

STUDY OF FREEDOM OF EXPRESSION ON THE INTERNET IN SENEGAL



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LIST OF ACRONYMS AND ABBREVIATIONS

APPEL : Online Professionals Press and Publishers Association of Senegal

ARTP : Telecommunications and Post Regulatory Authority

AJ PENAL : Current criminal law

Arch. Phil. Dr : Law Philosophy Archives

C.A. : Court of Appeal

Cass. Civ. : Cassation Civile

ECOWAS: Economic Community of West African States

Ch. Corr. : Criminal Chamber

Cass : Cassation

CDP : The Personal Data Commission

CEDH : European Court of Human Rights

CNRA National Audiovisual Regulatory Council

CORED: Advice on Compliance with the Rules of Moral and Ethics

CP : LEG law of expert services

CPP : Code of criminal procedure

Crim : Crime

D. : Dalloz Collection

IMF : International Monetary Fund

Ibid: Ibidem

JORS : Official Journal of Senegal

LOSI orientation law on information society

NTIC : New Information and Communication Technologies

UN : United Nations

Op.cit. : *Opere citato* (quoted above)

Pén : criminal

PME : small and medium-sized business



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Rev : review,
RTS : Senegalese broadcasting corporation
SYNPICS : Union of Information and Communication professionals
TIC : Information and communication technologies



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SUMMARY

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I. INTRODUCTION

I/ Historical review of terms of reference of the study

The current millennium is dominated by the emergence of (New) Information and Communication¹ Technologies whose omnipresence and tendency towards digitisation are growing². The emergence of new information and communication technologies³ on the one hand, and the advent of Web 2.0⁴ on the other, mean that *"the law is necessarily influenced by data, which is external to it, but which it is called to regulate. Facts always change the law"*⁵. Computer science, *"the science of automatic and rational processing of information as a medium of knowledge and communication"*⁶, communication technologies have given rise to the Internet⁷, the *"global web"*⁸.

¹ We often refer to "new technologies" of information and communication (N.T.I.C.); however, it seems that the term "new" should be dropped. Because of the role that computers has been played for several years and still do in our daily lives. So, it seems inappropriate to use the adjective "new", even if it is true that we are still using this adjective to designate the American continent (New World) while its discovery goes back for several centuries. V. S. EL ZEIN, op. cit. , p. 153; A. TOFFLER: *La Troisième Vague* (London, Casserole), [1981] pp.13 et s, quoted by M. CHAWKI, in "Essay on cybercrime notion", IEHEI, July 2006, p. 3.

² M. K. T. GAUTHIER, *Notion of cybercrime: praxis of a penalisation of electronic delinquency in Congolese criminal law*», University of Lubumbashi. Available on www.leganet.cd accessed on November 27, 2018 at 11:44 a.m.

³ Article 3 of the Senegalese Law No. 2011-01 of 24 February 2011 on the Telecommunications Code indicates that information and communication technologies "technologies used to collect, store, use and send information and include those that involve the use of computers or any communications system including telecommunications".

⁴ Expression used for the first time in 2005 by Mr. Tim O'REILLY to designate a mutation of the so-called social participative web in which the Internet user becomes information provider. Quoted by R. BOOS, in "The fight against cybercrime with regard to the action of States", *infra* 209.

⁵ Ph. Le TOURNEAU, "Contrats informatique et électroniques", 2nd ed. , recast, Dalloz, Coll. Dalloz Reference, 2002, no. 0.15, quoted by D. SOW, in "Retour sur l'adaptation du droit au numérique", *Revue CAMES/SJP*, no. 001/2016, p. 77-100.

⁶ *Le petit Larousse illustré*, Larousse HER 2000, p. 546

⁷ The word "Internet" is composed of the prefix "Inter" which indicates a link between two elements and the word "Net" which is translated from English by "réseaux". The Internet is then a link between two or more computer networks, "a network of networks". In fact, it is the largest computer network in the world. It encompasses a multitude of regional, governmental, and commercial networks. All these networks discuss each other through the same communication protocol, TCP/IP (transmission Control Protocol Over Internet Protocol). The connection is made through the use of lines, cables, and satellites as a telephone line joint. Unlike traditional telephone calls,



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Being essential to life, the use of ICT in many areas of daily life has led to the introduction of the modern concept of the "*information society*", a model of society that offers immense possibilities. Thus, putting information in free access means taking it out from the hands of central power, and thus strengthening democracy.

The Internet has transformed the world into a global village. It improves business productivity, modernize working methods and enables the emergence of new business models for communicating, negotiating, exchanging and marketing in due time. In that sense, its contribution is crucial for our societies. Nowadays it has become so necessary over time that few organizations and individuals cannot manage without it⁹.

The expansion of the Internet has led to an exponential growth in opportunities for expression. This is why the Internet is the most powerful means of individual expression ever invented by man.

Michel Elie notes that this freedom of speech has become one of the battle horses of the Internet pioneers: on the network everything must be said, it is «forbidden to prohibit»; it is up to everyone to raise critical mind, to filter and cross-reference information¹⁰.

which transmit information through the switching circuit. The Internet transmits information through the “dial-up packet”; in this mode, the communications are changed to small signals. After they are sent to the recipient packets arriving at their destination via the different routes, the communication is then rebuilt at the end of the receiver. On these points V. K. HAFNER: *Where Wizards Stay Up Late: The Origins of the INTERNET* (N.Y., TOUCHSTONE), [1996] p. 12; J. NAUGHTON: *A Brief History of the Future: From Radio Days to Internet Years in a Lifetime* (N. Y. , Woodstock) [1999] p. 140; A. BRIGGS: *A Social History of the Media: From Gutenberg to the Internet* (Cambridge, Polity Press), [2002] pp. 311 et seq. In fact, it is the largest computer network in the world. It encompasses a multitude of regional, governmental, and commercial networks. All these networks discuss each other through the same communication protocol, TCP/IP (transmission Control Protocol Over Internet Protocol). Globally, the Internet had more than 100,000 million users and was accessible by more than 100 states. V. A. F-N VOLUNTEER; *An Introduction to the Internet*. Available from: <http://www.austinfree.net/> (2/3/2001), on this whole issue, V. M. CHAWKI, in “Essay on the notion of cybercrime”, IEHEI, July 2006, *ibid*

⁸ D. SOW, “Retour sur l’adaptation du droit au numérique”, *CAMES/SJP Journal*, no. 001/2016, p. 77-100.

