

**LEARNERS' UNDERSTANDING OF THEIR RIGHT TO
FREEDOM OF EXPRESSION IN SOUTH AFRICA**

by

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Submitted in partial fulfilment of the requirements for the degree

PHILOSOPHIAE DOCTOR

in

EDUCATION MANAGEMENT

Department of Education Management and Policy Studies

Faculty of Education

University of Pretoria

SOUTH AFRICA

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October 2005

DECLARATION

**“I declare that the thesis which I hereby submit
for the degree**

PHILOSOPHIAE DOCTOR

IN

EDUCATION MANAGEMENT

**at the University of Pretoria, is my own work
and has not previously been submitted by me for
a degree at this or any other tertiary institution”.**

Willem Johannes van Vollenhoven

**Signed on the _____ day of _____ 2005
Pretoria, South Africa**

Ethics statement

Taalversorging

Dedication

I dedicate this thesis to

- my dear mother, who takes pride in the achievements of her children, my precious family and my late father whose name I carry and strive to uphold;
- Pieter, my lifelong source of inspiration who is helping me to complete the “Constitution of Life”;
- the drafters of the Constitution for allowing me to research freedom of expression passionately; and
- the learners of South Africa. May your freedom of expression always be treasured!

Acknowledgements

I acknowledge the contributions of the following:

- professor Jonathan Jansen, Dean of the Faculty of Education, who inspired me to strive for academic excellence and who has taught me to become my own critic;
- my supervisor, Prof Johan Beckmann, who exposed me to the lonely, but stimulating world of research. Under his guidance I have grown from an insecure student into a confident academic;
- professor Seugnet Blignaut for long hours of tutoring and technical guidance, especially with regard to data analysis. Her support has opened avenues of academic enthusiasm and exploration;
- my critical readers, advocate Elsabe Schutte and Pieter Bresler for choosing suitable scenarios and appropriate words – my sincere appreciation;
- Elsabe Olivier, information specialist, for invaluable support;
- the plaintiff in the *Antonie v Governing Body, Settlers High School and Others* for an open and honest in-depth interview;
- critical friends and every person who assisted me in any way, by giving support and motivation and for just asking how the research was developing.

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Thesis	Learners' understanding of their right to freedom of expression in South Africa

* Available on CD-ROM

Abbreviations and Acronyms

ACHR	American Convention on Human Rights
APA	American Psychological Association
CAQDAS	Computer-aided qualitative data analysis software
CODESA	Congress for a Democratic South Africa
CRC	Convention on the Rights of the Child
DoE	Department of Education
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
GDE	Gauteng Department of Education
GETC	General Education and Training Certificate
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LRC	Learners' Representative Council
LSD	Lysergic Acid Diethylamide
NGO	Non-Governmental Organisations
NP	National Party
NQF	National Qualifications Framework
S	State
S. Ct.	Supreme Court
SADC	Southern African Development Community
SAQA	South African Qualifications Authority
SASA	South African Schools Act
SNCC	Student Non-violent Coordinating Committee
SPLC	Student Press Law Center
UDHR	Universal Declaration of Human Rights
UDIHR	Universal Declaration of Islamic Human Rights
UK	United Kingdom
UN	United Nations
UNC	United Nations Charter
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics

Abstract

Newspapers often report on the violation of learners' rights. Many of these violations and critical incidents are related to the right to freedom of expression, which is internationally viewed as a core right in a democracy. My inquiry focused on grade 11 learners' understanding of the right to freedom of expression. It is important to understand learners' understanding of the right to freedom of expression, as they are the leaders of tomorrow and the right to freedom of expression is central to the survival of democracy. This inquiry was informed by an interpretivist paradigm. Atlas.ti™ was used to systematically analyse the data and categorise it into three hermeneutic units. This computer-aided qualitative data analysis software (CAQDAS) tool facilitated the process of analysis and enhanced the validity of the research. During the inductive process of analysis two patterns crystallised, viz. the absolutising of the right to freedom of expression by some learners and the lack of skills to implement the limitation to the right to freedom of expression in schools.

The main findings indicated that some learners did not have knowledge regarding the right to freedom of expression, although most learners were aware that they could speak their minds under this right. Furthermore, learners didn't seem to know how to exercise the right to freedom of expression. One of the factors disrupting the implementation of the right to freedom of expression in schools is the perpetuation of an authoritarian culture in schools. Theoretical and practical recommendations are suggested and avenues for future research are identified.

Keywords

freedom of expression

democracy

absolutising

limitation

core right

artistic expression

symbolic expression

religious expression

authoritarianism

understanding

CHAPTER ONE

ORIENTATION AND BACKGROUND: Invitation to undertake the journey

1.1 INTRODUCTION

“My dear, I don’t care what they do, so long as they don’t do it in the streets and frighten the horses” (Madame Beatrice Stella Tanner Campbell, early 20th Century British actress).

Rasnic (2001, p. 1) avers that Madame Campbell’s words illustrate the latitude of protection the courts have provided in regard to freedom of expression, particularly in the United States of America (USA), where case law has been compelled to gradually develop the interpretation of this right in the absence of a limitation clause. The question arises as to how widely this statement reflects both the international interpretation of the right to freedom of expression, as well as the interpretation by South Africans of their right to freedom of expression. I have noted similar latitude regarding many incidents in schools concerning the protection school authorities offer learners¹ in regard to the right to freedom of expression,² one of which resulted in the suspension of a pupil for wearing a Rastafarian hairstyle.

1.2 BACKGROUND

It is not uncommon to see headlines in newspapers indicating that learners’ right to freedom of expression has been violated, for example: “HRC³ finds that schoolgirl’s right to freedom of expression was violated” (Ismael, 1999), apropos the suspension of Layla Cassim, a Muslim teenager, who was suspended for displaying her essay regarding the Palestinian issue on the notice board of a school with predominantly Jewish learners.

