details on this point <https://oip.org/analyse/lobsession-de-la-punition/> (accessed 22 September 2023)).

46 See French Council of State, order of 3 April 2020, relating to the request of the France lawyers’ union, No 439894, unpublished in the LEBON collection.

47 The presumption of innocence is enshrined as a principle with constitutional value by the Constitutional Council (Constitutional Council, decisions 80-127 DC, 19 and

among others. In Senegal, on the initiative of the Minister of Justice, all hearings have been suspended since 16 March 2020, with the exception of emergency procedures and criminal matters. This decision was indeed to have consequences on the prison population with the extension of pre-trial detention.

This suspension of hearings, accompanied by the closure of detention facilities, including prison administration facilities, has seriously harmed detainees who find themselves unable to enjoy their visiting rights for health reasons, except when it is a question of being assisted by a lawyer.⁴⁸ But the COVID-19 pandemic has not only been detrimental to prisoners' rights, it has also given them the opportunity to regain freedom; for some, to enable them to resume normal working lives.

Indeed, the difficulty of fighting the disease in severe conditions of prison overcrowding has prompted the Senegalese national authorities to release prisoners *en masse*. On three occasions, the President of the Republic has granted pardons allowing 3 731 prisoners to leave the prison premises. In addition, the Minister of Justice issued instructions to prosecutors on the limited capacity of Senegalese remand prisons.⁴⁹ Rights and freedoms go hand in hand in the fundamental texts that guarantee their enjoyment, so it is obvious that freedoms are feeling the shock wave of the COVID-19 bomb on rights.

9 Suspension of certain fundamental freedoms

The introduction of the emergency regime by the Senegalese national authorities was sure to have an impact on the fundamental freedoms guaranteed, the enjoyment of which by the populations is a boon for the

20 January 1981, *Security-Liberty*) on the basis of art 9 of the Declaration of Human Rights (Constitutional Council, Decisions 89-258 DC, 8 July 1989, *Amnesty Law*).

48 Recall that the minimum standards for the protection of prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955 and endorsed by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 provide in paragraph 93, the following: 'An accused person shall be allowed to request the appointment of a public defender, where such assistance is provided, and to receive visits from his lawyer for the purpose of his defence. He must be able to prepare and deliver confidential instructions to the latter. For this purpose, he must be given, if he wishes, material for writing. Interviews between the accused and his lawyer may be within sight, but may not be within hearing distance of a police or institutional officer.'

49 See on this point, the circular of 19 March 2020 through which, the Minister of Justice, Grade des Seaux, draws 'particularly the attention of prosecutors to the limited capacities of our prisons which, for the most part, have already exceeded their possibility of reception', committing them 'to reconsider certain rules of our criminal policy by prosecuting certain offences without resorting to pre-trial detention'.

development of the virus. The elements of COVID-19 contamination are facilitated by the grouping and movement of people. COVID-19 is, therefore, very favourable to human-to-human exchanges and mass gatherings. It consequently justified the necessity to temporarily withdraw from citizens certain rights-freedoms, some of which can be described as physical and others psychological.

9.1 Physical freedoms linked to the movement of citizens

Apart from exceptional regimes such as the state of emergency and siege enshrined by the constituent in article 69 of the Constitution and the legislator in titles 1 and 2 of the 1969 law on the state of emergency and siege, there is no other regime in Senegal with less devastating effects on fundamental rights and freedoms as is the case in some States.⁵⁰ If indeed, other exceptional regimes such as the state of alert found in States such as Spain or the state of disaster in Chile⁵¹ moderate their relations with regard to fundamental rights and freedoms, with the only effect of suspending them, generally known regimes such as the state of emergency and siege are drastic regarding these same relations. In particular, the negative effects of the state of emergency have been strongly felt on certain fundamental freedoms, namely freedom of movement and freedom of association grouping.