⁹ A. El AZZOUZI, “Cybercrime in Morocco”, 2010, p. 14

¹⁰ M. ELIE, Internet, back on the origins and the “philosophy” of the web, available on <https://www.lemonde.fr>, consulted on 17/07/2019 at 11: 50 pm.



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‘There is no doubt that the Internet is a space of freedom, but *is it a space of total freedom?* if so, such a situation would present obvious and serious risks of any kind of deviations.

The problem is that the Internet maintains a libertarian mythology: the Internet would be a zone of no right, where one could vent oneself and on which everything is allowed. On the Internet, there is no defamation, no counterfeiting!!

But the reality is different: the Internet is not a space of total freedom. Some behaviours can be a source of criminal and civil liability¹¹.

A- Definition of “freedom of expression”.

‘Man can claim his divine offspring only to the extent that he can say what he thinks, do what he wants, or move at his will. His/her optimal development in society is subordinated to a range of privileges and facilities grouped under the term "freedom", this obviously subject to the provisions and legal requirements relating to order, public safety and tranquility’¹².

On this, according to Article 4 of the human Rights and Citizen Declaration of 26 August 1789, *“Freedom is about being able to do everything that does not harm others; thus, the exercise of the natural rights of every human has no bounds except those that assure the other members of society the enjoyment of these same rights”*. Article 11 of that Declaration states that *“The free thoughts communication and opinions is one of the most precious rights of man; every citizen can therefore speak, write, print freely, except to answer for the abuse of this freedom in cases determined by the law”*.

Freedom of expression is a basic principle of any democratic society; this was enshrined in the Universal Declaration of Human Rights of December 10, 1948 : *‘anybody has the right to*

¹¹ On the whole question, see: Mrs V. JAWORSKI. Ms S. CORIOLAND, PENAL LAW OF THE INTERNET - SUBSTANTIVE AND PROCEDURAL ASPECTS

¹² <https://princekmer.skyrock.com/3138839190-LES-ATTEINTES-A-LA-LIBERTE-DES-PERSONNES.htm>.



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freedom of opinion and expression, which implies the right not to be worried about his opinions and the right to seek, receive and spread, without limits, information and ideas through any means of expression”.

Freedom of expression is also guaranteed by the Declaration of Principles on Freedom of Expression in Africa¹³ : *“Freedom of expression and information, including the right to seek, receive and communicate information and ideas of any kind, orally, in writing or in print, in artistic form or in any other communication form.”, even across borders, is a fundamental and inalienable right and an indispensable element of democracy. Every individual must have an equal opportunity to exercise the right to freedom of expression and access to information, without any discrimination”.*

It is in the same sense as the Senegalese Constitution¹⁴ , in its article 10 states that: *“everyone has the right to express and disseminate his or her opinions freely through speech, pen, image, peaceful march, provided that the exercise of these rights does not interfere with the honour nor consideration of others nor public order”.*

It is therefore a freedom to reveal one’s thoughts to others; it is also a freedom of opinion and a freedom to receive or communicate information or ideas without state interference and without regard for borders.

a. The vectors of electronic communication

Freedom of expression on the Internet may be achieved by means of electronic communication which are the subject of publication or which are not the subject of publication. Relating to the means of electronic communication concerning publication, there are: The World Wide Web, open discussion forums, blogs, social media, online news, etc.

¹³ The African Commission on Human and Peoples' Rights adopted, at the 32nd Ordinary Session, held in Banjul, The Gambia, from 17 to 23 October 2002, a Declaration of Principle on Freedom of Expression in Africa, see: The Freedom of Expression Guarantee, available at: <https://www.article19.org/data/files/pdfs/igo-documents/declaration-of-principles-ua-french.pdf>.

¹⁴ JORS, n° 5963 of 22 January 2001.



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The World Wide Web: an Internet network, "*a major vector of public expression*"¹⁵, is by nature oriented towards the communication of content. The World Wide Web is undoubtedly the Internet service which is closest to the act of publication¹⁶. This allows us to say that freedom of expression is an individual freedom¹⁷, fundamental to the extent that it enjoys conventional¹⁸ and constitutional protection¹⁹.

Open discussion forums. Also referred to as the "Newsgroup", the forum is a virtual forum for discussion around a theme of common interest; each forum member can thus send accessible messages to other participants, the latter can well reply and argue²⁰. In other words, they are online discussion groups organized around specific topics involving connected users who share the same centre of interest. The information of the forum is grouped in a single server that the user must contact²¹.

¹⁵ Ch. BIGOT, Connaitre la loi de 1881 sur la presse, Guide Légipresse, 2004, p. 156, P. A. TOURE, in Le traitement de la cybercriminalité devant le juge : l'exemple du Sénégal, p. 324.

¹⁶ Ch. FERAL-SCHUHL, Cyberlaw, le droit à l'épreuve de l'Internet, 5th edition, Dalloz, 2008, p. 852; J. FERRY, Cybercrime. World Challenge, 2nd edition, 2009, p. 35: On the other hand, the Web allows a host's server to make freely available to an indifferent public information that it is free to pick up and consult even if access to the site is subject to a subscription. By analogy, these publications could be considered to be offered for reading by passers-by in front of the kiosks, each being free to stop to consult them," P. A. TOURE, Ibid.

¹⁷ Individual freedom can be exercised by everyone separately from other citizens. Collective freedom is a right that can be exercised in the context of collective life in society.

¹⁸ If we refer to the European Convention on Human Rights, the European concept of freedom is, as expressed in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which states that "everyone has the right to freedom of expression". This right includes freedom of thought, conscience and religion, freedom to receive or communicate information or ideas, and "the right to respect for private and family life, home and correspondence", see, Ch. FERAL-SCHUHL, Cyberlaw, Law to the Test of the Internet, 6th edition Dalloz, 2011-2012, p.946.

¹⁹ See the preamble to the 2001 Senegalese Constitution: "respect for fundamental freedoms and the rights of the citizen as the basis of Senegalese society".