It is, however, not only the right to freedom of expression that is violated, but learners often endure (verbal) abuse for daring to speak their minds, e.g. “Pupil endured abuse for right to speak her mind” (Sukhraj, 1999). Layla Cassim’s peers blew spit-balls at her during a lesson while she was attempting to concentrate on her work. In a very recent incident Sunali Pillay was obliged to obtain an interim court order to prevent her school from continuing a disciplinary hearing which resulted from her wearing a nose-stud (Broughton, 2005). One could argue that the right to freedom of expression of these learners was violated by school authorities, because the “... teachers were victims of an education system that did not recognise freedom of speech” (Mazibuko, 2002, p. 6). Therefore, educators unknowingly and unintentionally violate the right to

¹ “Learner” is the term used in South Africa for a “student” or “pupil” attending primary or secondary school.

² Section 16 of the Constitution.

³ Human Rights Commission.

freedom of expression. Educators should be educated on implementing human rights in schools (Anon, 1998a).

In a new school system in a democratic country where human rights should be protected, the right to freedom of expression can be viewed as one of the core rights applied in solving social problems. Therefore, Mr Patrick Lekota, former chairperson of the National Council of Provinces, stated in 1997 that “*dialogue should already start at school level*” (Anon, 1997a, p. 2). The anonymous author indicates that a peaceful society is not one in which everyone always agrees on all issues. The solution lies in communication and not just in exercising one’s own fundamental human rights, like the right to freedom of expression, but also in respecting the rights of others.

It is, however, imperative to understand exactly what a specific human right entails in order to exercise it. Incidents like those mentioned in the media, indicate that learners and other stakeholders are not *au fait* with what their right to freedom of expression entails nor are they certain of how the right should be exercised. I therefore deduce that learners’ lack of understanding of their right to freedom of expression will pose a threat to the implementation of the right and the survival of democracy. Research is essential to determine exactly what learners understand by their right to freedom of expression.

1.2.1 Exercising the right to freedom of expression

Although the cultural and socio-economic background of South Africans is not the major focus of this thesis, a short overview of the nature of South African society will serve as a backdrop for the investigation of fundamental human rights in the newly democratic Republic of South Africa,⁴ as the qualitative approach applied here crosses the boundaries “between various institutions and the social and cultural contexts in which they exist, to tell a story of why things happen” (Adler, 1996).

The Republic of South Africa founded in 1961 was governed by a white minority according to an apartheid policy that neither respected nor protected, but rather violated, the fundamental human rights of the majority. The violation of fundamental human rights occurred, amongst others, in the form of repressive laws, arbitrary arrests, detention without trial and harassment by the police (Alston, 2002). In addition, the government controlled the media and denied citizens the right to full access to information by censoring information disseminated through the media, which could be regarded as a form of indoctrination.

⁴ The first democratic elections in the Republic of South Africa took place on 27 April 1994. Prior to this election, when the apartheid regime was in power, the majority of citizens were denied fundamental rights, such as political rights, and were therefore refused the right to vote in elections for any legislative body.

The current position of especially white, Afrikaans speaking South Africans can be understood only against the backdrop of their history and cultural background. The Europeans arrived in the Cape of Good Hope with Jan van Riebeeck's expedition on 6 April 1652 to establish and administer a refreshment and halfway station between Europe and India. During the 17th and 18th centuries The Netherlands government sent Dutch, German, and French settlers to the Cape to establish themselves at the Cape (Davenport, 1987; Omer-Cooper, 1987; Van Jaarsveld, 1982). Most of these volunteers, like the French Huguenots, grasped the opportunity to gain freedom of religion. Although most Germans belonged to the Lutheran church, the Dutch and the French settlers had a fundamental Calvinistic background.

This diverse European settler population, mainly supporting a Christian Protestant religion, was coaxed into cultural uniformity: "The Afrikaner people, an amalgamation of nationalities came gradually into being during the century after Hendrik Bibault described himself as an 'Afrikaander' in 1707" Davenport (1987). Since Europe was overwhelmingly Roman Catholic and the rights of Protestants there were violated, they sought opportunities to exercise their freedom of religion elsewhere.

The teachings of John Calvin, a French Protestant religious reformer, hold that God is Almighty. This was the basis for the Christian religion practised by many Protestants at the Cape, and is summarised in the Bible text: "Of Him, and through Him, and to Him are all things" (Meeter, 1960). To summarise, one can say that predestination, redemption and regeneration are the work of God by His grace only. In other words, God determines who will receive the gift of salvation. Since one's faith and salvation are thus totally in the hands of the Lord, Calvinism stresses morality. Although one cannot change faith, one must strive to a life of high morality because of one's thankfulness for being chosen. This life of high morality then gives authority to the church over all Christians. Discipline connects the members of the church and also forms the foundation of the church. No Calvinist is exempted from the discipline of the church. Calvinism sees authority as something given to its bearers by God. Anybody who questions or opposes any lawful power resists the ordinance of God.

Such Christians believed that they were instructed in the New Testament not to mix with the heathen, but rather to convert them to Christianity, after which they would be viewed as part of the group. On their travels to America, Africa and the East, the Europeans encountered dark-skinned inhabitants (natives) who, in contrast with themselves, had very little or no formal education and a much lower socio-economic status. This financial, educational and religious

advantage, among other factors, caused the Europeans to regard themselves as more privileged than the natives.

Originally the main difference between people in Cape of Good Hope was whether they were Christian or heathen. All Christians were accepted in the church, regardless of origin. Europeans were allowed to marry natives who converted to Christianity. Legislation as far back as 1678 led to differentiation between people on the basis of religion, distinguishing between Christians and heathens, as well as on socio-economic grounds. No intercourse was allowed between a Christian male and heathen female, i.e. miscegenation was opposed (Van Rensburg, 1982). It is ironic that these very same Europeans, who relocated to a new country to prevent majority groups from violating their human rights and to exercise freedom of religion (Christianity), later developed the policy of apartheid. It is, however, important to point out that they attempted to motivate their philosophy through biblical principles.