9.1.1 Freedom of movement

The state of emergency with a curfew that was decreed resulted in the withdrawal of a constitutionally recognised fundamental freedom for Senegalese citizens,⁵² including the right to come and go. The gravity of the powers granted to the administrative authority under this regime gained notorious flagrance, and from the taking effect of the state of emergency on 23 March 2020 to its lifting on 30 June 2020, the Senegalese administrative authority has used almost all the possibilities offered by the 1969 law.

50 In this connection, mention may be made of the Constitution of Spain of 27 December 1978, which, in addition to the state of emergency and siege enshrined in arts 116.3 and 116.4, provides for a third regime less restrictive than the first two in art 116.2, in particular the state of alert.

51 See for more details on this exceptional regime in Chile, C Cerda-Guzmann 'History, continuity and current events of exceptional regimes in Chile' (2018) 112 *Cultures and Conflicts* 75-92.

52 Indeed, art 8 emphasises 'freedom of movement' in the enumeration of the various freedoms guaranteed to Senegalese citizens. Art 14 goes into detail by stipulating that: 'All citizens of the Republic have the right to move and settle freely throughout the national territory and abroad.'

By activating article 3 of the 1969 Act, the freedom of movement was confiscated from citizens with the prohibition of the movement of people and vehicles at certain times and in certain places. Parts of the territory that had been considered outbreaks were banned from citizens. Article 4 of the same law has also been implemented, since security arrangements have been made by the defence forces for the closure of land and sea borders, thus halting the movement of civilian aircraft and ships on the national territory.

The curfew that takes effect from 24h00 until 06h00 has placed all Senegalese citizens under house arrest. Internments have also been practiced here and there by the Senegalese national authorities, many affected people have been quarantined in premises specially equipped for their treatment with a formal prohibition for them to trade with the rest of the population by coming and going or receiving visits.

Apart from the power to search for and abduct persons and to order day and night searches granted to the administrative authority under article 7, paragraphs 1-2 and 10.1, which were not applied at the Senegalese national level during the emergency regime introduced, all the other provisions relating to the state of emergency enshrined in the 1969 Act have been incorporated.

The only reliefs that this freedom has experienced during this period of exception relate to situations of pure necessity. This is the case with freedom of movement for the acquisition of food, pharmaceutical and other essential products, freedom of movement to reach the place of work and freedom to return home, freedom of movement for medical emergencies for pregnant women and persons in health distress and freedom of movement for the burial of deceased persons. The confiscation of this freedom has also spared certain professional bodies and sectors of activity,⁵³ but it has not left intact another category of constitutionally guaranteed freedom, namely that of association and worship. What about freedom of assembly within the framework of associations?

9.1.2 Freedom of association

Among the freedoms that have been severely undermined at the Senegalese national level by the introduction of the exceptional regime

53 Article 2 of the Order of the Minister of the Interior 008207 of 24 March 2020, temporarily prohibiting the movement of the cites them. These are Presidents of Institutions of the Republic, Ministers and Secretaries of State, Deputies, Ambassadors, Governors, Prefects and Sub-Prefects, as well as their deputies, magistrates and clerks, personnel of the defence and security forces, health personnel and others.

related to the COVID-19 pandemic, it is important to put the cursor on the freedom of association. Senegal is a country with a strong activity of grouping people either for professional reasons or for political and social reasons. The constant and progressive dynamism of these groups of persons prompted the 2001 constituent to take them better into account by constitutionalising their status.⁵⁴ Article 12 of the Constitution recognises the freedom of Senegalese citizens to form economic, political, cultural and social associations. However, the Senegalese constituent through the same article hastens to specify in its last paragraph that groups whose purpose or activity is contrary to criminal laws or directed against public order are prohibited.

The COVID-19 pandemic has made it possible to meet all the conditions justifying the prohibition of the exercise of this freedom of assembly within the framework of associations. It is for this reason that the President of the Republic, on the occasion of an Emergency Presidential Council held on 14 March 2020, banned all demonstrations of a political nature over a period of 30 days.