²⁰ Ch. FERAL-SCHUHL, Cyberdroit, le droit à l'épreuve de l'internet, 6e édition Dalloz, 2011-2012, p.947.

²¹ P.A. TOURE, Le traitement de la cybercriminalité devant le juge : l'exemple du Sénégal, p. 327 ; According to an authorized doctrine, forums open to all Internet users, even if they are virtual, meet the conditions of the «public meeting» within the meaning of Article 23 of the Law of 1881, B. ADER, "Evolution of the notion of publication: from the written press to the Internet", Légipresse, no. 165, October 1999, p. 125; This text defines the public meeting as "the gathering of several persons in one place", R. MERLE and A. VITU, Criminal Law Treaty. Special Criminal Law, CUJAS Edition, 1982, p. 1227, n° 1558, on the whole question, see P.A. TOURE, Le traitement de la cybercriminalité devant le juge : l'exemple du Sénégal ibidem.



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The blogs. According to an author²², the blog constitutes the ‘*diary of the XXI century*’ made on the Internet by a personality or by anyone. The content can be varied according to the centers of interest of its author²³. It is in this context that Pape Assane TOURE argues that the blog “*responds to a growing need for freedom of expression and information exchange not controlled by traditional media*”²⁴.

Therefore, the above-mentioned means of electronic communication constitute online public communication services under the terms of Article 2, No. 5 of the Electronic Transactions Act 2008²⁵: ‘*any transmission of digital data which do not have a character of private correspondence, by an electronic communication process using the Internet network which allows the reciprocal exchange of information between the transmitter and the receiver*”.

Regarding the means of electronic communication which are not published, we can list the electronic mail. It is a service that allows messages to be sent to a specified person through a single email address²⁶. The definition of this service is given by No. 2 of Article 2 of the Law 2008-12 of 25 January 2008 on electronic transactions²⁷ as “*any message, in the form of text, voice, sound or image, sent via a public communications network, stored on any server or in the recipient’s terminal equipment, until the recipient becomes aware of it*”.

²² G. KESSLER, « Legal aspects of the blog », D. 2006, p. 446, quoted by P. A. TOURE, in *Le traitement de la cybercriminalité devant le juge : l’exemple du Sénégal* op.it, p.328.

²³ The creation of a blog is very simple, since in most cases it is enough to use the free or paid services of a blog host, such as «Skyblog» or an access provider who also provides the hosting function, Mr. QUEMENER and J. FERRY, *Cybercrime. Global challenge*, 2nd edition, 2009, p. 43, quoted by P. A TOURE, in *Le traitement de la cybercriminalité devant le juge : l’exemple du Sénégal*, op. cit. , p. 328.

²⁴ P. A. TOURE, *ibid*

²⁵ Law no. 2008-08 of 25 January 2008, on electronic transactions (JORS, no. 6404 of 26 April 2008, p. 395).

²⁶ Supported by P. A. TOURE, op. cit. , p. 330; For the same author again, certain means of electronic communication are excluded from the scope of the offences provided for in Article 248 and following of the Senegalese Penal Code and fall within, as a result, private correspondence.

²⁷ See footnote 23



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Consequently, electronic mail is not accessible to the public by electronic means, as confirmed by the Paris Court of Appeal in a judgment of 16 January 2003²⁸.

There is no doubt that e-mail is private correspondence²⁹ and such is protected by the secrecy of correspondence³⁰.

1. Overall objective of the study

The study on freedom of expression on the Internet in Senegal is carried out by the Senegal-based organization JONCTION³¹ (<http://jonction.e-monsite.com/>) in collaboration with the

²⁸ CA Paris, 11th floor. B, 16 Jan. 2003, CEC 2003, n° 99; However, it was held that the private correspondence regime was not intended to apply to an e-mail addressed to dozens of persons not related to each other by a community of interest (Civ. 2nd, 24 Jan. 2002, No. 00- 16. 985, Bull. civ. II; No. 2. See Ch. FERL-SCHUHL, *Cyberlaw, le droit à l'épreuve de l'internet*, 6th edition Dalloz, 2011-2012, p.939; In the same sense, in Senegalese jurisprudence, in the «Palluci» case: e-mail can be a means of public communication. In a judgment delivered on 16 March 2010, the Regional Court of Dakar proposed an interpretation of the notion of advertising in the context of the distribution of images contrary to good manners by means of e-mail. A Cape Verde national, who lived in cohabitation with a French painter, was photographed and filmed by the latter in obscene positions. When she broke off her relations with the French painter, the latter, revolted by the attitude of the girl, who maintained a new relationship with a general director of a Senegalese public society, Emailed the disputed photos to a dozen people from an email address he opened for the occasion. In accordance with Article 431-59 of the Penal Code, the French national, who has acknowledged the facts, was convicted and sentenced to six months in prison; (TRHC Dakar, no. 1159 of 16 March 2010, Palluci case, unpublished), quoted by P. A. TOURE, in *Cinq ans de droit pénal des technologies de l'information et de la communication (2008-2013) : chronique de jurisprudence sénégalaise*”, p. 148, available at <http://coursupreme.sn>.

²⁹ V. in particular, F. BITAN, “E-mail”, J.- Cl. Communication, 2006, fasc. 4740, no. 62 et seq; P. AUVRET, “Application de la loi de 1881 à la communication en ligne”, J.- Cl. Communication, 2006, fasc. 4860, no. 21; P. AUVERT, “The Application of Press Law to the Internet”, JCP 1999, I.108. p. 258; N. MALLET-POUJOL, “The notion of publication on the Internet and its impact on the prescription of offences online”, in “The law of the press: a legitimate or outdated specialty

V. in particular, F. BITAN, “E-mail”, J.- Cl. Communication, 2006, fasc. 4740, no. 62 et seq; P. AUVRET, “Application de la loi de 1881 à la communication en ligne”, J.- Cl. Communication, 2006, fasc. 4860, no. 21; P. AUVERT, “The Application of Press Law to the Internet”, JCP 1999, I.108. p. 258; N. MALLET-POUJOL, “La notion de publication sur Internet et son incidence concernant la prescription des délits en ligne”, in “Le droit de la presse: une spécialité légitime ou dépassé?”, Actes du Forum Légipresse du 29 septembre 2005, Légicom, 2006, I, no. 35, p. 60; B. ADER, “Evolution de la notion de publication: de la presse écrite à Internet”, *Légipresse*, no. 165, October 1999, p. 124. Quoted by P. A. TOURE, in “Five Years of Information Technology Criminal Law ‘Five Years of Information and Communication Technology Criminal Law (2008-2013): A Chronicle of Senegalese Case Law”, Supreme Court, Information Bulletin 7-8, p. 147, available at <http://coursupreme.sn>.