White Christians believed that the authority of the church or other high authority was unquestionable. This resulted in whites, influenced by their Calvinist origins, seldom questioning authority. In addition, they failed to exercise a variety of rights, including the right to freedom of expression. One could argue that an elite group was developed with Christianity as prerequisite for being part of society no longer relevant, but instead other values or variables mattered (Meeter, 1960).

In South Africa non-white⁵ citizens did not have equal rights compared to whites, and their fundamental rights were severely violated. Non-whites also had no right to freedom of expression⁶ and although they were offended and most probably despondent as a result of the situation, they learned not to speak out – those who did, were often imprisoned or banished from their country (Connolly, 2001; Mufson, 1990).

Although it is not my intention to focus on ethnicity, the following information in regard to authoritarianism is pertinent to the research topic. The cultural background of the majority of inhabitants in South Africa still influences the way they deal with their fundamental rights, especially the right to freedom of expression. Although black South Africans comprise of a

⁵ In South African society non-whites were differentiated into three separate groups based on race or skin colour, viz. blacks (the original inhabitants [natives] of the African continent), coloureds (the ethnic group which developed as a “mixed race” when Europeans mixed with the natives at Cape of Good Hope) and Indians (people who arrived in South Africa from India).

⁶ Those who tried to speak out and who “fought” for their human rights, were banished and had to live in exile or spend their lives in prison on charges of terrorism, as did Nelson Mandela, the first president of the democratic Republic of South Africa.

number of ethnic groups, each with its own culture and customs, Ramagoshi (2003) indicates that the culture and customs of all these groups are basically the same.

The traditional culture of the black South African is characterised by respect and obedience toward authority and the elderly. Hoernlé (1946, p. 14) notes that the early history of black South Africans, shows an “ordered group-life, with reciprocal rights and duties, privileges and obligations, of members, determining behaviour-patterns for each individual member toward other members, and moulding the feelings, thoughts, and conduct of members according to these patterns, so that it is only in and through them that the individual can achieve his personal self-realisation and participate in the satisfaction offered by the life of his community”. Sebahwane (1993) points out that South African black societies are traditionally patriarchal. Unlike schools in most western countries, many rural secondary schools in South Africa (and other Southern African countries) used to have far more male than female educators (Davies, 1990; Sebahwane, 1993). In many ethnic groups, women and children traditionally have no rights reflected in customary law (Steyn, 1999). Children are regarded as adults only after the successful completion of initiation rites in a traditional initiation school.

The rights of blacks were often violated in South Africa prior to 1994. They were not treated as equal to whites and did not have the same right to just administrative action. Although there is a well-documented history of rebellion, resistance and oppression in South Africa where the right to freedom of expression was used under the auspice of liberation and black consciousness movements (also in the form of expressing opposition to policies and practices in many ways) (Connolly, 2001; Karis & Gerhart, 1997; Motlhabi, 1988; Mufson, 1990),there was not a general government-led culture that enhanced or respected the right to freedom of expression. The apartheid society bred an oppressed culture of people that would rather not speak out, for fear of arrest or assault or they had to speak out “behind the scenes” (Gerhart, 1997; Mufson, 1990).

During the Soweto riots of 1976 when the government attempted to enforce the teaching of certain subjects through the medium of Afrikaans, black learners were urged to challenge the government and to speak out against the violation of their rights. They were encouraged to challenge authority and to break the silence enforced by their tradition and the system, and they spoke violently in public, using hate speech to achieve their aims. On 16 June 1976 a sector of society challenged the government when a large crowd of learners gathered in Soweto to protest against this enforcement of existing legislation. Policemen fired into the crowd and killed several youths, including thirteen-year-old Hector Pieterse (Hopkins & Grange, 2002). These young people sacrificed many rights in attempting to achieve their aims e.g. the burning down of their

schools. They also used hate speech to achieve their aim - at the time that was the only way they could speak out in public in South Africa.

Alston (2002) finds that the implementation of the right to freedom of expression in South Africa is affected among others, by culture, group identity and dependence. The political background and history, as well as socio-cultural development in South Africa, created a society, that even in a new democracy, does not know how to speak out and to exercise the right to freedom of expression. The rigid and repressive system of the apartheid regime became a way of life that was not easy to accept and the influence of the apartheid tradition cannot be underestimated: "The normative prescriptions implied by the idea of 'tradition' derive from the ways in which people appeal to an image of their past to give legitimacy to presently preferred beliefs and practices" (Spiegel & Boonzaier, 1988, p. 56). Human rights in former black schools are currently being researched by Dumisani Mkhize at the University of KwaZulu-Natal and his research will contribute toward the debate from an African perspective.

Since the implementation of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution), South African citizens have generally become more aware of their protected and entrenched fundamental rights. Furthermore, the Calvinist-orientated population tends to make less use of the Calvinist Christian doctrine as basis for decisions. The urbanisation of rural South Africans has also alienated them from their traditions and customs (Finlayson, 1984). One should, however, be alerted to the fact that the notion of human rights in theory, differs from the reality. International human rights instruments and the Constitution spell out a utopia toward which citizens must strive. The application of such instruments and constitutions, however, does not guarantee the smooth implementation of the human rights. When dealing with human rights there will always be a tension between the intention in theory and the reality of implementing the human rights (Joubert & Beckmann, 2001).

