

CHAPTER FOUR

FREEDOM OF EXPRESSION: Packing ... the journey starts!

4.1 INTRODUCTION

In the previous chapter, I wrote an overview of the literature regarding the concept of human rights and pointed out the change in focus as human rights developed through time, touching on the development of human rights in South Africa. Lastly, I discussed the way in which the concept of human rights is addressed in public schools.

In this chapter the human right to freedom of expression will be the main focus. The journey starts with a definition of the concept of the right to freedom of expression. Subsequently freedom of expression in international instruments will be examined, after which the focus will shift to the USA and South Africa. Although I am not involved in a comparative research project but rather with local research, one can learn much from the USA as it took them approximately two centuries to establish legal principles. The USA is a litigious country and has no limitation clause in its Constitution. The final focus will be on freedom of expression in schools.

4.2 THE RIGHT TO FREEDOM OF EXPRESSION

As the purpose of my journey is to examine learners' understanding of their right to freedom of expression, this chapter explores the literature and case law regarding this right. I shall begin by defining the concept of freedom of expression.

4.2.1 Concept

Alston (2002, p. 262) argues that freedom of expression is not the property of any political system or ideology, but a general human right guaranteed in international law. It is regarded widely as one of the core rights and essential foundations and freedoms of a democracy ("Handyside", 1976; Marcus, 1994; McQuoid-Mason, O'Brien, Greene, & Mason, 1993; Sachs, 1992; Tribe, 1988; Wood, 2001). In *Lehman v. City of Shaker Heights* 418 U.S. 298 (1974) ("Lehman", 1974) the court held that freedom of expression invites dispute. This is vital for developing a democracy.

Judge Cardozo defines this concept as "... the matrix, the indispensable condition of nearly every other form of freedom" in *Palko v. Connecticut* 302 U.S. 319 (1937) ("Palko", 1937, at 327). In the same case freedom of expression is viewed as a prerequisite for a democratic society and for participation in the democratic process (Clayton & Tomlinson, 2001), and is necessary also for the development of the individual (Alston, 2002). This notion was summarised by McIntyre in the Canadian Supreme Court in *Retail, Wholesalers and Department Store Union, Local 580 v. Dolphin Delivery Ltd* 18720 BC (1986) ("RWDSU", 1986). Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that have formed the basis of the historical

development of the political, social and educational institutions of Western society. Representative democracy, which is in great part the product of the free expression and discussion of varying ideas, depends on the maintenance and protection of freedom of expression.

In defining the concept “expression” it is necessary to accept that the word involves a wider concept than “speech” and refers to a number of entities. Generically, it is not seen as only the words one utters, but includes the totality of being and one’s freedom to show it. It includes aspects such as academic freedom, advertising, artistic creativity, blasphemy, broadcasting, regulation, commercial expression, common law offences restricting expression, defamation, false speech, hate speech, incitement to imminent violence, information (freedom to receive), press freedom, pornography, prior restraints on publication and propaganda, music, dress, symbols, gesture and other forms of conduct through which people convey their views (De Waal *et al*, 2001; Malherbe, 2003; Marcus, 1994; Van der Westhuizen, 1994; Wood, 2001). It therefore extends to forms of outward or non-verbal expression, e.g. clothing and hairstyles (Bray, 2000b). Similarly, Beatty (1995) defines freedom of expression as a broad term that includes everything that is done to convey meaning. He contends that even breaking the law to make a statement can be viewed as part of a person’s right to freedom of expression and includes the right of a person not to express any view. According to De Waal *et al*. (2001, p. 311) “... every act by which a person attempts to express some emotion, belief or grievance should qualify as constitutionally protected expression”. A variety of actions, including the right to freedom of expression is summarised in *Griswold v. Connecticut 381 U.S. 479 (1965)* (“Griswold”, 1965, at 483) by Judge Douglas as:

... not only the right to utter or to print, but the right to distribute, the right to receive, the right to read ... and freedom of inquiry, freedom of thought, and freedom to teach ... without those peripheral rights the specific would be less secure ...

It is, however, necessary at this point to indicate that the Constitutional First Amendment of the USA contains the term “freedom of speech”. It is clear from USA case law that, although there is not always consensus in this regard, the trend in courts is to interpret this “freedom of speech” as not only pure speech but speech “plus” (“Cox”, 1965, at 563) and symbolic speech. One can thus assume that the First Amendment “freedom of speech” of the USA resonates with the broader term “freedom of expression”, found in other national and international legislation and instruments (see § 4.2.3).

The fundamental need for the right to freedom of expression in a democracy (Clayton & Tomlinson, 2001) is emphasised by Türk and Joinet (1999) who indicate that freedom of expression was regarded as a “core right” even before the advent of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982 (hereinafter referred to as the Charter). This means that freedom of expression may well be treated as if it were a constitutionally protected freedom even in countries without a constitutionally entrenched Bill of Rights. It thus follows clearly that freedom of expression is widely protected as a prerequisite to democracy. Similarly, Beatty (1995) concurs and describes freedom of expression as the value that underpins a liberal-democratic government. In terms of the First Amendment of the Constitution of the USA (Van Staden & Alston, 2000), freedom of expression is viewed as an inherent right, which indicates that freedom of expression, among other rights, may

well be treated as if it were a constitutionally protected freedom, even in countries without a constitutionally entrenched bill of rights. Also, in 1988 a United Nations Commission on Human Rights report on freedom of expression suggested that the right to freedom of expression and information should be contained in the core of inalienable rights. This would hold that even in a state of emergency, this right could not be subjected to restrictions beyond those permissible in a democratic society. The right to freedom of expression is therefore a right tending toward the absolute (Türk & Joinet, 1999).

Clayton and Tomlinson (2001) say the right to freedom of expression enjoys special protection on three different grounds: it is the market-place of ideas which promotes the search for the truth; it ensures individual development and self-fulfilment, which can be derived from the right to human dignity and to equality of concern and respect; and it secures the right of the citizen to participate in the democratic process. Emerson (1970) of the Yale Law School has put forward a fourth premise, viz. that freedom of speech is also a prerequisite for maintaining the balance between stability and change in society.

The four premises, which enhance the claim that freedom of expression seems to be a core right in a democracy, will now be discussed.

4.2.1.1 Market-place of ideas

The right to freedom of expression enables human beings to express new ideas and discoveries, which enhance scientific, artistic or cultural progress. This can be seen as the foundation of the 'quest for truth' paradigm. Clayton & Tomlinson (2001) define the market-place of ideas as a collection of ideas used to promote the search for truth. The epistemic function of education as confirmed by Judge Holmes in *Abrams v. United States* 250 U.S. 616 (1919) ("*Abrams*", 1919, at 630) is realised in this search for truth:

[C]ompetition among ideas strengthens the truth and rules out error; the repeated effort to defend one's convictions serves to keep their justification alive in our minds and guards against the twin dangers of falsehood and fanaticism; to stifle a voice is to deprive mankind of its message, which we must acknowledge might possibly be more than our own deeply held convictions ...

One should be able to think, speak and create ideas, even if what is expressed is "wrong". Unpopular views must be uttered and will either be enhanced or defeated by public opinion (education), rather than by censorship (Alston, 2002), which would impair creativity, ideas, individual development and democracy. De Waal *et al.* (2001) point out that if everyone who believed that the world is round had been silenced, one would still have a misconception about the shape of the earth. In other words, even the right to freedom of false expression of ideas should be protected, because it provokes further discussion through which the truth may be discovered. Hence, freedom of expression ensures the vibrant and inquisitive "mind" of a dynamic democracy.

4.2.1.2 Individual development

Freedom of expression creates a market-place of ideas ("Abrams", 1919) that helps to develop individuals to self-fulfilment (Clayton & Tomlinson, 2001; De Waal *et al.*, 2001). As such De Waal *et al.*, (2001) argue that the denial of this right would be inhuman because it is an essential human activity to express oneself. As people become involved in the "market-place of ideas" concept in the search for truth, individuals become involved in their individual development, which underpins freedom of expression and *vice versa*. The right to express own opinions, even if they differ from the opinions of others, is essential for individual self-fulfilment (De Waal, Currie & Erasmus, 1998). In this regard Sachs (1992) states that the right to freedom of expression allows individuals to be who and what they are. If persons' right to express themselves is violated, they will be restrained from developing to their fullest potential. The right to freedom of expression of the individual person should outweigh the interests of society (Alston, 2002), but may be limited if it poses a potential risk to society. The balance between individual development and participation in democratic society is achieved through education in schools (Wielemans, 1999). Schools need to teach all learners about their right to freedom of expression to maximise not only their personal potential, but also the fullest potential of their society. It is necessary to enhance and respect freedom of expression in order to develop and encourage critical and independent thinking.

4.2.1.3 Participation in the democratic process

Clayton & Tomlinson (2001) and Gordon (1984) regard freedom of expression as a prerequisite for participation in the democratic process. This was established by the European Court in *Handyside v. United Kingdom* 24 EHRR 737 (1976) ("Handyside", 1976). One could argue that freedom of expression is essential to the right of citizens to participate in the democratic process. People must be able to make political choices and therefore they need to have access to information and to different viewpoints. The right to freedom of expression is related to freedom rights, as well as political rights. Türk and Joinet (1999, p. 37) also argue that the case law of the European Court of Human Rights confirms that this right constitutes one of the basic foundations of a democratic society.

Alston (2002) describes the democratic process as political and asserts that the political process can never be democratic without the openness to hearing everything and allowing differing views to be expressed. The accommodation of differing views is socially acceptable and creates stability in a society. Different and even unpopular views enhance critical thinking, which is a prerequisite for a democratic society. The public school, as education mentor for children (learners) in a democracy becomes a forum where children are guided to adulthood and guided to fulfil their place in a democratic society. Section 7(1) of the Constitution provides the Bill of Rights as a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.

Wielemans (1999) points out that education attempts to solve problems in society. There is a movement back to an holistic approach where the school becomes more than "leerinstituut" (learning

institution) but rather “opvoedingsgemeenschap” (educational society) (Wielemans, 1999, p. 5). Similarly the DoE set out the purpose of a General Education and Training Certificate (GETC): “to equip learners with knowledge, skills and values that will enable meaningful participation in society ...” (SAQA, 2000, p. 14). A meaningful participation in society is feasible only if one has developed the skill of critical thinking or reflection.

In a democracy people listen to and tolerate opinions with which they disagree (McQuoid-Mason, O'Brien, Greene, & Mason, 1993). Freedom of expression ensures that governments are unable to abuse democratic or fundamental rights. Judge Cameron states in *Holomisa v. Argus Newspapers Limited 1996 SA 588, 608 J-609A (w)* (“*Holomisa*”, 1996, p. 615) that “[t]he success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens”.

Wielemans (1999) refers to this participation in the democratic process as the “*instrumentele taken*” (instrumental tasks) of the school. This implies that the school aims to guide learners to their fullest potential in order to enhance the optimal functioning of society. For this to occur, the right to freedom of expression should be respected. He holds that since the school nowadays tends to be the only “power” in modern society that still has the role of disciplining, it functions as a public forum where the youth (learners) are challenged to agree or disagree. The school increasingly becomes a social forum for learners in which to interact with one another and to share experiences (Wielemans, 1999). By so doing they simultaneously shape their own lives as individuals and strive toward a democratic society.

The “epistemic” function of (public) education is to enable learners to acquire the skills necessary to become knowledgeable and productive participants in a democratic society (Gordon, 1984). But, it is the duty of the government to provide education so as to supply citizens with the requisite facts relevant to political decision-making and to train them to draw conclusions from those facts (Gordon, 1984). The epistemic function of education is to develop self-controlled citizens who can participate actively in a common system of discourse (Yudof, 1983). Gordon concludes that citizens who have developed their fullest capacity and fulfilled their own interest, are less likely to call for political change, will be economically productive and maintain a higher standard of living, hence, the government’s economic interest in education. Educators ideally should have the freedom to choose their own study material and need to steer learning activities skilfully to ensure the development of critical thinking.

4.2.1.4 Maintaining the balance between stability and change in society

If persons are not allowed to air their point of view, that viewpoint will never be tested. It is in free discussion, which prevents society from becoming stagnant, that people’s own prejudices and pre-conceptions are tested (Emerson, 1970). Freedom of expression is balanced in societies in order to protect other values like public order, justice and the personal rights of others (Dugard, 1978). The right to freedom of expression may also be limited in terms of the ICCPR (“International Covenant on

Civil and Political Rights", 1976) and in the interests of national security, public order, safety, health and morals.

Du Toit (1993, p. 5) defines "democracy" as "rule by the people", which he interprets as "... all citizens shall participate on an equal basis in public decision-making on vital aspects of all common affairs, including social life, the economy, morality and education". The core of a democracy is that all citizens have a right to participative decision-making (Morrow, 1989). In the same way Coetzee and Le Roux (1998, p. 2) agree that:

"... [d]emocracy can be regarded as a system of government in which the ruling power of the State is legally vested in the people: government of the people, by the people, for the people".