³⁰ See Article 13 of the Senegalese Constitution of 2001; On the protection of electronic mail by the secrecy of correspondence, Trib. Corr. Paris, 2 November 2000, Comm. com. electr. , January 2001, 2. p. 14, quoted by P. A. TOURE, op. cit. , p. 331.



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Uganda-based organization CIPESA (<https://cipesa.org/>). (Collaboration on International ICT Policy for East and Southern Africa). The main objective of this study is capacity building for stakeholders (government, private sector and civil society) on the issues and stakes of freedom of expression on the Internet and of confidentiality on the Internet in order to build an information society respectful of human rights.

This study will be used as a tool for awareness and advocacy campaigns to promote respect for freedom of expression on the Internet.

These reference situations will make it possible to strengthen freedom of communication, Internet opinion in Senegal by facilitating civil society participation in key national e-decision processes.

2. Working Methodology

In the context of the study on freedom of expression on the Internet in Senegal, we started from a vast research work of collecting publications, national legislative text, community and international libraries and documentation centres. We also went to see practitioners, experts from civil society on ICT and freedom of expression, in order to talk to them to have a clearer vision of the breaches, limits and frames of freedom of expression on the Internet.

This scientific work is the result of research on: "The aim is to advocate for the respect of individual freedoms, in particular the freedom to express oneself freely in the digital space.

The strong ideas to consider in this study are :

1- Overview of the legal and institutional framework for freedom of expression on the Internet in Senegal ;

³¹ An international organization whose mission is the defence and protection of digital rights, including the protection of privacy, privacy of correspondence, cybercrime, cybersecurity, etc.: <http://jonction.e-monsite.com/>.



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- 2- Violations of freedom of expression in Senegal ;
- 3- Limits to freedom of expression on the Internet ;
- 4- Recommandations.

II/ Overview of the legal and institutional framework for freedom of expression on the Internet in Senegal

II/ a. The legal framework for freedom of expression on the Internet

If the legislator is required to ensure the protection of individual freedom, because it is his duty to meet the conditions that allow each human being to perfect his own personality³². According to epochs, religions or philosophies, it is said that the State must ensure that each individual can lead his life according to his own nature³³, follow his star, improve his karma, realize his vocation, respond to his mission, to fulfill his destiny³⁴.

For this, the State of Senegal, as part of its sovereign mission, has adapted its legal system to the modern evolution of communication and information technologies by providing legislative responses to freedom of expression on the Internet.

It is in this sense that in the preamble and corpus of the 2001 Senegalese Constitution³⁵, contains conventions³⁶ and provisions which guarantee freedom of expression. This freedom, defined and

³²Von. Jhering, "The spirit of Roman law" T.II § 33: The most primordial right of the individual is that of the free deployment of his individuality, available on <https://ledroitcriminel.fr>.

³³ Daval, «General Philosophy» (ed.1952) p.317: The experience of freedom reveals it to us as an autonomy, as a positive power to act. The free act derives its richness from its creative originality. Whether it is a real power of invention or the expression of a moral vocation. In this sense freedom is the very mark of the spirit, available at: <https://ledroitcriminel.fr>.

³⁴ Lecomte du Noüy, " L'homme et sa destinée ", 284, 140: No one should take pride in having chosen the best route, nor force his neighbour to follow it. Everyone takes the path that suits him best, path imposed by the structure of his brain, heredity, traditions. We can offer him his support, his lights, his help. But what succeeds with one can fail with the other, and every man must fight his own struggle, or else he will not advance. There is no shortcut to the truth... No one has the right to substitute their own conscience for that of others, for progress depends on personal effort and to suppress this effort is a crime. Freedom is not just a privilege, it is a test, available on <https://ledroitcriminel.fr>.

³⁵ JORS, n° 5963 of 22 January 2001.



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guaranteed by law in a democratic context like Senegal, is built over time, as the various founding texts show us:

- Declaration of human and Citizen Rights (1789);
- Universal Declaration of Human Rights of 10 December 1948³⁷;
- International Covenant on Civil and Political Rights of 16 December 1966³⁸;
- The African Charter on Human and Peoples' Rights of 27 June 1981³⁹.

Specifically, Articles 8,⁴⁰ 10⁴¹ and 11⁴² of the Constitution give very strong expression to freedom of the press and freedom of expression.

The constitutional provisions on freedom of expression, access to information and freedom of the media have given rise to a number of laws and regulations. These include: Law No 96-04 of 22 February 1996 on the Organs of Social Communication and the Professions of Journalist and Technician.

³⁶ According to Article 13 of the Senegalese Constitution of 2001: The secrecy of correspondence, postal, telegraph, telephone and electronic communications is inviolable. This inviolability can only be restricted by law”.

³⁷ According to Article 19 UDHR: “Every individual has the right to freedom of opinion and expression, which implies the right not to be concerned for his opinions and the right to seek, receive and spread, without regard to frontiers, information and ideas through any means of expression”.

³⁸ Freedom of expression includes the freedom to seek, receive and disseminate information and ideas of any kind, without regard for frontiers, in an oral form, written, printed or artistic and by any other means of its choice. That is what Article 19 of the Covenant provides. It is important to note that the International Covenant on Civil and Political Rights was signed by the State of Senegal on July 6, 1970 and ratified on February 13, 1978.

³⁹ Article 9 of the African Charter on Human and Peoples' Rights, which provides that “every person has the right to express and disseminate his or her opinions within the framework of laws and regulations”.