In the new democratic South Africa, many black learners attend former 'whites only' schools. This multi-cultural, ethnic and racial interaction serves to alert learners to the fact that their own traditional culture and customs are not the only 'correct' ones. Learners either still fail to use their rights, e.g. freedom of expression, as a result of their traditional beliefs, or, if they become accustomed to the fact that they can exercise rights, they become defensive and absolutise the rights. They appear to be unaware that rights imply a responsibility not to violate the fundamental rights of others. In light of this, it is imperative to investigate learners' understanding of the right to freedom of expression. If learners' understanding of this right could be gauged, policy makers would be able to ensure that the exercising of the right occurs within the parameters of legislation

without infringing the rights of other stakeholders and will be able to indicate to learners when and how the right should be limited.

Traditionally, because of a general authoritarian culture, a tendency exists for the majority of people in South Africa to remain silent, rather than to speak out and to use the right to freedom of expression. Nowadays, because of the culture of human rights and rapid social transformation (Steyn, 1999), people are confused about using the right to freedom of expression. Some clearly do not know what it entails or how (or even that) it can be used. It is important to investigate in this research what learners understand under the right to freedom of expression.

1.3 AIM

The aim of this research is to determine learners' understanding specifically of the right to freedom of expression.

1.4 RATIONALE

The intention of the Universal Declaration of Human Rights (UDHR), which was proclaimed in 1948 is to ensure that all human beings "shall enjoy freedom of speech and belief and freedom from fear as common people of the world" ("UDHR", 1948, preamble). Since human rights should be protected by the rule of law, the nations of the world agree through this preamble that the right to freedom of expression is the core of a democracy and individual freedom. It was in this preamble that I discovered the purpose for writing this thesis. If it is agreed that the right to freedom of expression is the core of individual development and democracy, it is important to determine learners' (the leaders of tomorrow) understanding of this right, as the violation of the right to freedom of expression could lead to the violation of a whole range of human rights.

In the past, South African learners were indoctrinated by the culture of Calvinistic and cultural acceptance and taught total acceptance of authority. Learners were not aware of the fact that they had fundamental human rights and that they were denied those rights. It would have been regarded as unmannered to speak out against an educator⁷ or any other figure of authority. The change in this regard was brought about on 27 April 1994, when South Africa became a full democracy and the new democratic government accepted the Constitution with the Bill of Rights, which entrenches human rights and for the first time in the history of South Africa, the human rights of all citizens were now protected and people realised that they too have human rights.

⁷ "Educator" is the term used in South African legislation for primary and secondary school teachers.

I anticipated, however, that these human rights would cause people to absolutise them, as they were not familiar with the interpretation or implementation of the rights. My assumption was based on disciplinary problems, critical incidents and even court cases reported in the media (Anon, 1998c; "Antonie", 2002; Broughton, 2005). The school curriculum needed to be transformed to develop critical thinking and to teach young citizens to function responsibly in a democratic society in which human rights are entrenched and protected (Anon, 1997c; Jansen & Christie, 1999; Schoeman, 2003; Tiley & Goldstein, 1997; Van der Horst & McDonald, 2003). To this end the South African government implemented an outcomes-based education (OBE)⁸ approach.

This is in direct contrast with the previous culture of total acceptance of authority. In a society where learners were taught neither to question authority nor to use freedom of expression, critical thinking was discouraged. It became necessary to change the teaching/learning approach to develop citizens' skills for effective participation in a democracy (see § 4.2.1.3) as the old curriculum was based on the retention of information. Tiley and Goldstein (1997, p. 6) argue that "... the previous [education] system did not help people learn to make sound, compassionate judgements in a changing world". Since the new South African government was aware of the importance to develop critical thinking, the education system was changed from an educator centred system where the educator was believed to possess all the knowledge while the learners had none, to a learner centred system based on the assumption that learners possess knowledge and an ability to learn through discovery (Anon, 1996). The importance of the learner centred approach is highlighted in the preface to the policy for the foundation phase: "... education within the formative years follows an integrated child centred approach in which the learner is developed holistically" (Anon, 1997b, p. iii). This new curriculum is skills-orientated and applicable in practice. The curriculum prior to 1994 emphasised diversity in regard to race, class and gender and had to be restructured to enhance the values and principles of the new democracy. The report of the ministerial committee for development on the National Qualifications Framework (NQF), *Lifelong learning through a national qualifications framework* (NQF, 1996), emphasises the need for a paradigm shift as prerequisite for the realisation of the vision of democracy.

South Africa transformed its government from a government of the minority, which violated the rights of the majority, to a full democracy. The preamble to the Constitution states that the Constitution was adopted to "lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law" ("Constitution of the Republic of South Africa", 1996). It is also stated in section 1 of the

⁸ Total implementation of the new curriculum was originally planned for 2005 – hence the name Curriculum 2005.

Constitution that “[t]he Republic of South Africa is one, sovereign, democratic state ...” (“Constitution of the Republic of South Africa”, 1996).

People who were indoctrinated over a number of decades could not be expected to change their attitudes overnight. Newspaper articles and critical incidents indicate that even now, in the eleventh year of democracy, South African citizens are not *au fait* with the protection of human rights and many are still not aware of their rights under the Constitution. The more people hear or read about their rights, the more aware they become of such rights. The tendency for people to exercise their rights while neglecting to balance the scale in regard to the concomitant responsibilities, often results in incidents which sometimes lead to court cases.

When focusing on schools, one must pay attention to the ethos and basic moral values of society as these moral values become the force behind the momentum and aim of society. In terms of the Constitution, South Africa is founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- (b) Non-racialism and non-sexism; and
- (c) Supremacy of the Constitution and the rule of law (“Constitution of the Republic of South Africa”, 1996, section 1).

These are the values that ought to underpin the actions of citizens in South Africa, and therefore also pertain to education in this country. It is imperative when dealing with every stakeholder to be guided by this value system. There should also be equality in dealing with all stakeholders to protect the human rights and freedoms⁹ of all citizens. In regard to the right to freedom of expression¹⁰ in schools, one should note that all the stakeholders, i.e. the learners, educators and parents are entitled to this right. Since there is a continuous mutual interaction and interrelationship between the stakeholders, the exercise of the right to freedom of expression would need to be balanced against the rights of other stakeholders. Accordingly people should also be aware of the human rights of others in order not to violate them.