In a democracy the population must be included in civic life. The right to freedom of expression is related to freedom of association and assembly and these three freedoms are essential in a democracy (Dugard, 1978). In the *State v. Turrell 1973 (1) SA 248* case ("Turrell", 1973, at 257) which arose out of learner protest, Judge Van Zyl emphasised the importance of freedom of expression in a democracy: "[f]reedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously ...". It is significant that this statement was made before South Africa had a new Constitution or democratic government. The right to freedom of expression as core of democracy and human rights was therefore acknowledged by the courts even before South Africa became a democracy.

Although freedom of expression is vital in a democratic society, research has suggested that a significant number of Americans show no interest in respecting the right to freedom of expression (Andsager & Ross, 1995; Brock, 1996; McAdams & Beasley, 1994). A solution would be to teach learners how to use their right to freedom of expression so that they may be enabled to develop optimally as individuals and to fulfil societal responsibilities. Buckingham (1997, p. 78) suggests that "educators must ... prepare [learners] for a participatory form of citizenship which can function across a whole range of social domains". This is the schools' instrumental task (Wielemans, 1999). If freedom of expression is important to ensure the fulfilment of every individual, it is vital to educate toward freedom of expression. Andsager & Ross (1995) aver that freedom of expression courses enhance people's understanding of their right to freedom of expression. Such courses could also enhance a citizenry, making it more supportive of democratic and expressive rights.

4.2.2 A core human right

A democratic society is continuously in a process of change, will have restrictions on rights and freedoms and its procedures will persistently be questioned. In this way, democracy can be viewed as a "tragic" political system. As Castoriadis says, democracy is "the only regime that openly faces the possibilities of its self-destruction by taking up the challenges of offering its enemies the means of contesting it" (Türk & Joinet, 1999, p. 38). Similarly, Wood (2001) argues that freedom of expression is

regarded as an essential pillar of a free and democratic society. Although freedom of expression is regarded as a core human right in a democratic society, even this right can be limited.

In the USA, the First Amendment's guarantee of free speech has never been absolute. Although the United States Supreme Court has characterised freedom of expression as a "preferred right", some forms of speech, such as defamation, fighting words, and obscenity, fall outside the protection of the First Amendment.

It is against this background of the freedom of expression, seen as crucial in a democracy but which cannot be absolute, that I am investigating the issue in South Africa.

The value system that underpins the Constitution, was developed from South African history. When interpreting the Bill of Rights one must be guided by the value system. This is also echoed by Judge Ismail Mahomed in the *Makwanyane* case:

...the South African Constitution retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos ("*Makwanyane*", 1995, at 262).

In this quotation lies the motivation for the rationale of my study. Because of our history of lack of human rights one must ensure that the rights South Africa fought for are properly understood and appreciated. If the right to freedom of expression is viewed as the core right in a democracy, it is important that this right is properly understood and implemented, hence my research puzzle: What do learners understand under their right to freedom of expression?

4.2.3 Freedom of expression in the USA

The first ever constitutional rights provision is the First Amendment to the Constitution of the United States (1791) which provides that: "Congress shall make no law ... abridging the freedom of speech, or of the press ..." ("*Amendments to the Constitution of The United States of America*", 1791). The right to freedom of speech is part of the First Amendment of the Constitution of the USA. "Freedom of speech" in the USA Constitution did not originally mean exactly what modern instruments and constitutions imply by "freedom of expression". The concept has relied on decades of court interpretations to develop into modern international trends (see § 4.2.1). Furthermore, it is more a restraining of state power than a protected human freedom right.

By referring to case law, I shall, in the next chapter, indicate how courts have interpreted and developed the right to freedom of expression in the USA and other countries.

4.2.3.1 Right to receive information

In *Martin v. City of Struthers* 319 U.S. 141 (1943) ("*Martin*", 1943), the court invalidated a municipal ordinance that prohibited the door-to-door distribution of religious leaflets. With this 1943 decision, the court defined the parameters of freedom of expression as those of distributor of literature on one hand,

to the right to receive information or literature on the other. The court emphasised social values in the dissemination of knowledge and ideas ("Martin", 1943, at 145). This decision was based on the characteristics of freedom of expression as part of the market-place of ideas in order to enhance individual development and participation in a democracy.

In another case, *Lamont v. Postmaster General* 381 U.S. 301 (1965) ("Lamont", 1965, at 308), Judge Brennan argued in a case that involved the distribution of communist literature via the United States Postal Service that the dissemination of ideas could be effective only if individuals were free to receive publications they wished to receive.

The *Stanley v. Georgia* 394 U.S. 557 (1969) case ("Stanley", 1969, at 564) guaranteed both the right to receive information and ideas regardless of their social worth, and the right to read material, at least in the privacy of one's home ("Stanley", 1969 at 568). It was also stated in *Griswold v. Connecticut* ("Griswold", 1965, at 482) that the right to expression also includes the right to receive, the right to read and the freedom to inquire. It is therefore every citizen's constitutional right to disseminate material, to receive material and to read material, even if the content does not correspond with the value system of society.

While at school, learners lack *iudicium*⁴⁷ as they are not yet experienced in regard to judgement (see § 1.5 and 4.2.3.1). One could argue that this right should be limited to fit the ethos of the school in order to facilitate the aim of education. School authorities, however, may not limit the right to freedom of expression merely because they disagree with the content of the expression. Freedom of expression in schools can be limited only if authorities can prove that the content would lead to substantial disruption in the school (see Tinker § 5.2.12).

In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council Inc.* 425 U.S. 748 (1976) ("Virginia Pharmacy", 1976) the court expanded the right to receive information to include commercial speech. It is thus the right of everyone, under the right to freedom of expression, to receive advertisements and thereby to obtain information on products.

4.2.4 Freedom of expression in South Africa

The Constitution of 1996 brought about a move away from an authoritarian culture to one of openness or transparency, accountability and justification of actions (§ 3.2.7). Freedom of expression is one of the civil freedoms guaranteed in the Constitution

- (1) *Everyone has the right to freedom of expression, which includes:*
 - (a) *freedom of the press and other media;*
 - (b) *freedom to receive or impart information or ideas;*
 - (c) *freedom of artistic creativity; and*
 - (d) *academic freedom and freedom of scientific research ("Constitution of the Republic of South Africa", 1996, section 16).*

⁴⁷ Judgement/ discretion.

The word “includes” indicates that although only four aspects of this right are mentioned, it could encompass other aspects not captured. The Guidelines for Consideration of Governing Bodies in Adopting a Code of Conduct (RSA, 1998, section 4.5.1) define freedom of expression as more than freedom of speech, thus including a the right to seek, hear, read and wear. It therefore extends to include all forms of outward or non-verbal expression, e.g. the selection of clothing and hairstyles.

As mentioned earlier, this right basically protects scientific, artistic or cultural progress. It also enhances self-fulfilment in a democracy. The right to freedom of expression, however, is thus closely related to the freedom rights and political rights in the Bill of Rights. Judge O'Regan stated this for the Constitutional Court:

Freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognize the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views ("South African National Defence Force Union v. Minister of Defence and Another", 1999, at 8).

Section 16(1) protects freedom of expression including its contents and those to whom it is addressed (Malherbe, 2001). The protection of this right is important in South Africa. For many years, the majority of citizens were denied this right to freedom of expression and they could even be sued for speaking out against the government. In this bureaucracy even learners were taught not to “back chat” and not to question anything told to them by educators or authorities (Mazibuko, 2002). Therefore all citizens – even educators – were never taught to think critically, to question whatever was told to them or what was happening to them. They could never speak out or differ from authorities.

Subsections 16(1)a–d particularly include protection for the freedom of the press and media (1a), the freedom to receive or impart information and ideas (1b), artistic creativity (1c) and academic freedom and scientific research (1d). Section 16(2) specifies when this right in section 16(1) can be limited. According to section 16(2) this right can be limited when it is used as propaganda for war (2a), incitement of imminent violence (2b) and some forms of hate speech (2c). It is important to realise that the mere fact that certain ways of expression are mentioned in section 16(1) definitely does not single them out for greater protection than other forms of expression (De Waal *et al.*, 2001). Although the right to freedom of expression is inherently limited in section 16(2), it can also (like any other right) be limited under the limitation clause (section 36 of the Constitution) (see § 4.4.3.1).

The focus of section 16(1)(d) “academic freedom and freedom of scientific research” is of importance to the higher education sector. One should be aware of the fact that since this is a subsection of the Constitution, the right to academic freedom of any academic enterprise is protected and not only that of “institutions of higher learning”. This emphasises the right of the individual to do research to publish,

etc. without government interference. One should bear in mind that academic freedom pertains not only to lecturers, but also to everyone engaged in the practice of science. Even a government employee has the right to freedom of expression that includes academic freedom. Since the focus of this study is the right to freedom of expression of learners in public schools, I shall not focus on Section 16(1)(d) of the Constitution.

In South Africa, which is characterised by a multicultural diverse society, hate speech, as limited by section 16(2)(c), needs to be addressed. International law could guide South African courts in implementing legislation in this regard. The Canadian Supreme Court has also accepted the legitimacy of controls on hate speech ("*Keegstra*", 1990). Section 16(2) of the Constitution excludes advocacy of hatred based on race, ethnicity, gender and religion from the ambit of the right to freedom of expression when it amounts to incitement to cause harm. Hate speech can cause emotional damage and will be a violation of the individual's right to human dignity.⁴⁸ It is therefore important to guide young learners in exercising their right to freedom of expression, so that they do not infringe upon the fundamental rights of another person by using hate speech. Section 16(2) of the Constitution defines hate speech as speech that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. This right is not mentioned in the South African Schools Act, Act 84 of 1996 (SASA). Freedom of expression will hence be viewed directly via the Constitution as well as through the value system that underpins the Constitution and the South African democracy.

Evidence of uncertainty about exercising the right to freedom of expression in the public school sector of South Africa can be found in local newspapers. One of these incidents involved Yusaf Bata, a Muslim teenager who attended Hoërskool (High school) Vorentoe in Johannesburg (Pretorius, 1998).

He, acting according to his religion, declined to shave his beard as a symbol/notification that he knew the Koran by heart, was refused admission to school in 1998. Although this was viewed mainly as an infringement of his right to freedom of religion (Pretorius, 1998) or the right to attend a school of his choice,⁴⁹ it was also an infringement of his right to freedom of expression. The growing of a beard was a symbolic act to express his fundamental protected right to religion, belief and opinion, and expression. In terms of section 16(1)(b) everyone has the right to freedom of expression, which includes the freedom to receive or impart information or ideas, as well as the freedom of artistic creativity (Section 16(1)(c)).

4.3 Freedom of expression in international human rights instruments

The importance of the right to freedom of expression as a pillar of democracy is clear when one sees that this right is protected in all the major international human rights instruments (see § 3.3). Specific references to the right to freedom of expression in international instruments are captured in Addendum T. The right to freedom of expression is addressed in such a way that in a democracy it tends toward

⁴⁸ Section 10 of the Constitution.

⁴⁹ Section 18 of the Constitution.

the absolute and is seen as the core of respect for all other human rights. Although the earliest international instruments mention the right to freedom of expression and view it as a core right, they do not indicate the spectrum of expression that it involves. In this way the UDHR has no inherent limitation to freedom of expression in terms of section 19. It provides for opinions to be held without interference and for the recital of and imparting of ideas through any media, regardless of “frontiers”. The more modern instruments, e.g. ICESCR, (1966), expand the idea that freedom of expression also includes artistic and creative or symbolic expression.

Freedom of expression, opinion and information are also protected in article 19 of the UDHR of 1948, which is a clear indication that freedom of expression is a fundamental right (Türk & Joinet, 1999).

The following is stated in the ICCPR:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in printing, in the form of art, or through other media of his choice ("International Covenant on Civil and Political Rights", 1976, article 19(2)).

This right is basically the same as the protection of the right to freedom of expression as protected under article 19 of the UDHR and it also tends toward an absolute right. It however, reaches more widely than the UDHR by stating that this right concerns not only oral (verbal) or written expression, but that it includes printed media as well as creativity and artistic expression. It adds to the protection of this right as provided in article 19(1) and 19(2), and contains an inherent limitation in article 19(3), which is not found in the UDHR. Although none of the earlier covenants and declarations included inherent limitations to the right to freedom of expression the ICCPR states the inherent limitation:

- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals ("International Covenant on Civil and Political Rights", 1976, article 19(3)).