⁴⁰ The Republic of Senegal guarantees all citizens fundamental individual freedoms, economic and social rights as well as collective rights. These freedoms and rights include: Civil and political freedoms: freedom of opinion, freedom of expression, freedom of the press, freedom of association, freedom of assembly, freedom of movement, freedom of demonstration, cultural freedoms, religious freedoms, philosophical freedoms, trade union freedoms, freedom of enterprise, the right to education, the right to read and write, the right to property, the right to work, the right to health, the right to a healthy environment, the right to plural information. Freedoms are exercised under the conditions set out in the law”.

⁴¹ Everyone has the right to express and disseminate his opinions freely through speech, pen, image, peaceful march, provided that the exercise of these rights does not affect the honour and esteem of others or public order

⁴² “The creation of a press organization for political, economic, cultural, sporting, social, recreational or scientific information is free and is not subject to any prior authorization”.



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The Ministerial Order on Terms of Reference for Undertakings Entitled to Broadcast Radio Programming in Senegal. Statutes of the Senegalese Broadcasting Corporation (RTS) (Law 12-02 of 6 January 1992) and Law 92-57 of 3 September 1992 on pluralism in broadcasting. From Law 33/2005 of 21 December 2005 establishing the National Audiovisual Regulatory Council (CNRA) and replacing Law 98-09 of 2 March 1998 creating the High Audiovisual Council (regulatory body for audiovisual media)⁴³.

In addition, computer science contains, at the same time considerable advantages and formidable dangers. These include serious threats to individuals' freedoms and privacy. These threats are further aggravated by the development of telematics, which easily permits the movement of data across state borders and can thus lead to the internationalisation of personal data breaches⁴⁴.

It is in response to these dangers that the Senegalese legislator, moving towards computer law, has set the most significant course in this discipline by adopting the law on the Information Society Guidance Law⁴⁵, the Cybercrime Act⁴⁶, the Personal Data Protection Act⁴⁷ and the Electronic Transactions Act⁴⁸. To be clear, these are the four acts of January 25, 2008.

In relation to Law No. 2008-10 of 25 January 2008 on the Information Society orientation Law⁴⁹ (LOSI), which provides in Article 5 para. 2 that *“the principle of freedom carries with it the fundamental right of every person to communicate, the right of every citizen to participate effectively in the information society, the right to free expression and the right to engage in e-commerce actions and to receive information across borders in accordance with applicable laws and regulations”*.

⁴³ On the whole question see Article 19 Report on Freedom of Expression in Senegal, “Freedom of Expression: A Challenge for Senegalese Democracy”, January 2007, available at: <https://www.article19.org/data/files/pdfs/publications/sengal-liberte-d-expression.pdf>.

⁴⁴ R. GASSIN, *Informatique et les libertés*, Rep. pén. Dalloz January 1987, p. 3.

⁴⁵ Law No. 2008-10 of 25 January 2008, on the Information Society Guidance Act (JORS, no. 6406 of 03 May 2008, p. 419 et seq.).

⁴⁶ 46 Law No. 2008-11 of 25 January 2008 on cybercrime (JORS, no. 6406 of 03 May 2008, p. 419) (Appendix 1).

⁴⁷ Law No. 2008-12 of 25 January 2008, on the protection of personal data (JORS, no. 6406, of 3 May 2008, p.434).

⁴⁸ Law no. 2008-08 of 25 January 2008, on electronic transactions (JORS, no. 6404 of 26 April 2008, p. 395).

⁴⁹ JORS, no. 6406 of 03 May 2008, p. 419.



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It is important to note that the Telecommunications Code Law No. 2011-01 of 27 January 2011 highlighted the main aspects of the regulation of telecommunications, in particular competition, interconnection, universal access/service, scarce resources and pricing.

The legal framework for freedom of expression on the Internet includes Law No. 2016-29 of 08 November 2016 on the Criminal Code and Law No. 2016-30 of 08 November 2016 on the Code of Criminal Procedure. The aim of these laws is to strengthen the legislative framework and promote an original approach to the regulation of cyberspace by drawing up a participatory criminal policy approach with technical providers.

In addition, on Tuesday, June 20, 2017 Senegalese Mps unanimously voted on the draft Press Code adopted by the Council of Ministers in May 2017. The text, 233 articles long, has been in the cards for more than seven years. It is the result of intense negotiations between the government and media professionals. This text covers two different regimes depending on whether it concerns the print and online press or the audiovisual sector.

Recently, the State of Senegal has adopted a new Code on Electronic Communications, it is the law 2018-28 of 12 December. This Law governs all activities of electronic communications, whether carried out from or to the territory of the Republic of Senegal, in accordance with Article 1 of this Law. It is therefore clear from the objectives of Article 5 of the aforementioned law: “promote the development and modernization of electronic communications networks and services in Senegal through the creation of an effective, flexible and transparent legal framework”.

Furthermore, it must be clear that the transnational dimension of the Internet and the globalisation of services, free expression being possible both at national and international level, the State of Senegal considers that it is necessary to codify certain Community texts in order to guarantee freedom of opinion and communication.

It is in that sense that the African Commission on Human and Peoples' Rights adopted, at the 32nd Ordinary Session, held in Banjul, The Gambia, from 17 to 23 October 2002, a Declaration



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of Principle on freedom of expression in Africa. It is the same for the Directive n°1/ 2006/ CM/ UEMOA of 23 March 2006 relative to the harmonization of policies of control and regulation of the telecommunications sector; Directive C/DIR/1/08/11 of 19 August 2011 on combating cybercrime in the ECOWAS area; African Union Convention on Cyber Security and Personal Data Protection signed in Malabo, Equatorial Guinea on 27 June 2014.

II/ b. The institutional framework for freedom of expression on the Internet in Senegal

It is within this framework that Ndiaga GUEYE, President of the Senegalese Association of Users of Information and Communication Technologies (ASUTIC), recalls that Article 27 of the Electronic Communications Code, Articles 180 and 181 of the Press Code, which create censorship of online press freedom in Senegal, “these provisions are a source of concern” .

Moreover, breaches of the law can be assessed through articles 5, 178 and 192 of the Press Code Act 2017-27 of 13 July 2017 . Article 5 of that Law provides that: “Journalists and media technicians have the right to free access to all sources of information and to investigate without hindrance all matters of public interest, subject to respect for “secrecy”, the secrecy of the investigation and of the regulations applicable to certain sites or structures”. The secret defence against the journalist is not defined by the Code, which could constitute an infringement of the freedom to inform.