The violation of human rights under the previous government in South Africa and the fact that children (learners) had no right to speak out against authority is significant for this research which focuses on determining learners’ knowledge in regard to and their understanding of the right to freedom of expression. Although all people, also learners, have the right to freedom of expression, the law regards children (learners) as minors with limited capacity and limited *locus*

⁹ Section 1(a) of the Constitution.

¹⁰ Section 16 of the Constitution.

*standi in iudicio*¹¹ (Bondesio, Beckmann, Oosthuizen, Prinsloo, & Van Wyk, 1989) (see § 4.2.3.1). Learners do not have full legal capacity, are not accustomed to having rights and were brought up in a culture of remaining silent and not questioning authority. It is imperative to gauge learners' knowledge and understanding of the right to freedom of expression, as this research will serve not only as an indication for learners on how to improve their right to freedom of expression, but will also be informative to parents, educators and policy makers.

In a democracy it is important for every partner to participate in every decision and to respect the rights of all stakeholders. In a democracy every voice should be heard. It is therefore important to protect the right to freedom of expression, since everyone should be free to express themselves without fear of the consequences, within the parameters of section 16 of the Constitution.

As minors children need to be guided in the school situation to exercise not only their fundamental rights, but also to deal with their obligations and responsibilities adequately in a democratic society. The purpose of education is to assist learners to develop the necessary skills. Human rights can be respected within a democracy, which can be enhanced by critical thinking, for which the right to freedom of expression is a prerequisite.

1.5 THEORETICAL FRAMEWORK

Vithal and Jansen (2001) state that a theoretical framework is a “well-developed, coherent explanation for an event”. This study will focus on learners' understanding of the right to freedom of expression, which is a human right that is entrenched in the Bill of Rights in chapter 2 of the Constitution. The investigation of any legal topic in South Africa should occur within the framework of the Constitution as the Constitution is the supreme law in South Africa and all other law, e.g. national legislation or subordinate legislation, is to be judged according to the Constitution in a court of law (Bray, 2000a; Van Vollenhoven, 2003). The Constitution is also prescriptive on the interpretation of human rights in the Bill of Rights. It is in these requirements for the interpretation of the Bill of Rights that my theoretical framework is anchored. In terms of the Constitution:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum:
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

¹¹ Place in the eye of the law.

- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill ("Constitution of the Republic of South Africa", 1996, section 39).

It is imperative to have knowledge of international law and a clear understanding of foreign law when making decisions or researching any field that involves law. In practice, case law has developed legal principles that are used as common law tools to guide practitioners to interpret and implement the law practically, as intended by statutory law. Hence the research of the understanding of learners' right to freedom of expression, should take place against this theoretical backdrop. Figure 1.1 comprises a visual representation of the theoretical framework for this research.

1.6 RESEARCH DESIGN

The research design will now be highlighted to orientate the reader regarding the expectations and methodology for this journey. The journey aims to explore only a single phenomenon, namely learners' understanding of their right to freedom of expression. However, various working premises and assumptions guide the inquiry.

1.6.1 Research question

What is learners' understanding of their right to freedom of expression?

1.6.2 Qualitative research premises and assumptions

My working premises are that some learners:

- (1) have limited knowledge of their right to freedom of expression; and
- (2) do not know how to exercise their right to freedom of expression.

In terms of the first premise I assume that most learners would:

- (1a) know that the right to freedom of expression entails the spoken word;
- (1b) know that the right to freedom of expression entails the written word; and
- (1c) not know that the right to freedom of expression entails symbolic or creative expression.

In terms of the second premise I assume that most learners would:

- (2a) tend to absolutise the right to freedom of expression; and
- (2b) not know how to limit the right to freedom of expression.