In other words, in terms of article 19(3)(a) of the ICCPR the right to freedom of expression can be limited if any other right of a person is violated in the process (see § 3.4.2.1). Furthermore, in terms of article 19(3)(b) of the ICCPR it can also be limited in order to protect the national security, public order, public health or morals. It is clear, judging from these inherent limitations, that the right is balanced by responsibilities. In other words, when exercising the right to freedom of expression, people have to remember to abide by their responsibilities, which are reciprocal to their right.

4.4 LIMITING THE RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression does not mean that all people have the right to say anything, at any time or in any place (Suttner, 1990). As freedom of expression is very personal, it holds the possibility of offending someone (Alston, 2002). If learners engaged in debating at school have opposite views

on a topic, it is likely that they may offend one another. This indicates the dilemma in regard to balancing the rights among minors. I shall now examine international law for further guidance.

4.4.1 International law

Although the fundamental right to freedom of expression is protected by its entrenchment in bills of rights internationally and tends to be an absolute right, which is a core right in a democracy (see § 4.2.1), it is not absolute and can be limited (see § 3.4). This is indicated in article 11 of the French Declaration of 1789 ("Declaration of the Rights of Man and of the Citizen", 1789), viz. that an individual must accept responsibility for his freedom of expression if he abuses it. In a democracy, reasonable restrictions on freedom of expression are acceptable in terms of time, place and manner (Marcus, 1994). Clearly, free political debate, which is necessary to enable people to make informed choices, is different from the explicit portrayal of sexual intimacy, which could be restricted in terms of time, place and manner.

The United Nations Convention on the Rights of the Child (CRC) ("CRC", 1990) has an inherent limitation on the right to freedom of expression in terms of article 13(2), i.e. the law should provide restrictions and the rights of others may not be violated. Freedom of expression can be limited for the protection of the national security or public order, or of public health or morals. Article 14(2) of the CRC protects the right of parents to provide direction to their children in the exercise of their right of thought, conscience and religion. Section 17(e) of the CRC places an imperative on government to protect children from information and material that could harm their development. Not all the variables are clearly defined; consequently it is difficult to know for certain when the right to freedom of expression should be limited or when it becomes a violation. The issue is further complicated by the fact that concepts such as morals, harmful information, etc. are debatable.

The Constitution indicates clearly that all rights (also the right to freedom of expression) can be limited or balanced by additional rights of other legal subjects.⁵⁰ This is in keeping with the view of the Honourable Judge President Strydom of the High Court of Namibia:

Sometimes sight is lost of the fact that freedom of speech, freedom of the press, etc., are not without certain restrictions, and that the exercise thereof to the detriment of the rights of others is not sanctioned by the constitution (Wood, 2001, p. 143).

4.4.2 The USA

The fact that the Constitution of the USA has no limitation clause has made this area vague. Courts took two arduous centuries to interpret the right and to develop legal principles to limit it. Judge Cardozo pointed out that freedom of expression in the USA is a pre-eminent right in its society, viz. "it is the matrix, the indispensable condition of nearly every other form of freedom" ("Palko", 1937, at 327). Alston (2002, p. 162) agrees and says that although USA courts tried to establish limitations, the fact that some of them were "inconsistent and indifferent to school authorities, appears to be a major reason" for the inconsistency.

⁵⁰ Section 36 of the Constitution.

The *Tinker v. Des Moines Independent School District* 393 U.S. 503 (1969) principle ("Tinker", 1969), the "material and substantive disruption" (see § 5.2.12), which holds that any right to freedom of expression can be limited if it causes substantial disruption to the educational process and/or if the exercising of the right infringes upon the rights of others, remains the basic rule. USA case law, however, has produced differences and even contradictions in interpreting the limitation of the right to freedom of expression, as the right has to be balanced with other legislation. The USA landmark decisions and other case law that have given momentum to the interpretation of freedom of expression will be examined in § 5.2.

While court cases before *Tinker* ("Tinker", 1969) addressed only pure speech (verbal) issues, *Tinker* ("Tinker", 1969) heralded a new era of symbolic speech. *Hazelwood School District v. Kuhlmeier* 484 U.S. 260 (1988) ("Hazelwood", 1988) shifted the focus again, giving school authorities the right to limit school-sponsored newspapers if they did not support the school's educational purpose (see § 5.2.18). *Bethel School District No 403 v. Fraser* 478 U.S. 675 (1986) ("Fraser", 1986) also gave school authorities more flexibility in limiting learners' right to freedom of expression if it was not in keeping with the educational mission of the school (see § 5.2.16).

USA case law developed the following tests to standardise the limitation of freedom of expression.

4.4.2.1 USA tests to limit the right to freedom of expression

As the USA has no limitation clauses, courts have developed various tests in order to establish when and if the right to freedom of expression can be limited. One of these tests is called "the least restrictive means" test and holds that the proposed limitation should be rejected in favour of less restrictive means to achieve the same end result.

Another principle established by the court in *Gitlow v. New York* 268 U.S. 652 (1925) ("Gitlow", 1925, at 667) is that authorities "may punish those who abuse freedom of expression by utterances inimical to the public welfare, tending to corrupt public morals, incite or disturb the public peace". Judge Holmes established another principle, viz. the "clear and present danger" rule in *Schenk v. United States* 249 U.S. 47 (1919) ("Schenk", 1919, at 52), stating that one cannot shout "fire" falsely in a crowded cinema. This means that freedom of expression may pose a threat to the extent that the government has the right to prevent it or to intervene to ensure that no damage occurs. The vagueness of this principle enables government to limit (or even violate) the right to freedom of expression. One's deeds have consequences and one remains responsible for them.

Another test is called the "fighting words" test and applies to words which contain "an emotional message and can be incitement to unthinking, immediate, violent action" (Alston, 2002, p. 119). In another test, related to "time, manner and place restrictions", the expression would be viewed as being inappropriate if uttered in a certain way at a specific place at a certain time.

The “ad hoc balancing test” too, is very vague and subjective as it suggests that the court should balance the individual and social interest in freedom of expression against the social interest of the freedom of expression. The best principle for limiting freedom of expression is one that would permit the maximum freedom of expression necessary for peaceful change, and not for the purpose of violent or unconstitutional change. This “golden rule” can be applied as freedom of expression tends to be absolute and is a prerequisite in a democracy (see § 4.2.1).

In the USA the “Smith Act of 1940” (“Alien Registration Act, Act 18 USC”, 1940; Türk & Joinet, 1999)⁵¹ used in *Dervis v. United States* 341 U.S. 494 (1951) (“Dervis”, 1951), states that the advocacy of the desirability of overthrowing the government by force is punishable by law because it amounts to hate speech. The organising of the Communist Party and staff members to overthrow the government by force created a “clear and present danger”, thus sufficient reason to limit freedom of expression. In 1957 the focus of this principle was changed slightly in *Yates v. United States* 345 U.S. 298 (1957) (“Yates”, 1957), i.e. the right to freedom of expression can be limited only if the advocacy urges people “to do something now or in the future, rather than merely to believe in something” (“Yates”, 1957, at 325). It implies that freedom of expression can be limited if it involves hate speech, incites, invades the rights of others or poses a threat to society. The question arises as to where the division between expression and incitement lies, as Judge Holmes argued in *Gitlow* (“Gitlow”, 1925, at 673):

Every idea is an incitement. It offers itself for belief and if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and incitement, in the narrower sense, is the speaker’s enthusiasm for the result. Eloquence may set fire to reason.

The quotation explains how difficult it is to discuss freedom of expression issues within clear, static boundaries.

The courts’ attempt to determine how to balance the right to freedom of expression in schools led to court decisions that at times contradicted one another (Alexander & Alexander, 1992). The literature assumes that freedom of expression can be limited by applying the “material and substantive disruption” test, which was determined primarily in the *Tinker* case (“Tinker”, 1969). Another variable that requires attention here is the notion of legal obscenity through vulgar, indecent or offensive expression. It needs to be acknowledged that the right to freedom of expression is a constitutionally protected and guaranteed human right, which tends toward the absolute and is the core right in a democracy (see § 4.2.1). Yet, no right is absolute and may be limited (see § 3.4). Freedom of expression can be limited if the expression is legally obscene, as it would constitute breaking the law and violating the fundamental human rights of others (“Roth”, 1957). It is therefore necessary to define the term *legally obscene*.

⁵¹ The name “Smith Act” derives from its sponsor, Congressman Howard W Smith of Virginia.

Not all “dirty” words and pictures are legally obscene. Something is legally obscene if, among other things, it is “patently offensive, appeals to the prurient interest, and, taken as a whole, lacks serious literary, artistic, political or scientific value” (Martinson, 1998, p. 348). The manifestation of freedom of expression in a vulgar, indecent or offensive manner is a dilemma to the courts. It is important to note that the three descriptive terms are not synonymous with the expression “legally obscene”. What might be vulgar, indecent or offensive to one person is acceptable to another. The dilemma increases when learners are involved as they are minors who lack *iudicium* (see § 5.1 and 4.2.3.1). Furthermore, since schools have an educational purpose to achieve, they guide and lead learners to self fulfilment and educate them for citizenship (see § 4.2.1). The educational purpose cannot be achieved without being underpinned by a value system, which is adhered to by educators and authorities. Such a value system cannot be developed and enhanced in a school which tolerates lewd, indecent or offensive expression. This principle was established in the *Hazelwood* case by Judge White: “A school need not tolerate student speech that is inconsistent with its basic educational mission ... even though the government could not censor similar speech outside the school” (“Hazelwood”, 1988, at 567) (see § 5.2.18). One could further argue that since the educational purpose of primary and high schools differ, variables such as age would influence the limitation of the right to freedom of expression (Zirkel, 2003).

4.4.3 South Africa

Before 1994 various laws were promulgated in South Africa to ensure that freedom of expression was limited, which actually amounted to a violation of the right to freedom of expression. Freedom of expression is limited in South Africa to protect the reputations of others and in the interests of public health, and also in the interests of internal security and public morality (Dugard, 1978). These limitations can be applied only if legally correct and tested by the Constitution. Two legally correct ways to limit the right to freedom of expression exist in South Africa.

4.4.3.1 The limitation clause

Like all other rights, the right to freedom of expression can be limited by means of the limitation clause⁵² in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (see § 3.4.2.1). If exercising this right infringes upon the right(s) of other citizens, the right can be limited in cases where expression would violate someone’s fundamental right, e.g. the right to human dignity.⁵³ One could thus argue that the inherent limitation in section 16(2) of the Constitution is excessive, as it could be limited by means of section 36 of the Constitution. The existence of section 16(2) of the Constitution, however, emphasises the value system that underpins the Constitution, and which must be applied when human rights are interpreted or limited⁵⁴ (see § 4.4.3.2).

⁵² Section 36 of the Constitution.

⁵³ Section 10 of the Constitution.

⁵⁴ Sections 1 and 7 of the Constitution.

The right to freedom of expression is also viewed by South African courts as central to a constitutional democracy to the extent to which it supports other rights, as stated by Judge O'Regan:

... freedom of expression lies in one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (s15), the right to dignity (s10), as well as the right to freedom of association (s18), the right to vote and to stand for public office (s19) and the right to assembly (s17). The rights taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinion. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where these views are controversial ("South African National Defence Force Union v. Minister of Defence and Another", 1999, at 8).

The outcome of disputes regarding the guarantee of freedom of expression will depend on the value the Constitutional Court places on freedom of expression (Marcus, 1994). This right needs to be balanced by all the other rights.

As is the case in the USA, South Africans also view the right to freedom of expression as fundamental to their constitutional democracy. South Africans, however, do not always view this right as the pre-eminent right in their Bill of Rights. As stated by Kriegler in *S v. Mamabolo 2001 (3) SA 409*:

With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims an unequivocal and sweeping commandment; section 16(1) the corresponding provision in our Constitution; is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection. Moreover, the Constitution, in its opening statement, and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law ("Mamabolo", 2001, at 41).

I disagree with this opinion as it is clear from later judgements that the right to freedom of expression is indeed pre-eminent, also in South Africa ("South African National Defence Force Union v. Minister of Defence and Another", 1999). However, the principle, stated by Judge Kriegler, that even the right to freedom of expression is underpinned by the values of dignity, equity and freedom, is of vital importance. In other words, although the right to freedom of expression is pre-eminent in a democracy, it is underpinned by a value system (as are all other rights). Therefore the value system balances the right to freedom of expression with all the other rights entrenched in the Bill of Rights.

When two rights are in conflict with one another they should be balanced in terms of section 36 of the Constitution. According to Rautenbach and Malherbe (1999, p. 345), rights can be limited "under specific circumstances and in a particular way for the protection of some public interests or the rights of others". Problems in regard to the right to freedom of expression usually arise when the rights of one person conflict with the rights of another and the rights should then be balanced. The right to freedom of expression can also be limited by means of its inherent qualifiers.