In the same vein, the Article 178 of the Code provides that, in order to qualify as an online press company, “it will require a minimum of three persons. The Publication Director must have at least 10 years of press experience and the Editor-in-Chief must have at least 7 years of experience”.

It is in this context that Ababacar DIOP, President of the organisation JUNCTION believes that such a provision is difficult or impossible to be respected in the current Senegalese context, especially since the emergence of online information sites is not very long ago and is often carried by young bloggers.



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Section 192 also infringes on freedom of expression, even worse, its application leads to a breakdown in the functioning of the press organization in so far as without the intervention of a judge: "in exceptional circumstances, the competent administrative authority (Governor, Prefect or Sub-Prefect) may, in order to prevent or stop an infringement on the security of the State, on the territorial integrity, or in the case of incitement to hatred or call for murder, order: the seizure of the media of a press enterprise; the suspension or cessation of the broadcast of a programme; the temporary closure of the press organ” .

II. c. African political attacks

It is important to note that restrictions on Internet access are on the rise globally , and rarely a week goes by without learning that Internet disruptions have occurred at the behest of a government. Driven largely by political and national security concerns, state-ordered Internet cuts are on the verge of becoming the “new normal” .

While the Declaration of Principles on Freedom of Expression in Africa states that: ‘No individual shall be subjected to arbitrary interference with his freedom of expression. Any restriction on freedom of expression must be imposed by law, serve a legitimate purpose and be necessary in a democratic society’.

Despite this statement, states tend to undermine freedom of expression through internet cuts. For example, Internet cuts began to attract global attention during the uprising in Egypt in 2011, when authorities shut down the Internet for nearly a week to disrupt protester communications . Since then, the use of Internet cuts as a tool for political purposes has steadily increased .

If we look at Sudan, about 100 activists have died under military fire. A bloodbath accompanied by a shutdown of the Internet for the Sudanese “on Eid Day, they shut down the Internet because there was the sit-in massacre. Nobody knows how to communicate, there are a lot of people who have disappeared, we don’t know where they are. That’s why they cut off the Internet, so that people would be isolated and unable to gather,” said Mohammed Omar, a resident of Khartoum, the Sudanese capital.



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"In Ethiopia at the time of the Ethiopian Airlines Boeing crash, the aim was to avoid the spread of false information. It is understandable that we want to protect families who are already bereaved. But at Internet Without Borders (ISF), you are well aware that nothing can justify these restrictions on freedom of expression, regardless of the socio-political context".

It is within this socio-political context that Julie Owono argued that 'there are at least five countries that are suffering from Internet cuts. Namely Sudan, Ethiopia, Mauritania, Somaliland where the Internet is not completely cut, but access to social networks is disrupted due to the end-of-year exams. It's the same situation in Chad where people have also been deprived of social networks for over a year. In Algeria, everything was restored last week. But all this is quite worrisome".

In the case of Cameroon, digital rights NGOs and the United Nations have repeatedly called on the Cameroonian authorities to restore Internet connectivity in the regions concerned. In vain. 'Internet suspension on this scale violates international law. It not only eliminates public debate, but also deprives Cameroonians of access to essential services and basic resources," said David Kaye, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression .

In Chad, Chadian Internet users have not been able to connect to Facebook, Twitter, Whatsapp, Viber and other social networks since 28 March 2018 via the country's two main operators, Tigo Tchad and Airtel.

Access to social networks is equivalent to "90% of the country's bandwidth usage," says Abdelkerim Yacoub Koundougoumi, Head of the Central Africa Division of the Internet NGO without Borders (IWF).

According to him, "the Chadians are invisible on the Web and the government does nothing to facilitate their access".



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On the contrary, “the government is afraid of the Internet” in a country where “protest is forbidden and the regime controls everything”, social networks have become the only way for Chadians to express themselves freely .

It continues, ‘despite two civil actions before the Chadian constitutional judge, reports filed with the UN Human Rights Council in the framework of the Universal Periodic Review of Chad, demonstrations, The Chadian government remains deaf and maintains a disproportionate, illegal and unjustified censorship of the interpellations of the special rapporteurs for freedom of expression at the UN and the African Union’ .

Therefore, Heba Morayef is right to say that “the right to freedom of expression is essential in a robust and dynamic society. Citizens in Tunisia must be able to openly criticize institutions and state representatives, including security forces, without fear of being prosecuted”. goes in the same direction the organization of the day of March 12 which particularly marks the lives of Internet users.

In fact, this date essentially allows to denounce cyber-censorship in the world. The 2019 edition once again renews freedom of expression on the Internet. However, in Senegal, despite the measures taken by the state authorities, censorship is not yet in order. It is on the occasion of this day that Ndiaga GUEYE, President of the Senegalese Association of Users of Information and Communication Technologies, takes stock of the situation in Senegal. The latter considers that, in terms of censorship, Senegal is, so far, in a situation of total freedom. “We have not yet seen any restrictions on freedom of information and expression, ” he said.

II.d. Economic and social violations

Based on the findings of the CIPESA report, which corroborates the convictions of David Kaye, UN Special Rapporteur on Freedom of Expression, human rights groups and civil societies, and from The Freedom Online Coalition in March 2017, and from The Brooking Institution and Deloitte: “instead of promoting stability (...) in the period of demonstrations, elections or examinations, these restrictions endanger economic activity and prevent a return to order” before



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specifying: “Internet outages, no matter how long they last, disrupt economic growth, disrupt essential services, undermine investor confidence and damage the country’s image” . In fact, the report shows that the consequences of these measures extend well beyond their downtime, because by disrupting supply chains, they have a systemic effect and affect efficiency at all economic levels .

In addition, Internet cuts affect economies in many ways, disrupting productivity and generating monetary losses in transactions that are both macroeconomic and micro-economic in urgency. So a danger for the development of the digital economy, especially for the ambitious young Senegalese, who are in search of income and active in digital entrepreneurship: startups, web-videos, online media...