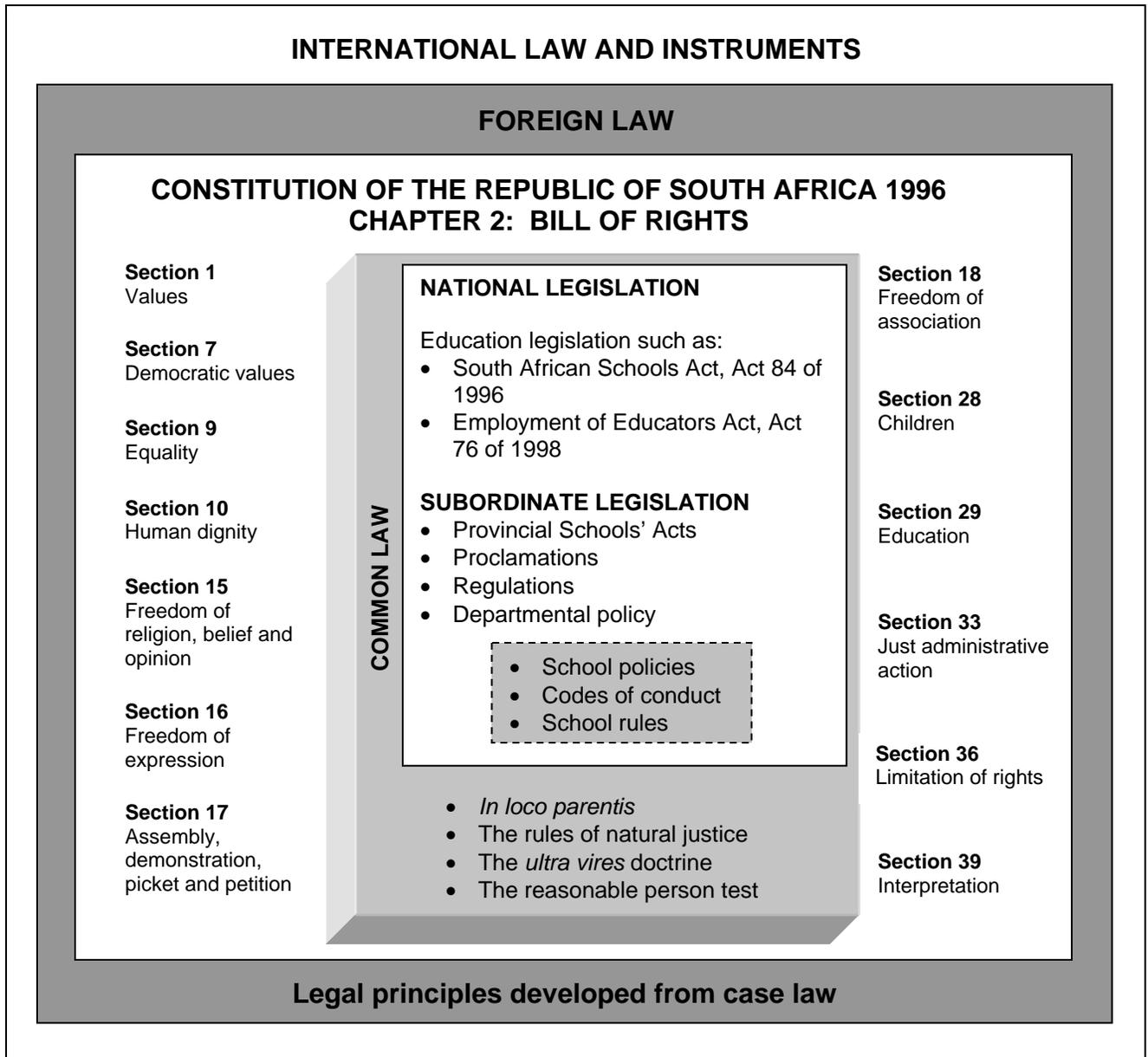


Figure 1.1: Visual representation of theoretical framework depicting the relationship between human rights within international law, foreign law and national legislation [adapted from Joubert and Prinsloo (2001, p. 28)]

1.6.3 Methodology

I shall now give a summary of the methodology chosen for this research. This will guide the participants on the journey of understanding; make them aware of my basic assumptions, epistemological stance, my approach to the research, as well as the strategies and data collection instruments. This will enable them to prepare themselves to accompany me on a journey toward understanding.

1.6.3.1 Knowledge claim

While I view science as a search to understand a phenomenon, I believe that there is no single truth to be discovered. People give meaning to 'own truth' in their search to understand phenomena. I therefore view knowledge from the basis of two epistemological theories, viz. interpretivism and postmodernism (see § 2.3).

Furthermore, knowledge does not 'belong' only to the authoritative voice of the expert, but values the subjective and multiple voices of individuals who view the world holistically. All people construct meaning from information (interpretivism) in a world in which the truth can be regarded as a dynamic reality, which changes over time (see Human Rights in § 3.2.2).

As I shall conduct my study according to the interpretive paradigm, I shall construct my own understanding from the understanding with which the respondents construct their reality. While the right to freedom of expression is clearly entrenched in the Constitution, everyone attaches an individual, subjective meaning to the interpretation of this right. Court cases are therefore necessary to ensure harmony. While assuming that learners give their own interpretation to this right, understanding their understanding of this right will enable authorities and managers to formulate and implement policies to ensure greater harmony between learners and school authorities and to be pro-active in avoiding possible court cases.

1.6.3.2 Approach

As I am researching fundamental human rights, I shall use the traditional law method of research (Russo, 1996). Since this research will be conducted under the auspices of a Faculty of Education, I shall combine the traditional law methods with the research methodology used in the human sciences. Qualitative research will be done in terms of the literature review based on an in-depth literature study, including articles and case law relating to the research problem (see § 2.2).

In assuming that multiple realities are social constructs created by individuals and society, a qualitative approach will assist in determining learners' understanding of the right to freedom of expression, which in turn will help managers and policy makers develop more learner centred policies.

1.6.3.3 Inquiry strategies

I shall use a hybrid case study as strategy of inquiry as I do not intend to research a full case study by for instance, focusing on a specific school or learner (see § 2.6). As no single learner or school will be studied, i.e. the limitation of the hybrid case study is the selection of a single topic,

viz. learners' understanding of their right to freedom of expression. Due to purposive sampling the boundary was extended to grade 11 learners in the five sampled schools in the Gauteng Province (see § 2.8).

1.6.3.4 Methods of data collection

My methods of data collection can be divided into three phases (see § 2.10). In phase 1 I shall use structured, open-ended questionnaires. In phase 2 I shall conduct five open-ended semi-structured, focus-group interviews in order to determine why learners are unable to exercise their right to freedom of expression.

In order to ensure rich data collection I intend conducting an in-depth interview with the plaintiff in *Antonie v. Governing Body, Settlers High School, and Others 2002 (4) SA 738 (C)* to enable me to glean a detailed view from a learner who experienced a court case because she believed that her right to freedom of expression had been violated. This in-depth interview should produce rich data because it will be on a one-to-one basis.

1.7 DATA ANALYSIS PROCEDURES

I shall use Atlas.ti™, a computer-aided qualitative data analysis software programme (CAQDAS), to aid the analysis of multiple data. The data from each research phase will form a hermeneutic unit¹² (see § 2.13), thus resulting in three complete hermeneutic units, which will be available in the format of HTML files on the CD-ROM included with this thesis (see addenda A, B and C).