4.4.3.2 Inherent limitation

Section 16(2) poses an inherent limitation to the provision of the right to freedom of expression in section 16(1). Judge Langa held:

Section 16(2) ... defines the boundary beyond which the right to freedom of expression does not extend. In that sense the subsection is definitional. Implicit in its provisions, is an acknowledgement that certain expression does not deserve constitutional protection because, among others, it has the potential to impact adversely on the dignity of others and cause harm. The SA Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect ("Islamic Unity Convention", 2002, at 32).

Therefore the inherent limitation in terms of section 16(2) of the Constitution to the right to freedom of expression⁵⁵ is founded on the values that underpin the South African democracy.

The right to freedom of expression is inherently limited in terms of the Constitution (see § 3.4.3):

- 16(2) The right in subsection (1) does not extend to
- (a) propaganda for war;
 - (b) incitement of imminent violence;
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. ("Constitution of the Republic of South Africa", 1996, section 16(2)).

In terms of section 16(2) of the Constitution the right to freedom of expression is limited the moment it is used for war propaganda;⁵⁶ when it amounts to incitement of imminent violence,⁵⁷ when it advocates hate that constitutes incitement to cause harm.⁵⁸ In terms of section 16(2)(c) hate speech is defined as advocacy of hatred that is based on race, ethnicity, gender or religion, and constitutes incitement to cause harm. Judge Cary states:

hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill will and malevolence in another. Clearly an expression must go a long way before it qualifies ... ("Andrews", 1990, at 211).

The term "incitement to cause harm" refers to more than only physical harm ("Islamic Unity Convention", 2002, at 32-33). Therefore if one's dignity is harmed (violated), the expression is, according to section 16(2)(c) and ("Mamabolo", 2001, at 41), illegal. This is described in the Canadian *Keegstra* case:

It is indisputable that the emotional damage caused by words may be of grave psychological and social consequences. In the context of sexual harassment, for example, words can in themselves constitute harassment ("Keegstra", 1990, at 23).

As hate speech is a violation of other rights, e.g. human dignity⁵⁹ and equality,⁶⁰ freedom of expression can definitely be limited if it amounts to hate speech (see § 4.2.4). This was also determined in *R v. Keegstra 3 SCR 697 (1990)* ("Keegstra", 1990). The inherent limitation of Section 16(2) of the Constitution is based on article 20 of the ICCPR, which follows on article 19 which protects freedom of expression. According to article 20:

⁵⁵ Section 16(1) of the Constitution.

⁵⁶ Section 16(2)(a) of the Constitution.

⁵⁷ Section 16(2)(b) of the Constitution.

⁵⁸ Section 16(2)(c) of the Constitution.

⁵⁹ Section 10 of the Constitution.

⁶⁰ Section 9 of the Constitution.

Any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law ("International Covenant on Civil and Political Rights", 1976, article 20).

Govender, Botha and Manamela of the South African Human Rights Commission point out the difference between article 19 of the ICCPR and section 16(2)(c) of the Constitution ("The Freedom Front v. The South African Human Rights Commission", 2003 p. 3). In terms of article 19 of ICCPR "any restriction on the freedom of expression, including hate speech, must be provided for by law and be necessary for the objectives listed in article 19(3)(a) and (b)" ("International Covenant on Civil and Political Rights", 1976, article 19). In section 16(2)(c) of the Constitution, however, hate speech is deliberately excluded from the protected speech in section 16(1) of the Constitution. To conclude, if expression is deemed to be hate speech under the Constitution, government needs no further justification to prohibit such speech.

It is important to note that section 16(2)(c) of the Constitution distinguishes between expression that offends and expression that harms. The first is not necessarily limited in terms of 16(2)(c) of the Constitution, while the latter is. One needs to differentiate between "offend" and "harm". Nasty utterances, like offensive words that one would prefer not to hear, differ from words that have the intention to cause or advocate harm. Govender *et al.* ("The Freedom Front v. The South African Human Rights Commission", 2003) argue that if the expression advocating hatred is directed at minorities or vulnerable groups in society, there is a chance that they will be harmed by the advocacy of hatred. This principle was anchored by the court in *Mamabolo*: "... the offending conduct, viewed contextually, really was likely to damage the administration of justice" ("Mamabolo", 2001, at 50).

In other words, it is important to balance different rights. When interpreting section 16(2)(c) of the Constitution one should remember that the protection of freedom of expression is the norm.⁶¹ If 16(2)(c) of the Constitution is interpreted too widely, expression that is of vital importance to the advancement of democracy may be viewed as hate speech "because our society is still in respect of significant social issues, divided on racial lines ... [t]he focus must be on whether the expression itself causes or is likely to cause harm, and not on the subjective intention of the person articulating it" ("The Freedom Front v. The South African Human Rights Commission", 2003, p. 19). To conclude, there must be likelihood that the expression could cause harm before it can be deemed to be hate speech.

The moment one expresses an opinion that constitutes hate speech or defamation, one's right to freedom of expression is inherently limited in terms of section 16(2) of the Constitution.

Other concepts that can be listed under this inherent limitation⁶² of the right to freedom of expression⁶³ and require clarification, are censorship, defamation, obscenity, contempt of court, state security and commercial speech (advertisements).

⁶¹ Section 16(1) of the Constitution.

⁶² Section 16(2) of the Constitution.

Before 1996, the Publications Act ("Publications Act, Act 42", 1974) was the censorship tool in South Africa. It led to the banning of numerous publications and films. Currently, constitutional rights are used as guideline in censorship issues. The application of the Publications Act substantively violated the right to freedom of expression, but since this Act is no longer in use, less censorship is applied.

- **Defamation**

The term "defamation" needs to be defined, since someone can be accused of defamation only if s/he uses offending expressions in public and when there is a link between the harming of the aggrieved person's good name and the offending material. The expression should lead to an insult or lowering of the esteem of the plaintiff's good name in the presence of others. Furthermore, there must be an infringement of the aggrieved person's right to his/her good name.

To summarise, according to legislation there are certain requirements that have to be met in order to successfully claim defamation, viz.

- an act by the defendant;
- an act causing or tending to cause harm to the plaintiff's good name;
- the act must be wrongful; and
- the act must be published or expressed.

The right to freedom of expression can be limited because of defamation only if there is proof that the expression was expressed with actual malice, in the sense that it was published or expressed with knowledge of its falsehood or reckless disregard as to whether or not it was true (Marcus, 1994).

- **Obscenity**

"Obscenity" was defined by the Indecent or Obscene Photographic Matter Act ("Obscene Photographic Matter Act, Act 37", 1967) as including photographic matter depicting, *inter alia*, sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature. Also, this broad definition would not be valid according to the human rights that are now entrenched in the Constitution as some of these criteria would constitute unfair discrimination in terms of section 9 of the Constitution (see § 4.4.2.1 where "legally obscene" is defined).

- **Contempt of court**

In *S v. van Niekerk 1972 (3) SA 711* ("S v. Van Niekerk", 1972, at 724) the issue at stake was whether the statement or document at issue tended to prejudice or interfere with the administration of justice in a pending proceeding. The USA courts determined that there must be a "clear and present danger" to

⁶³ Section 16(1) of the Constitution.

the administration of justice before speech can be curtailed. In *Bridges v. California* 314 U.S. 252 (1941) the Court held that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished” (“Bridges”, 1941, at 263). Currently, in South Africa, with the entrenched right to a fair trial and just administrative action,⁶⁴ contempt of the court will be balanced against these human rights.

- **State security**

One of the greatest violations of human rights in the pre-1994 South Africa was violation of political protest and dissent in the name of the security of the state (Marcus, 1994).

In the USA Judge Holmes determined the principle in *Schenk*:

The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree (“Schenk”, 1919, at 52).

He also held in *Abrams* (“Abrams”, 1919, at 628) that freedom of expression could be limited only when there was “present danger of immediate evil or intent to bring it about ...”. In the “new” South Africa, limitations of the right to freedom of expression are judged according to the advocacy of their political agendas (Marcus, 1994).

- **Commercial speech/advertisements**

Commercial advertisements can be limited (right to freedom of expression) if they are balanced against the rights of others. One may not disparage other products or provide wrong information intentionally. The most important requirement for an advertisement is that it must convey the truth. Other requirements are that it must be concise and attract attention.

4.4.3.3 Conclusion on limitations

These boundaries or limitations are set by the right itself to account for the value system of South African society (Adams, 1997). For example, although one has the right to speak one’s mind in terms of section 16(1) of the Constitution, one’s expression is limited in terms of section 16(2) of the Constitution or in concurrence with the value system of the Constitution and South African society,⁶⁵ viz. which are human dignity, equality and freedom. The right to freedom of expression should be limited like any other fundamental right by applying the limitation clause,⁶⁶ otherwise there will always be the risk that someone will abuse the right (Van der Westhuizen, 1994).

⁶⁴ Section 33 of the Constitution.

⁶⁵ Section 7 and section 36 of the Constitution.

⁶⁶ Section 36 of the Constitution.

The right to freedom of expression in section 16(2) of the Constitution has an inherent limitation which, together with the limitation clause, gives courts in South Africa a clear indication of what is allowed or not allowed under the protection of the right to freedom of expression.

4.5 THE RIGHT TO FREEDOM OF EXPRESSION IN SCHOOLS

Since the right to freedom of expression is a core right in a democracy (see § 4.2.1) it is important in schools, where the youth (learners) are guided to self fulfilment and adulthood to fulfil their societal obligations (see § 4.2.1). It is in schools where learners should be trained in regard to exercising the right to freedom of expression in a democracy without infringing other persons' rights. It is therefore alarming that John and Knight (2005) found, in an American survey of high school learners, that the biggest threat to the liberty of America does not lie in the success of liberty abroad, but in the perceptions and attitudes of the next generation. In a survey 83% of American learners indicated that people should be free to express unpopular opinions. The fact that only 51% of learners agree that newspapers should be free to publish without government approval is alarming, as this perception implies a threat to the right to freedom of expression in that learners believe that government has an automatic right to censor what is published. This perception contradicts the values and principles of a free and fair democratic system. Most worrying, however, is the fact that only 27% of learners think about their right to freedom of expression. Surely, if something is important it will be a contentious issue, since according to the old adage "out of the fullness of the heart, the mouth speaketh". The fact that only a quarter of learners think about it is an indication that they do not realise the importance of their right to freedom of expression in a democracy. They could also feel that thinking about it is not worthwhile, because they are required to obey authority without questioning rules. It is vital for schools to guide learners to be critical, responsible citizens in a democracy. Therefore educators should choose study material in order to stimulate the market-place of ideas (see § 4.2.1.1).

4.5.1 Educators' right to choose study material

Although the focus of this thesis is the right to freedom of expression of learners, I also need to explore the educators' right to freedom of expression regarding choice of study material, as this has a direct influence on the learners' right to freedom of expression. The court determined in the *Virginia Pharmacy* case ("Virginia Pharmacy", 1976, at 756) that the right to express implies the reciprocal right freedom to receive information. In terms of section 16(1)(b) of the Constitution the right to freedom of expression includes freedom to receive information or ideas. With the *Martin* decision the court defined the parameters of freedom of expression as those of distributor of literature on one hand, to the right to receive information or literature on the other. The court emphasised social values in the dissemination of knowledge and ideas ("Martin", 1943, at 145). This decision was based on the characteristics of freedom of expression as part of the market-place of ideas in order to enhance individual development and participation in a democracy. In *Mailloux v. Kiley 323 D. Mass 1387 (1871)* ("Mailloux", 1971) the court held that the educator could not be suspended for using a vulgar word on the board while teaching English grade 11 learners about taboo topics. The controversial method was used in good faith and developed learners' skills in developing as critical thinkers. The educator

therefore had a substantive right to choose the best method and pedagogy to teach the lesson effectively (Dvorak & Dilts, 1992).

Conflict may arise between educators who want to select their own teaching material and authorities. Courts that are sensitive to educators' needs, generally attempt to balance societal interest in an educator's freedom with the interest of the school, thereby maintaining the order and efficiency necessary for learning. Such courts will limit the educator's right to choose study material only if order and efficiency necessary for learning are not in doubt. Judge Stewart noted, in *Epperson v. Arkansas* 393 U.S. 97 (1968) ("Epperson", 1968, at 116) that the right to establish a public school curriculum does not include the power to punish educators for classroom activities related to an 'entire system of respected human thought'. In *Mailloux* ("Mailloux", 1971, at 1242) the court determined criteria to be used when deciding on the use of controversial teaching methods, namely the:

- age and sophistication of the learners;
- closeness of the relationship between the specific technique used and some conceded by valid educational objectives; and
- context and manner of prevention.

Only methods that are dysfunctional and disrupt learning are likely to be without protection, e.g. in *Adhern v. Board of Education of School District of Grand Island* 456 8th Cr (1972) ("Adhern", 1972) an economics educator was dismissed for allowing learners to make decisions about curriculum, tests and classroom management.