In the same perspective, the festivities relating to the celebration of the anniversary of the independence of Senegal which are held throughout the territory every April 4 have been postponed and summarised in a simple ceremony of taking up arms within the Palace of the Republic. Thus, on the basis of the ground relating to the maintenance of public health order, the Senegalese administrative authority thwarted all attempts by opposition parties and civil society activists to regroup to demonstrate to denounce the manner, ways and means that were used by the Senegalese national authorities to manage the health crisis.

9.2 Psychological freedoms linked to citizens' opinions

The Senegalese constitution of 22 January 2001 is very generous in terms of rights and freedoms for the benefit of Senegalese citizens. In addition to economic and social rights and freedoms, article 8 refers to a category of civil and political rights and freedoms, which are guaranteed to every citizen. However, it certainly had for non-exceptional situations unlike those related to COVID-19 which caused the restriction of some of this category of freedoms, such as freedom of expression and worship.

54 Article 8 of the January 2001 Constitution, in its enumeration of the various freedoms granted to Senegalese citizens, emphasises: 'freedom of association and freedom of assembly'. Article 12 goes further by stating: 'All citizens have the right freely to form associations, economic, cultural and social groups, as well as societies'.

9.2.1 Freedom of expression

The COVID-19 pandemic has been very detrimental to the enjoyment of article 10⁵⁵ of the Constitution of 22 January 2001 by Senegalese citizens. Indeed, this provision must have been seriously put into perspective during the pandemic period.

It must be recognised that the efforts made by the Senegalese national authorities to contain the spread of the virus have come up against a certain public opinion in the direction of developing the conspiracy theory regarding the advent of COVID-19 in the world. A fringe of the Senegalese population has for a very long time denied the existence of the virus and its rapid spread within the territory.

These are mostly people whose activities prosper thanks to the movement and grouping of people either for cultural or religious reasons especially. The crisis caused by the disease in their chosen sector has pushed some of them to use their freedom of expression to raise awareness about this possible conspiracy theory, thus calling into question the official communication of the national authorities responsible for containing the spread of the virus. Faced with the progressive multiplication of cases and the mistrust that a good part of citizens, nourished by these conspiratorial ideals shows this freedom to express themselves on the disease in the press without any title of authorisation (doctor, administrative authority) has simply been withdrawn from Senegalese citizens.⁵⁶

A significant number of people have been arrested and accused of ‘fake news’ with a formal ban on expressing themselves on any aspect relating to COVID-19, its spread, and its actual existence. To date, the only people authorised to speak about the disease in the media are either people with proven skills in modern medicine or mandated by the authority primarily responsible for managing the COVID-19 pandemic.⁵⁷ Religion

55 This constitutional provision specifies: ‘Everyone has the right to freely express and disseminate their opinions by word, pen, image, peaceful march, provided that the exercise of these rights does not infringe upon honor. or to the consideration of others, nor to public order’.

56 United Purpose ‘Tackling COVID-19 “fake news” in Senegal’ (8 September 2020) <https://united-purpose.org/stories/2020/9/8/tackling-covid-19-fake-news-in-senegal> (accessed 22 September 2023).

57 See the press releases of the Ministry of Health and Social Action considered to be the only ones that are official and likely to engage the responsibility of their author, including the administrative authority. Ministry of Health and Social Action ‘Coronavirus: Press Release No 277 of Thursday 3 December 2020’ <http://www.sante.gouv.sn/Actualites/coronavirus-communiqu%C3%A9-de-presse-n%C2%B0277-du-jeudi-03-d%C3%A9cembre-2020-du-minist%C3%A8re-de-la-sant%C3%A9> (accessed 22 September 2023).

has also been severely undermined in the exercise of freedom of worship in exceptional circumstances.⁵⁸

9.2.2 *Freedom of religion*

The importance of religion and the various brotherhoods that emanate from it has also facilitated an explosion of associations of religious worship. Thus, with 95 per cent Muslims and five per cent Christians, all living in religious associations, it was a major challenge for the constituent to explicitly recognise their existence by conferring on them constitutional status.⁵⁹

It is above all these groupings in the form of religious associations that have been among the most sensitive subjects during the establishment of the emergency regime. The President of the Republic in his first message to the nation called on the various religious leaders to make their contribution in the fight against the pandemic. However, some of the latter very quickly expressed their firm intention not to renounce their freedom of religious worship and association, which would obviously come up against measures prohibiting gatherings and closing public places, including places of worship.