The three phases (see § 1.6.3.4 and § 2.10) of data collection will ensure thick and rich data. The amalgamation of the questionnaires, focus group interviews as well as an in-depth interview will add depth, breadth and insight. The in-depth phase will help to crystallise the data and findings of the first two phases (see §.8.1). The varied data collection methods will afford multiple perspectives. The use of a sequential procedure will assist to expand the findings from one phase to the following phase and will also allow me to change questions and foci as required.

1.8 LIMITATIONS OF THE RESEARCH

Research dealing with learners' understanding of their right to freedom of expression should be an inclusive study of the entire South Africa, cover all education sectors and focus on all races and ethnic groups. Since such a study would be time-consuming, I have decided to focus only on the public school sector in one province. Unfortunately private schools are not included here. It can be anticipated that the outcome in regard to private schools will differ slightly from that

¹² A hermeneutic unit is a unit of transcribed data which is managed by Atlas.ti™.

regarding public schools as the existence of private schools *per se* is already a break away from the traditional authoritative school system.

I shall not focus on the highly interesting and information rich sector of higher education, but only on grade 11 learners, i.e. the further education and training phase. The reason for this choice is that these learners are more advanced than learners in grade 1 to 9 in terms of their discretion and decision-making skills. Despite their maturity in certain respects, grade 11 learners are minors with a lack of *iudicium*¹³ (Davel, 2000).

Despite the limitation I intend to research a diverse school system, including former black and white urban and rural schools, to ensure a sample representative of the total population of South Africa.

1.9 SIGNIFICANCE OF THIS STUDY

Since I am aware that the implementation of freedom of expression could pose challenges to school managers in regard to balancing the rights of all learners, I shall focus on learners' understanding of the right to freedom of expression, as this may alert authorities to learners' expectations and perceptions regarding the right. As the right encompasses such a wide spectrum of nuances, I shall focus on learners' understanding of their right to symbolic and artistic freedom of expression, i.e. their understanding of the right to freedom of expression, which includes their understanding of their grooming, dress, jewellery and artistic creativity.

This research is also intended to assist authorities to understand learners' understanding of the right to freedom of expression and to guide them to, *inter alia*, develop appropriate policies, to ensure that this right is respected and balanced correctly, and to prevent court cases.

1.10 RELIABILITY AND VALIDITY

The three-phase data collection will not only help to crystallise the data, but will also increase the reliability and validity of the data. If the data from phase 1 in which the questionnaire is used as data collecting instrument, correlates highly with data from phase 2 in which the focus group interview is used, and these two phases correlate with the data in phase 3 in which the in-depth interview is used, concurrent validity will be achieved (Cohen, Manion, & Morriison, 2000). Although the purpose of qualitative research is not to generalise, I suspect that I shall be able to generalise in context some facets of the three phases, which will enhance the reliability of the data (Adler, 1996). If I manage to generalise some issues or themes from the three phases of data collection, this will further enhance the validity of the data. The way the data is captured,

¹³ Judgement or discretion.

analysed and presented, i.e. so that all evidence, as well as the structuring and crystallisation of the data is available to the reader, will enhance the reliability, validity and trustworthiness of the data.

In addition, a final report based on the participants' perusal and verification of the transcribed data from phase 2 and phase 3, will further enhance the validity.

1.11 DELIMITATION

I shall not be able to research all the provinces of South Africa or the private school sector. The foundation phase, the intermediate phase and the senior phase have also been excluded. Only the understanding of the right to freedom of expression of learners in grade 11 (further education and training phase) will be researched. I have neither planned to examine the right to freedom of expression of educators, nor the right to freedom of expression in the higher education sector. A learner is here defined as a person receiving a (public) school education.

1.12 ITINERARY FOR THE JOURNEY TOWARD UNDERSTANDING

Chapter 1:	Introduction and orientation	Invitation to the journey
Chapter 2:	Research design and methodology	Planning the journey
Chapter 3:	Human rights	The logistics of the journey
Chapter 4:	Freedom of expression	Packing ... the journey begins!
Chapter 5:	Case law	Speeding and appearing in court
Chapter 6:	Data analysis	First glimpses of the destination
Chapter 7:	Data analysis	Becoming acquainted with the environment
Chapter 8:	Data analysis	Crystallising the events of the journey
Chapter 9:	Conclusions	Reflecting on the journey toward understanding

1.13 SUMMARY

The right to freedom of expression of learners in South African schools is often violated. I therefore propose an in-depth study to determine learners' specific understanding of the right to freedom of expression. The authoritarian life view based on different historical and social backgrounds, has resulted in people in South Africa being unaccustomed to exercising the right to freedom of expression or respecting those who do exercise the right. In a democracy in which human rights are internalised, learners should understand exactly what it means to exercise the right to freedom of expression, i.e. that the right is not absolute and that it has an inherent limitation and can also be balanced in terms of section 36 of the Constitution. This research aims

to determine learners' understanding of the right to freedom of expression and will conclude with findings and recommendations to address issues, which may be identified during the research journey.

In the next chapter I shall discuss the research design and methodology as guide to the rest of the journey.

CHAPTER TWO

RESEARCH DESIGN AND METHODOLOGY: Planning the journey

2.1 INTRODUCTION

When planning a journey, one normally consults a map to decide which route to take. It could also be helpful to contact local authorities to enquire about road works, accidents, etc. which may influence one's final choice of route. Even then unexpected variables like weather conditions could eventually force one to adjust one's plan. Just as the answers to all such enquiries assist the traveller in choosing the best route, this chapter serves to inform the reader on the research philosophy, research design, methodology, research instruments, data collection strategies and data analysis procedures.

2.2 RESEARCH PHILOSOPHY

I concur with Cohen *et al.* (2000) that both quantitative and qualitative research have a purpose and place in educational research. I do not plan to become involved in the controversial qualitative/quantitative debate, but rather intend to motivate why qualitative research in particular serves this research effectively.