Educators have a duty to develop learners as critical thinkers to their full capacity in a democratic society. Therefore educators need to speak out, even against school authorities, if the aim is to enhance the educational purpose. Hence the fact that in *Pickering v. Board of Education of Township High School District* 391 U.S. 563 (1968) ("Pickering", 1968), the court held that educators may write a letter to a newspaper to disagree with the school board, since educators have a duty to speak out to the benefit of the learners as long as it does not interfere with their classroom duties or the regular operation of the school. Educators should have the freedom to choose their study material to ensure that this goal will be realised. Educators need to prove the important nexus between their subject matter and their methods (Dvorak & Dilts, 1992).

Gordon (1984) states that education also has an inculcating function. Continued existence of a society depends on transmission of common values and beliefs from one generation to the next. Education becomes the tool to educate in regard to the values that are necessary for the survival of any human society. The choice of curriculum reflects values in a society. The hidden curriculum reflects the value system of a society even more so, as James Rachels (1982, p. 79) states:

Children learn values in school even when teachers do not specifically set out to teach them. Teachers naturally insist that learners do their own work, without cheating, and so honesty is learned. Hard work is rewarded with good grades, while laziness results in poor marks, and so industriousness is encouraged.

The right to freedom of expression of the educator to choose material is important in regard to learners as this has a direct influence on their right to freedom of expression. Choice of learning material exposes them to material that they do not want to receive or keeps them from receiving material that they want.⁶⁷

As learners' freedom to symbolic and artistic freedom of expression and not the written or oral word forms the focus of my research, relevant case law will be scrutinised in § 5.2. Sachs (1992) indicates the importance of the right to creative freedom of expression when he states that it means that everyone has the right to be a creator and to enjoy the creations of others. He emphasises the importance of not violating this right or not placing too much emphasis on censorship, as it constitutes a violation of this right and could result in individuals not developing their full potential.

I shall now discuss some of the issues related to the right to symbolic or artistic freedom of expression that need to be addressed at schools.

4.5.2 Issues related to the right to symbolic and artistic freedom of expression

It is necessary to examine these issues which sometimes result in disciplinary measures (Anon, 1998b; "Antonie", 2002; Broughton, 2005) as school authorities are not always sure of how to manage them practically, and learners uncertain of the implication of the right to freedom of symbolic or artistic expression.

The use of discipline as a tool at school in order to maintain a culture conducive to education is sometimes not balanced with learners' rights or the value system that underpins the South African Constitution and can be ridiculous or infringe the rights of learners. On the other hand, learners can also absolutise their rights and in the process infringe the rights of other stakeholders. I shall now turn to some of the issues related to the right to freedom of expression in schools.

4.5.2.1 Hairstyles

Alston (2002) indicates that hairstyles in American schools have led to several court cases. Learners won some of the cases and some were won by schools. The failure of American case law to uphold a fixed interpretation regarding hairstyles in schools has made the issue controversial. In some cases the court ruled in favour of the learners, stating that dress codes were invalid, e.g. the *Stull v. School of the Western Junior-Senior High School 450 3rd Cir 339 (1972)* case ("Stull", 1972) because they would cause no disruption or disturbance at school and formed part of the development of an own individuality. In others, e.g. *Zeller v. Donegal School District Board of Education 517 3rd Cir 600 (1975)* ("Zeller", 1975) the court ruled in favour of the school, claiming that hairstyle is a private school matter and that legislation should not intrude in this area. In *Zeller* ("Zeller", 1975) the boy lost the claim because he had been excluded from the school's soccer team for non-compliance with the prescribed

⁶⁷ Section 16(1)(b) of the Constitution.

hair length. The court held that this was a school matter in regard to which the court should not intervene. This verdict is problematic since courts actually supply an entrenched constitutional right for the school to interpret as the school sees fit, instead of interpreting it according to legal principles. In other words, courts need to decide on human rights issues that are protected in the constitution as no subordinate law (school rule) may contradict the constitution.

Alston (2002) points out that although hairstyles change with fashion trends, schools have always been conservative and have shown a lack of flexibility in regard to learners' hairstyles. Courts in the USA have been reluctant to address hairstyle issues under the right to freedom of expression (Alston, 2002; Levin, 1990). Certain hairstyles, however, cannot be banned just because the authorities dislike them. In other words, if a specific hairstyle is unlikely to lead to disruption in the school, it may not be banned fairly, as stated in *Pickering* ("Pickering", 1968).

The realisation that hairstyle is not merely an issue of changing fashion or rebellion, makes it more contentious. Cultural and religious customs certainly also influence hairstyles. In *New Rider v. Board of Education, Pawnee County, Oklahoma 414 U.S. 1097 (1973)* ("New Rider", 1973) the US Supreme Court refused to hear the case brought before them by Pawnee Indians who wanted to wear their hair in the traditional way, to convey the message that they were proud to be Indians, i.e. parted in the middle with a long braid on each side. They were suspended from school for violating the school hair length regulation. The court motivated its stance by stating that a school system cannot cater for different groups and still remain one organisation. When the *Tinker* principle is applied to test the situation, learners' right to freedom of expression does not end once they enter the school grounds, and they can therefore wear black armbands as long as the operation of the school is not substantially disrupted. In this case, however, school officials felt that the hairstyle would be disruptive to the school climate and interfere with the integrated school system, different groups and the single organisation. The question as to whether the right to association and to protect their own culture was not denied by the court needs to be answered. The South African courts are guided by the values that underpin democracy. Therefore, although schools may have a dress code, punishment for breaking the dress code should not be as harsh as suspension, especially if the school was not disrupted by the wearing of the hairstyle.

In *Oloff v. East Side Union High School District 404 U.S. 1042 (1972)* ("Oloff", 1972) the court held that decisions about hairstyles are a family matter. This decision indicates that cultural attire or customs have greater autonomy than schools' codes of conduct or dress codes. In another case, the *Hatch v. Goerke 502 10th Cir 1189 (1974)* case ("Hatch", 1974), Buddy, another Indian boy, was expelled because of his hairstyle. The court, in contrast with the ruling in the *Oloff* case, dismissed the appeal, arguing that the parental right to raise children according to their own religious, cultural and moral values had not been violated by the expulsion.

Issues of hairstyle and hair length either involve culture-related customs or the expression of individual personality. Alston (2002) mentions the example of a cultural custom among Xhosas to shave their hair as a sign of respect to a deceased relative. In 1998 a Xhosa male was almost suspended, as the school authorities believed that the shaving of his head was a sign of rebelliousness. Alston's study (2002) also suggests that school boys have been suspended because their hairstyles were regarded as improper, e.g. for being cut into a "step", shaved too short or styled in Rastafarian dreadlocks. Additional issues are at stake, for example, the colour of ribbons, wearing of braids and the colouring of hair. Only one similar case was decided in court in South Africa (see § 5.4.1).

The court argued in the *Antonie* case ("Antonie", 2002) that the growing of dreadlocks was prohibited by the school code of conduct, even if only hypothetically. Assessment of this prohibition in a rigid manner is in contrast with the values and principles set forth in the managerial Guidelines for Governing Bodies to consider when adopting a code of conduct for learners (RSA, 1998). Adequate recognition has therefore to be given to the offender's need to indulge in freedom of expression, which then cannot be seen as "serious misconduct". The school's defence was rejected by the court.

It seems from this case and other incidents, that school governing bodies and school managers are eager to manage schools and learners according to legislation, because it offers a clear guideline on how to manage schools (Van Vollenhoven & Glenn, 2004). Since this is still a vague area for school managers to implement, they easily forget the values which underpin the Constitution. Courts in South Africa, however, already operate within the parameters of the values that underpin democracy. The right to freedom of expression will thus be balanced (limited) when it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,⁶⁸ in a spirit of mutual respect, reconciliation and tolerance ("Antonie", 2002).

Hairstyle issues also extend to the shaving of facial hair, as illustrated by a critical incident involving Yusuf Bata, a Muslim teenager from Hoërskool Vorentoe in Johannesburg (Eshak, 1998; Pretorius, 1998). Acting according to his religion, Yusuf neglected to shave his beard to signify that he knew the Koran by heart. As a result he was refused admission to school in 1998. Although this was viewed mainly as an infringement of his right to freedom of religion or the right to attend a school of his choice⁶⁹ it could also be seen as an infringement of his right to freedom of expression (Pretorius, 1998). Growing a beard was, from his perspective, a symbolic act expressing his fundamental and protected right to religion, belief and opinion, and expression. In terms of section 16(1)(b) of the Constitution everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas.

According to Section 9 of the Constitution, everyone is equal before the law and may not, *inter alia*, be unfairly discriminated against on grounds of race, ethnic or social origin, religion, conscience and belief. The fact that Yusuf was denied admission merely because of his beard, i.e. part of his religious

⁶⁸ Section 36 of the Constitution.

⁶⁹ Section 18 of the Constitution.

expression, could constitute an infringement of his fundamental right to equality,⁷⁰ freedom of religion, belief and opinion,⁷¹ and freedom of expression.⁷² The issue was resolved out of court.

4.5.2.2 Dress codes

Learner dress code is another freedom of expression issue in schools. Can schools deny learners access to school if they wear traditional apparel after initiation rites? The issue here is who the learners should obey. Should they obey and respect the school rules or the authority of their culture as protected in the Bill of Rights? In such a situation all the parties are at a disadvantage. If schools would allow learners to express their traditions, there would be much less stress and tension. The literature suggests, in accordance with the *Tinker* principle, that the only reason to justify school dress codes would be if learners' apparel interfered with the learning process (Brunsma, 2004). In other words, in principle, dress codes amount to a violation or limitation (if there is a reason for their existence) of the right to freedom of expression.

- **Uniforms**

In raising the issue of school uniform Alston (2002) asks whether children can be denied entry to school for not adhering to the dress code because they want to express a view through their clothes, e.g. by wearing traditional, religious attire. Alston also believes it would be unfair to deny learners education because their parents cannot afford the prescribed school uniform.

I agree with Lane, Swartz, Richardson, and Van Berkum (1994); Lane, Richardson and Van Berkum (1996) and Alston (2002) that the mere fact that learners are obliged to wear a specific school uniform is essentially an infringement of their fundamental right to dress as they prefer. This compulsion is an intrusion on the private life of learners and devalues their individual freedom. One of the aims of individual learners' right to freedom of expression is to be developed to their fullest potential (see § 4.2.1.2). Disregarding the freedom of individuals, however, places a burden on their self-realisation. In countries where schools have no uniform, schools also have dress codes for various reasons. In regard to school uniform or dress code, one should determine whether limitations are justifiable. If a court should find dress codes unconstitutional, they are not viable and should be abolished.

In *Jones v. Day 136 So 906 (1921)* ("Jones", 1921) the court held that the school could not expect its learners to wear their school uniform when visiting public places five miles or further from school. The court held that this rule could apply only to learners who resided in the school hostel. Other learners could be required to wear school uniform only at school and on their way to and from school.

Alston (2002) points out that there is currently a tendency in the USA to promote the wearing of school uniform in order to eliminate the wearing of gang-related clothing. This tendency was supported by President Bill Clinton in his 1996 election campaign (Brunsma, 2004; Mitchell, 1996) and is also

⁷⁰ Section 9 of the Constitution.

⁷¹ Section 15 of the Constitution.

⁷² Section 16 of the Constitution.

motivated by the violence (often gang-related) in schools. Mary Hatwood Futrell, executive director of the National Education Association, believes school uniforms can “provide an element of safety” (Woodard, 1989, p. 15). The executive director of the National School Safety Centre, Ronald Stephens, echoes this statement: “In the wake of school shootings, communities and schools are much more willing to embrace uniforms, as well as a number of other strategies to enhance student safety” (White, 2000, p. 37).

In *Valentine v. Independent School District of Casey* 183 N.W. 438 (1921) (“Valentine”, 1921) the court held that the school could not withhold the graduation diplomas of learners who refused to wear the provided caps and gowns, as the wearing of the gowns and caps was not related to educational values.

A challenge in regard to school uniform or dress code is often related to religious practices and principles. In the *Mitchell v. McCall* 140 So.2d. 629 (1962) case (“Mitchell”, 1962) the father sued the school after refusing to allow his daughter to wear the prescribed physical education outfit. She was suspended for refusing to wear the “immodest dress” which purportedly offended her religious principles.