Thus, from the industrial point of view, Internet cuts are a major challenge, affecting the wealth of companies, especially SMEs, too little awareness of the protection of their information system as regards the creation of value, income and jobs. The consequences of these cuts may have a financial impact such as loss of revenue; an inability to produce, to function resulting in dysfunction and unavailability of services.

The cuts also undermine commitments to development objectives such as education, health and economic development.

“In 2015, 194 countries in the United Nations General Assembly recognized ICT as a horizontal catalyst for achieving the new 2030 Development Agenda. The UN Sustainable Development Goals (Sdgs) demonstrate the world’s commitment to social and economic growth. In particular, governments are committed to ensuring universal and affordable Internet access by 2030. Internet cuts conflict with this commitment” .

The economy being a fundamental source for the development of a country, it is with relevance that Julie OWONO declared that: “This is a very bad decision by the Cameroonian government, especially since the country prides itself on being one of the pioneers of the digital economy in Central Africa. It’s not worth the risk. This will have a serious impact on Cameroon’s economy,



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which is already suffering (the IMF has been advocating a return to structural adjustment plans since 2016)” .

In social or societal terms, attacks on freedom of expression and opinion on the Internet put users (cyber-citizens, consumers or actors) at the centre of concerns: the concern to live in safe societies and without Internet cuts where the concept of digital trust succeeds in imposing itself.

IV/Limits to freedom of expression on the Internet

Professor R. SAVATIER a great visionary, wrote in 1959: ‘It is not up to the human person to be the slave of technique, it is up to it to serve man’ . If the Internet is a space of freedom, “this freedom cannot be absolute, since the content may be harmful to the security and, in particular, to the dignity or physical integrity of individuals” .

\ As fundamental as it may be, freedom of expression must not, however, undermine respect for the person of others and human dignity or public order. These limits are recalled as a corollary to the principle of freedom of expression in Article 4 of the Declaration on the Rights of Man and of the Citizen.

They are also mentioned in the European Convention for the Protection of Human and Citizens' Rights: “the exercise of those freedoms involving duties and responsibilities may be subject to certain formalities, conditions, restrictions or penalties provided for by law, which are necessary measures in a democratic society for the defence of order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others, to prevent the disclosure of confidential information or to ensure the authority and impartiality of the judiciary” .

The Senegalese laws are not over the limitation of freedom of expression. Section 1 of the Electronic Transactions Act 2008 provides that : “unless otherwise provided, electronic communication may be limited only to the extent required, on the one hand, by respect for the dignity of the human being, for the freedom and property of others, the pluralistic nature of the expression of currents of thought and opinion and, on the other hand, by safeguarding public



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order, the needs of national defence, the public service requirements and the technical constraints inherent in the means of communication”.

In this regard, electronic networks such as the Internet have become real means of communication allowing with extreme rapidity to spread ideas, feelings and opinions of all kinds throughout the world. The numerous discussion forums organized in Senegalese news sites such as "rewmi.com", and "seneweb.com" etc. are often an opportunity to spread illicit messages or threats to the honour and dignity of individuals .

These include defamation, insults, spreading false news, and insulting the head of state. The recent advent of Web 2.0, a space of freedom by essence favouring the intervention of amateur Internet users, within the framework of an interactive and dynamic logic, has encouraged an intensification of abuses to press freedom .

In other words, the use of Facebook, while it may seem to symbolize freedom of thought and expression, may at times conflict with respect for other fundamental freedoms: respect for privacy, the right to image, respect for the dignity of the person, public order.

Example of some possible criminal offences :

Defamation

Penal Code Law No. 65-60 of 21 July 1965 provides a framework for freedom of the press, including the repression of the utterance of defamatory remarks against a person. This framework is provided for in Article 258, paragraph 1, in the following words: "Any allegation or charge of a fact which affects the honour or consideration of the person or body to whom the fact is impugned is defamation.

‘When it has been made by one of the means referred to in Article 248, it shall be punishable even if it is expressed in a dubitative form or if it concerns a person or body not expressly named, but whose identification is made possible by the terms of the offending speeches, cries, threats, writings or printed matter, cupboard or posters”.



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Under freedom of expression on the Internet, this provision applies when the conditions of the offence are met.

It is in this context that the contours of freedom of expression and its limits have been clarified by the Dakar special regional court by confirming the solution adopted in Robert SAGNA case . In the case of Momar NDAO, tried on 15 December 2011 , the national telecommunication society of Senegal (Sonatel) had directly quoted Mr. Momar NDAO, President of the Consumers' Association of Senegal before the Criminal Court for defamation.

Sonatel blamed the defendant for having published an article in osiris.com in which he criticized him, as part of the decree on incoming calls, to have been one of the operators who received the sum of 5 billion francs CFA, despite the suspension of the said decree. The magistrates found that the Internet network used to broadcast defamatory remarks, is analyzed in a means of public dissemination, to be a technical process intended to reach the public.

According to the judges, “it is common ground that the means of the Internet as a technical process intended to reach the public is indeed public broadcasting”.

Similarly, the Correctional Court considered that the World Wide Web, as a service of the Internet, which served as a vehicle for transmitting the video showing girls engaged in sexually explicit acts “is a means of public broadcasting, that is, a means of digital communication by electronic means” .

Thus, it is important to highlight the inventiveness of Senegalese judges who did not wait for the completion of the ICT legal framework reform project to “assimilate technological progress”. Indeed, through a process of judicial criminal policy, the jurisprudence of the courts and tribunals has, even under the rule of previous law, attempted to integrate the technological phenomenon into the criminal structure of the common criminal law (admission of computer data theft, online defamation, online scam, etc.) .

Therefore, it is good to know that the sanction of defamation is primarily due to reputation protection. That is why the Declaration of Principles on Freedom of Expression in Africa states



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that “States shall ensure that their laws relating to defamation comply with the following criteria: opinions or statements about well-known personalities that were reasonable to make under the circumstances; public personalities must tolerate much more criticism; and sanctions must never be so severe as to impede the exercise of the right to freedom of expression, including by others...” .

Term of abuse

Term of abuse is defined by Article 258, paragraph 2, of the Penal Code as “Any outrageous expression, any term of relative or not contempt at the origin of a person, any invective that does not contain the charge of any fact is an insult”.