The application of articles 6.1 and 6.2 of the 1969 law on the state of emergency has been catastrophic in some parts of the country where religion is a matter of daily management of the city and for some people who see through this prohibition, hidden ambitions on the part of the state authorities to weaken their religious beliefs.⁶⁰

However, it should be known that the problem is more textual and contextual than fraternal and religious. It is clear that the Senegalese

58 'Senegal: Laws to tackle "false news" must meet international standards' *Article 19* 4 July 2022 <https://www.article19.org/resources/senegal-laws-for-disinformation/> (accessed 22 September 2023).

59 Article 24 of the Constitution of January 2001 states: 'Freedom of conscience, religious or religious freedoms and practices, and the profession of religious educator are guaranteed to all, subject to public order.' Religious institutions and communities have the right to develop without hindrance. They are released from the supervision of the State. They regulate and administer their affairs autonomously.

60 Clashes were noted in some localities of the country such as Touba, a religious city in which the ban on gathering people in places of worship has never been respected. Some scholars have accused the state of having renounced its responsibilities and asserted its authority throughout the country (see *Jeune Afrique*, religion section of 26 March 2020). Another community came to prominence when the authorities arrested one of their imams, an attitude interpreted by the Brotherhood as probation and discrimination between different religious communities.

national authorities in the management of this pandemic have allowed themselves to take the easy way out. Even in States where two chambers coexist as is the case in France, they have worked urgently to adopt a new text (Law 2020-290 of 23 March 2020, known as the COVID-19 law) that adapts to the new context by ignoring the application of pre-existing texts that are not necessarily adapted to the situation.

In Senegal with a single chamber that also has a majority favourable to the President of the Republic, it was possible to urgently convene this assembly to adopt a law that is more concerned with health aspects than security. Yet it was this same Assembly that met when it came to voting to the President of the Republic the law empowering him to govern by ordinances and this, as soon as possible.⁶¹ The Senegalese populations rebelling against these measures, although having shown no intention of collaborating with the national authorities for a common action against COVID-19, cannot be held solely responsible. Indeed, the old law of 1969 which has been reactivated does not provide for the closure of places of religious worship in its provisions. Not only does article 6.1 and 6.2, which relates to this subject, exonerate refractory populations, but above all, it indicts the Senegalese national authorities to the extent that they violate its provisions.

The 1969 law, perhaps for the sake of clarity and precision, speaks of the closure of public places and mentions these so-called places,⁶² but in no way in this list have the places of religious worship been mentioned. The haste of the Senegalese national authorities, the main cause of recourse to this old law of 1969, must therefore be accompanied by a certain amount of caution and conciseness.

In the absence of new express provisions on the pandemic context, the President of the Republic was not only to invest the security forces in the execution of articles 3 to 14 of the former above-mentioned law, he also had to add a provision that would aim to specify that the closure of places of worship is now included in the scope of article 6.1 of the 1969 State of Emergency Act. Thus, all popular demonstrations would be justly

61 Indeed, in the space of only ten days, the National Assembly was able to examine and vote even if it was in conditions that did not convince the entire political class (only 33 deputies out of 165 were present for reasons of social distancing), the enabling bill that the President of the Republic had submitted to them. On 2 April 2020, Law 2020-13 of 2 April 2020 was adopted unanimously by the 33 deputies present.