Alston (2002) indicates that the courts overturned the ban on the wearing of jeans (“Bannister”, 1971), but upheld the decision to prevent learners from wearing T-shirts emblazoned with defamatory slogans (“Bivens”, 1995; “Broussard”, 1991; “Gano”, 1987). In *Fowler v. Williamson* 448 W.D.N.C. 497 (1978) (“Fowler”, 1978) the court, however, held that the school had not violated the boy’s right to freedom of expression when he was forbidden to wear jeans to the graduation ceremony. The court also held in *Jeglin v. San Jacinto Unified School District No 2228* 827 CD Cal. 1459 (1993) (“Jeglin”, 1993) that the school could not prohibit the wearing of professional sport team clothes as there was no proof of gangs or violence connected to the clothes or the school.

In an attempt to summarise the USA case law on school dress codes, it is necessary to apply legal principles determined in case law over many years. From *Tinker* (“Tinker”, 1969), I deduce that the *Tinker* principle will allow learners to wear what they want to as long as the apparel does not materially and substantially interfere with the school routine or disrupt the school.

The *Hazelwood* principle states that freedom of expression may be limited to protect the mission of the public school and to ensure that the goal to educate learners is realised. Using the *Hazelwood* principle, one could argue that dress codes can be limited not only when material and substantial disruption is proved, but also if the mission of the public school and the education of learners are in jeopardy. This is in agreement with Brown’s summary of the issue that although uniforms and strict dress policy violate the right to freedom of expression, courts will judge in their favour if their absence or non-application can be linked to issues of health, safety and potential disturbance of the learning environment (Brown, 1998).

Using these principles, one can believe that the school administration in Richmond, Virginia, acted correctly by allowing a grade 8 learner to attend school after (wrongly) sending her home for arriving at school with pink hair and wearing a floor-length dress. The fact that she attended school like that posed no fear of disruption of the school or the mission of the public school sector and did not jeopardise the education of the other learners (Rasnic, 2001). Court cases concerning dress codes, e.g. in regard to hairstyle and attire, can thus only be won if it can be proved that such attire, etc. could lead to disruption or jeopardise the school in the fulfilment of its educational mission.

There are several advocates for and against the wearing of uniforms. The opinions summarised here have been adapted from Brunσμα (2004) in Table 4.1:

Table 4.1 Advocates for and against school uniform

Advocates for school uniform	Against school uniforms
Higher marks	Unconstitutional
Better behaviour	Violate freedom of speech
Increased self-esteem	Violate parents' rights to choose fashion for their children
School pride	Uniforms are a way of "charging" for public schooling
Sense of belonging	Educators must teach, not administer dress code policies
Provide safety	
Combat gang wear	
Equal competition over designer clothing	
Economic disparities	
Help learners focus on learning	
Decrease violence	

The wearing of school uniform is a very contentious issue. In South Africa compulsory school uniforms are confirmed in the Draft National Guidelines on School Uniforms (RSA, 2005). Yet the wearing of uniforms could be challenged in court, i.e. as to whether the policy is constitutionally justifiable. The long list of motivations for the wearing of school uniform makes it seem the correct policy to enforce. However, quantity does not always rule. One must always remember that the rule of law is the Constitution and that no school can apply rules that are contradictory to the Constitution. The fact that uniforms are an infringement of the right to freedom of expression cannot be denied. However, the right can be limited by all the arguments of the pro-school uniform advocates if it is possible to prove in a specific case that the "absence" of school uniform will lead to substantial disruption at school and the school cannot achieve its educational aim. Brunσμα's (2004) critical analysis on the empirical research on this topic led him to conclude that school uniform has no significant impact on the self-esteem or psychological coping of learners and does not contribute to understanding behavioural problems.

Freedom of religion is intertwined with freedom of expression, as the wearing of religious attire is a method of expression. The problem it poses to schools is how to balance the right to freedom of religious expression with the school's dress code. The wearing to school of a Muslim headscarf is currently a contentious issue worldwide and is addressed differently by the courts in various countries,

since certain values that underpin constitutions vary. Judgements should take this into account. There might therefore be a slight difference in applying or balancing this right among different countries. The KwaZulu-Natal Education Department recently concluded a negotiation process allowing Muslim girls to attend school in Muslim dress or school uniform, but not in combination. Table 4.2 indicates countries in which this issue has been addressed in courts, as well as views expressed:

Table 4.2 Court cases on headscarves *

Country	For or against	Legal principle
Belgium	Against headscarves	Equality and neutrality of state
Denmark	Against headscarves	Dress codes may ban headscarves
France	Against headscarves	Secularism is cornerstone of republican values
Germany	Against headscarves	Neutrality of the state
Russia	For headscarves	Part of civil liberties
Singapore	Against headscarves	To enhance racial harmony
South Africa	For headscarves	Human dignity and tolerance
Switzerland	Against headscarves	Religious neutrality
The Netherlands	For headscarves	Human dignity
Turkey	Against headscarves	Secularism is cornerstone of liberal democracy
UK	For headscarves	Human dignity

* Generated by Van Vollenhoven from (Anon, 2005b).

Some countries in which the headscarf issue has not yet given rise to legal debate are Austria, the Czech Republic, Egypt, Poland, Saudi Arabia, Slovakia, Spain and Sweden.

In South Africa, where school uniforms are prescribed traditionally, one would expect the Supreme Court to balance the learners' right to freedom of expression with the authority to compel and influence the wearing of school uniform. I believe that school dress codes violate learners' right to freedom of expression. The *Tinker* principle should be used as a guide, as it states that learners' right to freedom of expression can be limited only if it would substantially disrupt the school. Secondly, the inherent limitation as stated in section 16(2) of the Constitution is a solid indication of when this right can be limited and should be used by school authorities and courts.

The argument of advocates for school uniform has been disputed by several USA researchers (Brunsma, 2004). Uniform does not necessarily enhance school discipline, which is said to lead to higher grades, better behaviour, self esteem and school tradition (although this is the argument of the Draft National Guidelines on School Uniforms). In principle compulsory school uniform remains an infringement of the right to freedom of expression, as the way learners dress reflects who they are and this right is constitutionally protected. This right can, however, be balanced by other rights, e.g. safety. The wearing of school uniform can be justified, but if it is not justified, would constitute a violation of the right to freedom of expression, i.e. a school will need to prove legally that a learner's "private" clothes will substantially disrupt the school or pose a threat to any other learners' rights to motivate wearing of the prescribed school uniform. Furthermore, schools need to be able to motivate why school uniform should be legalised and how it will enhance the educational purpose of the school.

School uniform includes the outfits worn for physical training and sports (Alston, 2002). When deciding on an issue in regard to uniform culture, religion, traditions and socio-economic factors should be considered in balancing this right. As the wearing of school uniform is currently a very contentious issue in the USA, it seems that learners are more likely to win a court case on freedom of expression about clothes worn to schools, if the school does not have a clear dress code. Where regulations on the wearing of school uniforms have been instituted, courts are more likely to support the schools than the learner (Brunsma, 2004).

- **Jewellery**

Internationally the wearing of jewellery is not as serious an issue as the aforementioned aspects and is often related to religion (Alston, 2002). Some of the reasons for wearing jewellery are fashion-consciousness, cultural beliefs, religious beliefs, sexual orientation or physical attractiveness. The right of a religious group to wear jewellery to express their beliefs might be balanced against the right to freedom of religion and belief.

Only one American case has addressed this issue. The court upheld the ban on the wearing of earrings by boys in *Oleson v. Board of Education School District No 228 676 N.D. 111 820 (1987)* ("Oleson", 1987) in order to deter the influence of gangs. One may argue about the legitimacy of this ruling, but if tested against the *Tinker* principle, it will be upheld on condition that the disruption of the educational process can be proved.

As is the case with dress codes, the wearing of jewellery can either be a freedom of expression issue or can be viewed as the wearing of religious and cultural symbols. Alston (2002) indicates, however, that the wearing of some jewellery might pose a risk to learners' safety and that this would be a valid reason to limit this right to freedom of expression.

In light of the aforementioned the question arises as to whether the school may prohibit the wearing of certain types of earrings. A further question is whether schools should have a say regarding body piercing which will not lead to disruption in school and is also not a health risk to other learners. One can expect schools to be unable to legally limit this method of freedom of expression. Schools, claiming that boys may not wear earrings, but allow girls to do so, could be taken to court, as this would be an infringement of boys' right to equality on gender grounds.⁷³

- **Tattoos**

The issue of tattoos is more problematic than jewellery, as tattoos are basically permanent and cannot be removed. In a school-related court case in America a girl was ordered by the school authorities to remove the tattoo on her hand. The court decided in favour of the girl, because the case had been procedurally incorrectly addressed. Consequently no ruling was made on the right to freedom of expression. Based on the principles determined in court cases, my view is that the school has no

⁷³ Section 9(3) of the Constitution.

power to force a learner to try to erase a tattoo. A school will be successful only if it can prove that a tattoo would lead to disruption of the school, that the educational purpose would be at stake or that it would pose a threat to other learners' safety.

4.5.2.3 Artistic creativity

Artistic creativity is best defined by Heins, quoted by Alston (2002, p. 193):

[Artistic expression] should include books, movies, paintings, posters, sexy dancing, street theatre, graffiti, comics, television, music videos – anything produced by creative imagination, from Shakespeare to sitcoms, from opera to rock. Freedom of expression may mean we have to tolerate some art that is offensive, insulting, outrageous, or just plain bad. But it is a small price to pay for the liberty and diversity that form the foundation of a free society.

As is the case with other forms of freedom of expression, the issue at stake is that artistic creativity could be limited in schools to protect young minds, or if it causes disturbances at school or places a burden on the achievement of the aim and purpose of the school. International instruments indicate that everyone, also the child, has the right to seek, receive and impart information and ideas through any media.

Marcus and Spitz (1996) describe the inclusion in section 16 of the Constitution of the section on artistic creativity as a response to the South African history "of draconian censorship of the arts". Although this might be the case, the issue of respecting creative freedom of expression is new not only to South Africa, as references to creativity are also found in other international instruments, e.g. Article 19 of the ICCPR ("International Covenant on Civil and Political Rights", 1976) see § 3.3.3); Article 13(1) of the ACHR ("ACHR", 1978) see § 3.3.4) and Article 13 of the Convention on the Rights of the Child ("CRC", 1990), see § 3.3.10). Previous laws that infringed the right to freedom of expression have been replaced by the Constitution, e.g. the Obscene Photographic matter Act ("Indecent or Obscene Photographic Matter Act, Act 370", 1967) and the Publications Act ("Publications Act, Act 42", 1974).

The literature contains varying opinions on the terms "art" and "artistic creativity". Van der Westhuizen (1994) states that "artistic creativity" is a wider term than "art" and is fundamental to the individual's self-fulfilment. Art can be viewed as fine art and interpreted according to traditional standards while artistic creativity refers to the wider spectrum of art including photography, drama, music, dance, etc., in the sense of the expression of a view.

There have been no court cases in South Africa in this regard to date. Should such a case be heard in court, aspects to consider would include the Constitution, the learners' code of conduct, the Guidelines and the Employment of Educators Act ("The Employment of Educators Act, Act 76", 1998). It is not clear what the outcome will be. The outcome will, however, be influenced by balancing the different rights involved. Furthermore, the courts will need to determine where the highest priorities lie, i.e. the fundamental constitutional rights, such as freedom of expression or freedom of religion or the code of

conduct for learners of the school, which involves rights such as the right to association and to have an ethos and own identity, etc. It is not as easy and clear as it seems, because all the cases involve fundamental rights. All discussions, judgements and decisions in South Africa should be guided by the values that underpin the Constitution, the supreme law in the country.

- ***Fine art***

As fine art is a way of creative expression, there will always be a tension between the absolute right of the individual to freedom of expression and balancing these rights by way of law of general application, e.g. can a school limit a learner's right to freedom of artistic expression when a portfolio containing a nude study for which a co-learner of the opposite gender was the model, is submitted? The tension here will be between the right to freedom of expression on one hand, and the model's right to dignity and privacy on the other, as well as between these two rights on one hand and the school's educational mission on the other. The variable "age" and the school's educational purpose and mission play an important role in limiting the right to symbolic and artistic creativity (Zirkel, 2003).

- ***Photography***

A case involving a nude photograph of a learner should also be considered. The same arguments apply as described above.

- ***Music***

The same arguments already explained above will be relevant in the music class. Can the school limit learners' rights if they write and sing their own lyrics in the learning area, arts and culture if the words have a strongly sexual nature or promote the use of harmful substances?

- ***Drama***

May schools forbid the performance of a drama containing vulgar words? It is clear from the above-mentioned literature that the answer to this is not simple. Firstly, one has a right to freedom of creative expression. Secondly, this right can be limited by the inherent limitation in terms of section 16(2) of the Constitution. Thirdly, vulgar words do not necessarily constitute legally obscene language (see § 4.4.2.1). Furthermore, the right to freedom of expression also includes not listening to what one does not want to hear. This must of course be balanced with the right to receive all information and with the school's educational purpose and mission.