Insult

The 2016 Penal Code Revision Act criminalizes “an insult committed through a computer system to a person by reason of their membership in a group that is characterized by race, colour, ancestry, national or ethnic origin or religion or to a group of persons who distinguish themselves by one of these characteristics is punishable by imprisonment from six months to seven years and a fine from 500,000 to 10,000,000 francs”. This is provided for in section 431-43 of the aforementioned Act.

Breaches of public order

Article 431-7 of the Law 2016 amending the Penal Code in its No 5 punishes breaches of public order committed by means of information and communication technologies, such as incitement to violence or racial hatred. According to the article: “any writing, image or other representation of ideas or theories that promotes or encourages hatred, discrimination or violence against any person or group of persons on the basis of race, colour, ancestry or national or ethnic origin or religion, to the extent that it is used as a pretext for or incitement to any of these”.

For illustration, the case of Ousmane MBENGUE, a young man who had launched via Facebook a call for murder against all Senegalese women. It was in the context of this case that



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the Dakar Court of Flagrant Offences imposed a 6-month suspended sentence on the above-named person.

There is also the case of the young senior student Saër KEBE at Demba DIOP high school in Mbour, who has been imprisoned since 2015 for apologizing for terrorism, after a post on his Facebook page threatening the American embassy in Dakar. The latter, tried by the Criminal Chamber of the Dakar Tribunal, was released after 4 years of preventive detention. He was acquitted for apologizing for terrorism and sentenced to three months on probation for threatening terrorism.

It is clear that “freedom of expression should not be restricted on grounds of public policy or national security, unless there is a real risk of imminent threat of a legitimate interest and a direct causal link between the threat and expression”. That is what the Declaration of Principles on Freedom of Expression in Africa provides.

Attacks on moral values

Beyond the limits of defamatory, insulting, public order and privacy, it is important to note that moral values are an obstacle to freedom of expression in Senegal. It was in this context that a young singer was arrested, Deesse Major, for a stage outfit, deemed provocative by a committee of «defense of moral values» . In response, a collective was formed to defend the freedom of expression of artists in a state in principle secular

For the record, following a complaint filed by a Moral Values Committee (CDVM). This young rapper was arrested and placed into custody for three days on June 19, 2016.

This committee withdrew its complaint, considering the media coverage of the case sufficient to get its message across: “Total freedom of expression is not permitted anywhere except in societies that are truly dedicated to sacrificing their culture and their children”.

The teaching that emerges from these various cases is that electronic communications made via message, post among other things on social networks, do not escape the control of the law. The



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cybernaut, out of respect for others, must impose him/herself limits on his/her own freedom: the freedom of each one stops where the freedom of the others begins. The exercise of a freedom must not affect the freedom of others or public order. This is the reason why the State, through the judiciary, guarantees respect for individual rights and freedoms (freedom of the press, freedom of conscience, freedom to come and go, etc.). So the freedom of everyone is necessarily limited by compliance with the law.

V/ Recommendations for respect for freedom of expression on the Internet

These recommendations are aimed for taking into account freedom of expression on the Internet and the promotion of human rights in the drafting of texts governing freedom of opinion and expression.

- Any restriction on freedom of expression on the Internet must be legislated and must be proportional, legitimate, and necessary in a democratic society. The State must undertake not to interfere with the freedom of expression of its citizens.
- The regulation of information and communication technologies must take into account fundamental respect for the rights and freedoms of human beings, including freedom of expression and opinion
- Respect for the right to information of the persons concerned; freedom of expression and freedom to come and go as provided for in the constitutional block
- Establish a framework for consultation between civil society actors and members of the judicial chain to promote and strengthen freedom of expression.
- The State of Senegal must take urgent measures to repeal the provisions of the Criminal Code and Criminal Procedure on defamation, insult and offence to the Head of State and national institutions in order to better guarantee freedom of expression on the Internet.



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- The judicial authority which guards individual freedoms must strictly ensure the protection of persons accused of abuse of freedom of expression, and even to put freedom above detention in order to put an end to excessive and anti-democratic restrictions.
 - Restrictions on the freedom of expression of the accused must be proportionate to the need to uphold the principle of the presumption of innocence and the principle of the adversary.
 - The need to ensure the protection of freedom of expression by the legislator by repressing infringements on the freedom to come and go, to the freedom of thought and opinion in order to guarantee the complete freedom of spirit of every human being, in order to allow him/her to live his life peacefully by expressing him/herself freely without worrying about public power.
 - Civil society organizations, as well as other stakeholders, should continue to play a key role in the defence and protection of fundamental rights and freedoms by guaranteeing individuals against the excesses of the executive, legislative and judicial branches.
 - Build capacity for stakeholders (some state services such as judicial actors, police and gendarmerie; private sector and civil society) on the issues and stakes of freedom of expression on the Internet and of confidentiality on the Internet in order to build an information society respectful of human rights.
 - Governments must prioritize all options for non-coupures by seeking best practices to resolve problems at source. Sharing experience within and between States could provide solutions that are not based on access restrictions.



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VI / Conclusion

Looking at freedom of expression on the Internet in Senegal has shown us that freedom of expression is a fundamental constitutional principle, an essential attribute of the human being.

Likewise, the free communication of thoughts and opinions is one of the most precious rights of man; therefore every citizen can speak, write, print freely, except to answer for the abuse of this freedom in cases determined by laws and regulations.

In Senegal, freedom of expression is guaranteed by the Constitution which provides in Article 8 that: “every citizen has the right to disseminate or express his opinions by word, pen and image, as well as the right to an unimpeded education from sources accessible to all”.

It is important to note that restrictions on access to the Internet are of legislative origin or are the result of the will of public authorities. For political reasons, States tend to infringe on freedom of expression through Internet cuts. These cuts can have an economic and social impact on a country’s development.

However, we must not lose sight of the fact that, as fundamental as it may be, freedom of expression must not, however, undermine respect for another person and human dignity or public order.

This is why the Declaration of Human and Citizen’s Rights, the European Convention for the Protection of Human and Citizen’s Rights and some Senegalese laws limit freedom of expression.

Whatever can be said, it is necessary to reconcile the demands of limiting freedom of expression with respect for fundamental rights and freedoms, in order to avoid the loss of the value of freedom, that is, its fundamental character.



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