62 Indeed, article 6.1 of Law 19-69 of 29 April 1969 on the state of emergency and the state of siege provides that: 'The competent administrative authority may: order the temporary closure of public places, such as theatres, drinking establishments and meeting places'.

punished, but until then, the populations have been within their legitimate right to claim the enjoyment of their freedom of association and worship.

10 Conclusion

The question of the immunity of fundamental rights and freedoms guaranteed to Senegalese citizens by the Constituent Assembly has never arisen until the President of the Republic declared a state of emergency throughout the national territory. The normal system of law that was in force at the national level never required these rights and freedoms to be called into question on the scale we know today.⁶³

The waiver of this immunity is therefore intimately linked to the exceptional legal regime that was established with the advent of the COVID-19 pandemic. If this were not so, the State, in its ambition to guarantee citizens the enjoyment of these individual rights and freedoms, would fail in its mission to preserve national health public order, thus sacrificing the collective for the benefit of the individual, which is contrary to its primary mission, which is the general interest.

It is important to stress that the fight for the recognition of more rights and freedoms and the confirmation of those already granted is very noble and should be encouraged. However, it must in no way take precedence over the reason of state which, in the face of certain circumstances such as those caused by COVID-19, must allow the latter to regain all sovereignty for a proper accomplishment of its mission of reorganisation of society.

International human rights law itself, which contributes considerably to the promotion and safeguarding of these fundamental rights and freedoms, admits scenarios in which the necessary intervention by State authorities cannot be carried out without these rights and freedoms being abused.⁶⁴ The derogating regime of fundamental rights and freedoms

63 Indeed, it is important to stress that these guaranteed fundamental rights and freedoms have never been without limits at the national level. Moreover, the settlor, each time it enshrines rights and freedoms, then ensures their guarantee, hastens to specify that their exercise is strictly framed by the laws and regulations in force. This is rightly what explains, for example, the clashes that we note here and there between the territorial command, especially the prefect and activist groups when the latter forbids them to demonstrate.

64 See art 4 of the International Covenant on Civil and Political Rights; art 27 of the American Convention on Human Rights; art 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art 4 of the Arab Charter on Human Rights. Even if on this point, the African Charter on Human and Peoples' Rights is less clear than the other texts, it still adjusts some provisions in this direction, this is the case of arts 10, 11 and 12.

currently in force in almost all States of the world is, therefore, neither contrary to domestic nor international law, COVID-19 is the basis of it.

11 Recommendations

The reaction of the Senegalese national authorities to provide an immediate response to contain the COVID-19 pandemic is very legitimate, especially since it is in them that the derived sovereign power resides. This reaction, even if it has not been a panacea for the problem, has nevertheless had the merit of putting in place response strategies against the threat. The suffering of democratic gains intimately linked to the evolution of the rule of law, notably rights and freedoms, is justified in the exceptional context that prevails. However, it is important for national authorities to be aware that solutions must vary according to the nature of the problems. We should not necessarily try to adapt a solution to a problem that does not correspond to it and in this current pandemic, this has been the case.

The health emergency that had to be taken into account through tools that comply with it was taken into account through effective means compared to other types of emergencies such as those related to security, following political tensions. This is the difficulty that the measures taken by the authority have encountered at the Senegalese national level. The reactivation of a system that applies to a security and non-health context explains the many demands and rebellions recorded during the implementation of these measures. In the eyes of the police and defence, it is a question of implementing the system put in place in terms of security and not prevention and care through the awareness of the population on the role of each citizen in this fight against the disease.

The security aspect highlighted has largely contributed to the multiplication of scenes of violence, blunders, abuses and excesses of police power, torture of citizens, home invasions and arbitrary arrests. In the future, it would be more appropriate in such health situations to focus on the aspect of empowering citizens and strengthening the skills of law enforcement and security forces, in order to establish a fruitful dialogue that would bring public authorities closer to citizens and strengthen the confidence that the latter must have in their institutions.

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