- ***Dance***

May schools limit a dance in the learning area, Arts and Culture, if the purpose is to convey particular feelings or moods and 'communicate ideas, thoughts and feelings through dance' if it happens to be sexually oriented or simulates sexual intercourse? Again, the same rights (as above) will be in tension and will need to be balanced.

4.5.3 Balancing the right to freedom of expression in schools

No right is absolute and may therefore be limited. Even the rights or freedom of children may be limited in order to save them and those around them from harm caused by themselves because of their lack of *iudicium* (see § 1.5 and 4.2.3.1). Article 3 of the CRC ("CRC", 1990) is in line with section 28(2) of the Constitution, stating that the best interest of the child is always of paramount importance ("Constitution of the Republic of South Africa", 1996). When balancing the rights of children one should be guided by the best interests of the child.

Article 13(2)(b) of the CRC states that freedom of expression may be limited for "the protection ... of public health and morals" ("CRC", 1990). A balance must be achieved between the legitimate interest of the learner and the duty of the school governing body to maintain proper order and discipline in the school. In other words, a learner's fundamental entrenched human right to freedom of expression is not absolute, but can be balanced or limited "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...",⁷⁴ as is the case with any other right of any person (even out of school). Under Section 8(1) of the South African Schools Act, all school governing bodies must adopt such a code of conduct for learners. Section 8(2) of the South African Schools Act holds that the aim of such a code of conduct should be to establish a "disciplined and purposeful school environment dedicated to the improvement and maintenance of the quality of the learning process" ("The South African Schools Act, Act 84", 1996). Schools need to be able to achieve an appropriate balance and censor or limit a learner's expression only in instances where the legitimate interest of the school's educational mission is at stake (Van Vollenhoven & Glenn, 2004), or where the fundamental rights of other stakeholders will be violated (Wood, 2001). Stager (1993) remarks that individual rights and responsibilities, as freedom of expression, are juxtaposed with institutional rights. In other words, although all persons, also learners, have a right to freedom of expression, an educational institution cannot allow learners to convey intimidating messages to other stakeholders. The balance lies in the conflict between the individual's right to freedom of expression and institutional responsibilities. School governing bodies should be pro-active in addressing the learners' right to freedom of expression as part of their school code of conduct and need to develop a separate policy in this regard.

The question should be asked when and how learners' right to freedom of expression could be limited. It seems that the Constitution of the USA has never protected learners' freedom of expression. The courts merely presumed that the school's policy or disciplinary action was valid and learners had the difficult burden of proving that the limitation was unreasonable. Alston (2002) points out that neither learners nor educators are certain about the acceptable boundaries to the right to freedom of symbolic and artistic expression. In the relatively new South Africa, with changing values and increased tolerance regarding previously unacceptable behaviour, e.g. accepting different cultures and religions, the courts need to offer guidance on these matters. The process of balancing fundamental rights with one another is intensified by the fact that all judgements or decisions must be made in accordance

⁷⁴ Section 36 of the Constitution.

with the value system that underpins the South African Constitution.⁷⁵ This process is further intensified by the fact that societies are not static, but change their value systems, as is exemplified by South Africa.

As no right is absolute, rights can also be limited in schools. Although learners do not shed their right to freedom of expression at the school gate ("Tinker", 1969, at 506), they do not share the same measure of protection of freedom of expression at school as adults do outside the school grounds (Brunsma, 2004). Basically, the right to freedom of expression can be limited in schools, if the expression leads to a material and substantive disruption in school operations, activities or the rights of others (Alexander & Alexander, 1992; Bray, 2000b). The smooth and disciplined running of a school to enhance education is a core function in a school. If freedom of expression leads to disruption at school, it can be limited. While schools educate young human beings into adulthood, they can limit the right to freedom of expression to further the aim of education. The right to freedom of religion can also be limited to ensure a safe environment, which also leads to another variable, i.e. to limit the right to freedom of expression, viz. age (Zirkel, 2003).

Although freedom of speech is recognised as a basic right because it is crucial both in a democracy and for the development of the individual (Clayton & Tomlinson, 2001; "Palko", 1937) "... total freedom of speech in the school situation is not feasible" (Joubert & Prinsloo, 2001, p. 64). Joubert and Prinsloo (2001) suggest that the right of learners to total freedom of speech be limited in the following circumstances, since the fundamental rights of others will be violated in all of them, viz. where:

- it will disturb the general order;
- vulgar language is used;
- it accuses falsely and maliciously; and/or
- it encourages another learner to behave in a disorderly manner.

I agree with this statement, but need to point out that vulgar language is not necessary legally incorrect, as only legally obscene words are not protected under the right to freedom of expression (see § 4.4.2.1). Schools therefore need to prove that the vulgar language has jeopardised their educational mission before they can legally limit it. One should also bear in mind that an expression cannot be limited merely because it is an unpopular expression ("Brown v. Louisiana", 1966; "Cox", 1969; "Edwards", 1963; "Garner", 1961; "Taylor", 1975; "Thornhill", 1940). When examining the limitation of the rights of learners, one needs to look at the code of conduct for learners, which has to be adopted by a school governing body in terms of Section 20(1)(d) of SASA. This code of conduct for learners must be adopted democratically by the school governing body after consultation with learners, parents and educators of the school.⁷⁶ In terms of section 8(2) of SASA, the aim of the code of conduct for learners is the establishment of a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process. If this process is

⁷⁵ Section 1 and 7(2) of the Constitution.

⁷⁶ Section 8(1) of South African Schools Act.

dealt with correctly, the code of conduct for learners becomes a subordinate legal document with which learners must comply. If learners do not comply, they will be breaking the law, which could lead to disciplinary action and punishment. If learners are punished, their rights or opportunities are limited.

The right to freedom of expression is further limited at schools in terms of the Guidelines (RSA, 1998, section 4.5.1):

Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learners' rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited, as the description of schools is unacceptable.

The Ministerial Guidelines for School Governing Bodies for the adoption of a code of conduct for learners, developed and distributed by the Ministry of Education in terms of section 8(3) of SASA, section 4.5.1, state that a learner's freedom of expression may be limited if it manifests itself in vulgar words or insubordination and when it is insulting or leads to a material and substantial disruption in school operations, activities or the rights of others, because disruption in a school is unacceptable.

Constitutional rights must be balanced in accordance with the broader social interest. Would it for instance be consistent with the professional responsibilities of a history teacher to express racist views in a public forum outside the school? In such a case, the interest of the school leadership in ensuring that the school is able to fulfil its educational mission in a way consistent with the Constitution would justify disciplinary action against that educator despite the educator's right to freedom of expression of an individual opinion. In this matter, the right to freedom of expression in section 16 of the Constitution must be exercised consistently with section 16(2), which states:

"The right in subsection (1) does not extend to :

- propaganda for war;
- incitement of imminent violence; or
- advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" ("Constitution of the Republic of South Africa", 1996, section 16(2)).

The fact that one often reads about critical incidents as the example of Yusaf Bata (Pretorius, 1998) and Layla Cassim (Ismael, 1999), among others, it is clear that learners may not know how to exercise their right to freedom of expression in terms of sections 16(1)(b) and 16(1)(c) of the Constitution. Furthermore, it is also clear from these incidents that schools do not know how to respect or limit this right according to the Constitution.

The right to freedom of expression can be limited in terms of section 36 of the Constitution, known as the limitation clause. Such limitation by means of law of general application must be reasonable and justifiable. Therefore factors that will influence the limitation of the right will be the age of the learners,

as well as contextual factors such as customs, morality and discipline (Wood, 2001; Zirkel, 2003). While balancing this right with other fundamental rights, the values of human dignity, equality and freedom in an open democracy should guide the process. Wood indicates that the action must always be based on sound educational principles and not on the whims of school authorities, i.e. whether the government regulation at issue is within the government's constitutional power, whether it furthers an important or substantial governmental interest and that governmental interest is unrelated to the suppression of free expression. Similarly, the right to freedom of expression can be limited by means of the inherent limitation in section 16(2) of the Constitution. The question remains, however, how school authorities can model respect for the right of free expression while ensuring that this right is not abused. Whilst the same problem can arise in any sphere of public life, it is especially difficult in schools, where vulnerable young people are under the care of educators, school managers and school governing bodies, all of whom are responsible for providing protection from hateful and harmful expression. The same young people – still "green in judgement" – are learning what it means to be citizens in a free society where differences of opinion are respected. How can limits on expression be set without restricting the expression to such an extent that the school becomes an anti-democratic environment?

Based on the ability of South African courts to view decisions from other jurisdictions as a form of persuasive precedent, coupled with a substantial amount of litigation, it is worth examining key cases from federal courts in the USA. Such a review is of value because it addresses issues that make their way into South African courts with increasing regularity.

American case law sheds some light on this issue. First Amendment freedoms are not greater than is essential to the furtherance of that interest ("Barnes", 1991). The courts held that, if suppressing communication is the object of the regulation of conduct, it is not permissible, as is illustrated by the following cases:

- (1) Flag burning: *United States v. Eichman* 496 U.S. 310 (1990) ("Eichman", 1990); *Texas v. Johnson* 491 U.S. 397 (1989) ("Texas", 1989);
- (2) Defacing a flag: *Spence v. Washington* 418 U.S. 405 (1974) ("Spence", 1974);
- (3) Wearing of symbolic black armbands: *Tinker* ("Tinker", 1969);
- (4) Participating in a silent sit-in: *Brown v. State of Louisiana* 383 U.S. 131 (1966) ("Brown v. Louisiana", 1966); and
- (5) Flying a red flag: *Stromberg v. California* 283 U.S. 359 (1931) ("Stromberg", 1931).

Where the court has prohibited conduct precisely because of its communicative attributes, it has declared the regulation unconstitutional (Lieuallen, 2002). Thus, if the purpose of the limitation is to suppress communication (expression), it is unconstitutional.

In the above-mentioned cases the plaintiffs were apparently not yet ready to use their right to freedom of expression and to balance it against the rights of others. The court cases have, however, helped to

establish principles to balance the right to freedom of expression. American case law took decades and often dealt with controversial issues to establish principles to limit the right to freedom of expression in schools - the dust has not yet settled (see § 4.4.2.1).

On the one hand the Constitution protects freedom of expression, but on the other some schools have policies to limit explicit expression. Advocates of policies against the absolute use of freedom of expression in schools argue that explicit expression in schools is inappropriate, while critics of such policies argue that one should deal with all kinds of ideas in education in the process of developing oneself as a citizen in the market-place of ideas (see § 4.2.1.1). Confusion among learners, school authorities and even the courts in regard to freedom of expression is evident from the high number of contradicting court cases and judgements and the fact that the issue has not yet been resolved. The "Teen People" online database elicited two teenage learners' opinions, and as could be expected, their responses were not the same. Lindsay Szekely, an 16 year-old teenager, said:

I think it is important for schools to be able to set limits on free speech because some things that people say or do can offend others. For example, if someone walks into school wearing a shirt that had *[sic]* a sexual expression or swear word on it, that would be inappropriate because it could distract other students, and it is potentially offensive. One day this guy at my school came in wearing a T-shirt with an obscenity on it but no one did anything about it! I don't think that creates a comfortable learning environment for other students.

Ashley Brewer, a 19 year-old said:

Students should absolutely be able to exercise their right to free speech at school. Open expression of opinion is an incredibly important part of learning ... free expression through writing, the arts or clothing allows us to stand up for what we believe in and explore our individuality. A school should never stop kids from stirring up controversy.

These two quotations correspond with my assumptions, namely that some learners either tend to absolutise their right to freedom of expression, or do not know how to balance the right with other rights (see § 2.5). Case law indicates that one's right to freedom of expression cannot be limited because it is "potentially offensive" ("Cohen", 1971; "Jones", 1970; "Lehman", 1974). Any view of any person is potentially offensive as people's opinions, culture, religion, values, etc. differ. A viewpoint can be limited only if the expression is in fact offensive or meant to be offensive. Freedom of expression cannot be limited only because authorities dislike or disagree with a person's point of view. ("Blackwell", 1966; "Edwards", 1963, at 5). The second quotation, however, shows an understanding of the importance of freedom of expression in regard to individual development (see § 4.2.1.2), but the respondent appears to absolutise the right.

Of the teenagers who voted online, 26% voted in favour of policies to limit the right to freedom of expression at schools, while 74% voted against such policies. The literature clearly indicates that the exercise of the right to freedom of expression is not clearly understood. Case law on the right to freedom of expression will now be examined.

Schimmel (2000) points out that the courts in the USA have never protected obscene or vulgar speech. The mere use of offensive, vulgar or dirty words does not make language legally obscene.

Schimmel further emphasises the three aspects that the courts developed to determine whether language is obscene, viz. language is obscene if it appeals to prudent or lustful interest; if it describes sexual conduct in a way that is offensive to the standards of the community; and if it lacks serious literary, artistic, political or scientific value. This issue was addressed in *Fraser* ("Fraser", 1986) where the court held that school authorities may limit learners' freedom of speech even if their speech does not cause disruption and is not legally obscene (See § 5.2.6). This limitation can be validated against the others' rights and the value system of the school and society ("Fraser", 1986, at 685-686), as the main purpose of school is to educate according to the fundamental values of public school education.

The finding in *Fraser* ("Fraser", 1986) gave school authorities the right to determine the nature of obscene and offensive language and allows them to limit the right to freedom of expression on those grounds.

In line with the *Fraser* case ("Fraser", 1986), the court in *Hazelwood* ("Hazelwood", 1988) approved a limitation of the learner's right to freedom of expression. Consequently learners' freedom of the press in school-sponsored, curriculum publications can be limited if the expression could undermine the school's basic educational mission, which is in line with the fundamental values of public school education.

In the 1969 landmark *Tinker* case ("Tinker", 1969, at 506), the court held that the First Amendment did indeed protect learners' right to freedom of expression and that learners do not lose their right to freedom of expression when they enter the school. This decision shifted learners' right to freedom of expression to the other side of the continuum and the verdict guaranteed learners' right to freedom of expression. During this case the court clearly reaffirmed the fact that the First Amendment protects learners' controversial opinions: "Students in school as well as out of school are possessed of fundamental rights which the State must respect just as they themselves must respect their obligations to the State" ("Tinker", 1969, at 511).

In *Jones v. State Board of Education for State of Tennessee 397 U.S. 31 (1970)*, involving the suspension of a learner, Judges Douglas and Brennan quoted from the Terminiello case:

A function of speech under our system of government is to invite dispute. It may indeed best serve its purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger. Speech is often controversial ... and it may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea ("Jones", 1970, at 34)⁷⁷.

However, in the same case decision Judge Brennan said that:

The relatively placid life of the college campus of the past has not prepared either administrators or learners for their respective responsibilities in maintaining an atmosphere in which divergent views can be asserted vigorously, but civilly, to the end that those who seek to be heard accord the same right to all others ("Jones", 1970, at 34).

⁷⁷ Quoting from Terminiello ("Terminiello", 1949, at 4).

As a result of *Tinker* ("Tinker", 1969) learners' right to freedom of expression was guaranteed and limited. Before *Tinker* ("Tinker", 1969) school authorities had mandatory control over learners' right to freedom of expression. After *Tinker* ("Tinker", 1969) learners' right to freedom of expression was recognised as long as it did not disrupt the school's discipline and educational purpose.

This swing of the pendulum was balanced by two court cases. The first was the *Fraser* case ("Fraser", 1986), which determined that learner speech is not absolute and can be limited at schools if not in line with the educational mission of the school. The second was the *Hazelwood* case ("Hazelwood", 1988), which also granted the school the administrative right to limit learners' written expression at school.

Hazelwood ("Hazelwood", 1988) further states that court cases during the 1960s focused on the right of association as guaranteed in the First Amendment, i.e. pertaining to "national defence" as "the notion of defending those values and ideas which set this Nation apart ..." ("Robel", 1967). In other words, freedom of expression includes the right to "defend" the national values of the country. Judges in court cases in the 1970s tried to establish the parameters governing the impact of environmental factors as established by Judge Fortas in *Tinker* ("Tinker", 1969). The time, place and manner of freedom of expression were then seen as variables that have an influence on the limitation of the right to freedom of expression (Marcus, 1994; Suttner, 1990).

Hazelwood ("Hazelwood", 1988) however, states that schools need not tolerate learners' speech if it is inconsistent with schools' basic educational mission. Learners' (childrens') right to freedom of expression can thus be limited to a greater extent than that of adults, because of their lack of *iudicium*, since they are immature (Lieuallen, 2002) (see § 4.2.2.1). Although *Hazelwood* ("Hazelwood", 1988) gives school authorities the legal right to limit learners' freedom of expression, this is not necessarily an educationally sound approach. Learners need to be trained to exercise their rights to freedom of expression in a fair and responsible way. This viewpoint is also echoed in the Protocol on Education and Training of the Southern African Development Community (SADC) which states that each member-state should be:

... promoting academic freedom and creating an enabling environment with appropriate incentives based on merit, for educated and trained persons to effectively apply and utilise their knowledge and skills for the benefit of member-states and the region (SADC, 1997, article 4(f)).

Salem summarises the inconsistent court decisions on freedom of expression in the USA as follows:

... the Supreme Court has held that the First Amendment protects political statements,⁷⁸ orderly public communication of views,⁷⁹ public and private distribution of

⁷⁸ Mills v. Alabama, 384 US 214, 218 (1966).

⁷⁹ Contwell v. Connecticut, 310 US 296 (1940).

literature,⁸⁰ peaceful picketing,⁸¹ and truthful commercial advertising,⁸² but not 'obscenity'⁸³ and private libel⁸⁴ (Salem, 1981, p. 1408).

During the 1980s, courts appeared to have overlooked religious, societal and political values in regard to freedom of expression, and differentiated three types of force: the traditional public forum, the public forum created by government designation and the non-public forum ("Perry", 1983).

The principles established by the *Tinker* ("Tinker", 1969), *Fraser* ("Fraser", 1986) and *Hazelwood* ("Hazelwood", 1988) cases have guided the expression in schools for the past thirty to thirty-five years.

I shall now briefly discuss a number of relevant incidents of human and political rights challenged by learners worldwide, to indicate the relevance of the right to freedom of expression in the everyday life of a school, also in South Africa.

4.5.4 Incidents

Tim Gies was threatened with expulsion when he painted anti-war and anti-Bush slogans on his shirt and wore them to school while America was preparing for the war in Iraq. The matter was resolved before it could reach court and exemplifies the notion that everyone is allowed their own political expression as long as it does not have a disruptive effect on the school ("Stromberg", 1931). In another case, Bretton Barber who wore a T-shirt emblazoned with the words "International terrorist" next to an image of President Bush, was reprimanded, sued the school and won.

In another case, the plaintiff, Nicky Young, neither harmed anyone nor did she disrupt the school by wearing a T-shirt bearing the slogan "Barbie is a lesbian". She received \$30 000 in compensation because her school had sent her home for wearing the T-shirt. Another learner, Elliot Chambers, who was forbidden to wear his T-shirt advocating "Straight pride" to school, also won the court case. When Daniel Goergen threatened to go to court for being prohibited from wearing his shirt depicting the words "Abortion is homicide", the school conceded. It was only in the Barber incident that the wearing of a T-shirt led to disruption in the school, as the class started to debate the topic and some learners started to wear opposing slogans. On applying the *Tinker* principle one would have expected the school to win the case. It seems that there is an awareness of learners' human rights nowadays and that learners could fairly easily win a court case concerning freedom of expression and apparel.

In yet another case, the T-shirt Tyler Harper wore to school on the school's day of silence during a national campaign protesting discrimination against and harassment of homosexuals and transgender

⁸⁰ Martin v. City of Struthers, 219 US 141 (1943).

⁸¹ Teamsters Local 695 v. Vogt, Inc., 354 US 284 (1957).

⁸² Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc. 425 US 748 (1976).

⁸³ Roth v. United States 351, US 476, 485 (1957).

⁸⁴ Gertz v. Robert Welch, Inc, 418 US 323 (1974).

learners, proclaimed: "Homosexuality is shameful". When told by the principal that his slogan was inflammatory, he responded: "How can you tell me I have to be tolerant of your views, but you can't be tolerant of mine?" Although one could argue that his expression did not support the educational mission (or at least the educational purpose of the day), the right to freedom of expression cannot be limited only because it is an unpopular view. Furthermore, the wearing of this slogan on his T-shirt did not result in disruption of the school and Harper won the case. It seems that there was a tendency in court cases before 2000 to respect the right to freedom of artistic or symbolic freedom of expression in schools in the USA. In light of the value system that underpins the South African Constitution, one could reasonably expect local courts to show the same tolerance and follow the same trend (Juarez & Sulmers, 2005).

To summarise, the fact that learners as minors had no right to freedom of expression, was changed by the *Tinker* interpretation, which states that learners do not shed their right to freedom of expression at the school gate. *Tinker* ("Tinker", 1969, at 506) thus affirms the First Amendment right, also of learners as citizens of the country. In *Fraser* ("Fraser", 1986), the courts determined that the First Amendment right to freedom of expression, can be limited if it can be proved that the expression constitutes vulgar and obscene speech and does not support the educational mission of the school. *Hazelwood* ("Hazelwood", 1988) further balanced the right to freedom of expression of students, stating that school authorities have the right to limit learners' right to freedom of expression in regard to school curricula (see § 5.2.18). Learners' personal points of view are protected under the First Amendment and cannot be limited or violated "only" because such points of view are unpopular or in conflict with views of other stakeholders. These points of view can be limited if they are proved to be in conflict with the educational mission of the school.

Fischer, Schimmel and Stelman. (2000) point out that learners' expressions can be limited in regard to curricular activities even if their views are not disruptive or obscene and do not interfere with rights of others. In such a case the learner will need to prove that the school's limitation was unreasonable or unrelated to legitimate goals. In cases of school-sponsored extra-curricular activities, some courts used the *Tinker* and others the *Hazelwood* principles. Fischer *et al.* (2000) contend that school administrators would be constitutionally safer using the *Tinker* principle.

Before 1994 the rights of learners in South African schools did not receive much attention and the school management was almost beyond reproach (Alston, 2002). Furthermore, learners' due process was largely ignored and schools extended their power beyond the school gates, often demanding unquestioning and unthinking obedience within their gates.

The Soweto uprising (1976) encouraged young non-white learners to challenge the authorities for enforcing Afrikaans medium tuition. The relentless protest can best be described in the words of Harry Mashabela, a journalist:

I was covering for *The Star* the local high school pupils' protest march, called specifically to demonstrate opposition to the use of Afrikaans as medium of instruction in schools within

the complex. The severity of that explosion was so stark it nagged me for days on end. Here was a generation of children, all of them products of an education literally intended to get them to make peace with their man-made lowly station in life, rising up in their thousands against the very authority that conceived it! I was, as it were, moved to the marrow (Mashabela, 1987, preface).

For the first time in South African history, learners were prepared to use their right to freedom of expression and lash out at the government. The question arose as to whether learners had a right to freedom of expression and if they had, how that right to freedom of expression should be exercised in schools. Another question that arose was whether stakeholders understood the right to freedom of expression and how it should, in practice, be exercised and limited.

4.5.5 Conclusion on the right to freedom of expression in schools

Although learners do not shed their constitutional right to freedom of expression at the school gate, this right is not absolute and can be limited, as the school's educational mission needs to be achieved. Furthermore, the school deals with minors who need to be protected from damaging themselves and those around them. After considering all the arguments for and against the wearing of school uniform and the verdicts for and against dress codes, there is no final, correct answer as to how the right to freedom of symbolic and artistic expression should be applied. It involves contentious and sensitive matters, as well as other human rights. My preliminary suggestion, based on the literature and court cases, is that the following guiding principles be applied:

- The right to freedom of expression (therefore also the right to freedom of artistic expression) is a fundamental and constitutionally protected right.
- As no right is absolute, this right can be limited:
 - (1) in cases of the violation of others and others' rights by applying the limitation clause;
 - (2) by inherent limitation;
 - (3) to prevent the disruption of the school environment;
 - (4) in case of a safety threat; and
 - (5) to prevent interference with the educational purpose of the school.

Attire is a legitimate form of personal expression and the limitation of this right can occur only with relevant proof, i.e. as long as the expression is passive there will be no legal reason to limit the right. Undifferentiated fear, apprehension, disturbance or the fact that the expression is contrary to the beliefs of the authorities, are not sufficient grounds on which to limit this right. School authorities cannot use dress codes to arbitrarily institutionalise their values and attitudes in regard to appearance (Sparks, 1983), e.g. imminent danger needs to be evident.

4.6 WE'RE OFF

In the discussion of the right to freedom of expression in this chapter the right was found to tend toward an absolute right that, in international instruments, is viewed as a core right in a democracy. Although the right to freedom of expression is important in a democracy, it is, however, not absolute and can be limited. Due to the absence of a limitation clause in the USA Constitution, USA case law

has developed principles to implement in order to balance the right in practice. The development of the right in the USA and South Africa was discussed in regard to its implementation in schools in the USA and in South Africa. USA case law has been characterised by a number of contradictory findings in this regard during the process of developing legal principles to limit the right to freedom of expression.

Although the modern South African Constitution contains detailed provisions in terms of the limitation of the right to freedom of expression, the practical application is often unclear, locally and in the USA. At this point my journey toward understanding is gaining momentum, and I turn to the next chapter to discuss case law pertaining to the right to freedom of expression, in an attempt to determine the international development of case law in this regard.