Since the research is to be conducted under the auspices of a faculty of education, the research methodology used for research in human and social sciences will be utilised. McMillan and Schumacher (2001) define a literature study as a critique of the status of knowledge of a carefully defined topic. It is similarly defined by Garbers (1996, p. 305) as "a systematic, circumspect search to track all the published information about a specific subject in whatever terms it exists and to collect useful resources". Bell (1993, p. 33) also points out that "any investigation, whatever the scale, will involve reading what other people have written about your area of interest, gathering information to support or refute your arguments and writing about your findings".

According to Ary, Jacobs and Razavieh (1990) the function of a literature review is to enable the researcher to define the frontiers of a study in order to place current debates in perspective, to limit questions, and to clarify and define the concepts of the study. A critical literature review leads to insight into the reasons for contradictory results and might indicate which methodologies have proved useful. An in-depth study of the literature will also avoid replication of previous studies, and in the final instance it will aid the researcher to interpret the significance of the results.

The literature review will therefore allow me to gain knowledge expounded by others involved in the research area, to benefit from the results of previous research on the topic (Wallen & Fraenkel, 2001) and to utilise background information relevant to the research question (Bless & Higson-Smith, 1995). The purpose of the in-depth literature study, including articles and case law, is to find data relating to the research problem and it has afforded me the opportunity to compare the findings of other researchers and court decisions on the topic. In a traditional literature review the researcher should

determine the primary sources or key publications on the topic. In regard to the amalgamation of law and social sciences, the primary sources are statutory law and case law. All other written sources, such as articles, books and law reports are thus regarded as secondary sources.

According to Russo (1996) the primary source of information for legal research is the law itself. The traditional method of law research is a systematic investigation that includes the exploration, interpretation and explanation of the law. While typical, traditional, legal research is neither qualitative nor quantitative, legal researchers endeavour to place legal disputes in perspective in order to inform practitioners about the intentions and status of a specific law. This method of research is necessary, since the nature of the law tends to be reactive, rather than pro-active. Past events, e.g. court interpretations, can therefore lead to enhanced stability in their application. It is imperative to consider legislation and case law in an attempt to determine how courts have interpreted statutory law in applying legal principles and precedents.

When researching fundamental rights, or in this case the right to freedom of expression, most researchers use the traditional law research method. A substantial number of researchers make use of only a literature review or comparative study to interpret the law. In brief, researchers discuss the relevant legislation and then compare different court interpretations of the legislation. They then deduce the consequences of the interpretations in regard to understanding legislation applicable to different walks of life. In this way a researcher can predict how a court will rule, based on precedent. Although this research will commence in a similar way, the intention here is not to follow through with it, but to utilise other research methods too. Qualitative methods are usually applied when researchers intend to determine the positive and negative aspects of policy development and implementation and are also applied when researchers are involved in researching the depth or width of a specific phenomenon (Schimmel, 1996). As my intention with this research is to determine *what* learners know about their right to freedom of expression, or as Russo states, to consider the “beliefs of those affected by the legal decisions” (1996, p. 51), this research will commence with a literature review according to the traditional method of law research, but will then continue, using a qualitative method.

In assuming that multiple realities are socially constructed by individuals and society a qualitative approach will be useful to determine learners’ understanding of the right to freedom of expression. This qualitative research will assist managers and policy makers to adopt laws that will ensure that learners understand that which legislators intend them to understand. Qualitative research will enable me to understand learners’ (respondents’) views on this right from their own perspectives. Furthermore, learners in South African schools are part of a new democratic society in which human rights are entrenched in the Constitution. This context will certainly influence the way in which learners and other stakeholders understand learners’ right to freedom of expression. The qualitative approach will be employed in the interpretation of the phenomena in terms of the opinions of the respondents (Smit, 2002).

2.3 KNOWLEDGE CLAIM

The theoretical underpinning of my study stems from the interpretive paradigm. In order to explain this choice, my view of reality, as this is also the lens through which I view reality in research (Cohen *et al.*, 2000), is described. I view science as a search toward understanding phenomena and I believe that there is no single truth which can be identified or researched objectively. People give meaning to their own truth through the search for the understanding of phenomena. The truth is not static, but rather a dynamic phenomenon interpreted via the meaning or understanding people ascribe to it. This becomes clear on viewing the development and *foci* within the concept of Human Rights (see § 3.2.2). For the purposes of this study, I therefore view knowledge from the basis of an amalgamation of two epistemological theories, viz. interpretivism and postmodernism. Since people assign meaning to their experiences, they therefore interpret meaning. It is for this reason that a society normally exhibits a positive growth in case law. People sue one another and go to court only if they believe that they have interpreted the law correctly and that the meaning that they attach to the law is the 'truth'. The court is required to judge the 'real' interpretation of the law (knowledge) because a variety of inter-subjective meanings are crucial in an attempt to achieve understanding and meaning.

Furthermore, knowledge not only 'belongs' to the authoritative voice of the expert, but it values the subjective and multiple voices of individuals. People view the world holistically and each person constructs meaning from information individually (interpretivism), therefore no absolute truth exists. Rather than being absolute, the truth is a dynamic reality that changes over time (see the development and change of the face of Human Rights in § 3.2.2). While assuming that learners give their own interpretation to this right, an understanding or appreciation of their understanding of this right, will enable authorities and managers to design policies to ensure harmony and to be pro-active so as to avoid possible court cases.

The subjectivist (or anti-positivistic) approach to this research originated in my belief that individuals create their own reality as they interpret and understand their environment. In other words, unique persons create their own reality through their own minds (Cohen *et al.*, 2000). Human beings do not respond mechanically to their environment, but are initiators of their own actions. Reality can never be fully explained or understood as an undiscovered phenomenon. Therefore research can provide only a specific perspective on the truth, rather than lay claim to exposing "the" truth (Merriam, 1998; Patton, 1990). The assumption is that multiple realities are constructed by individuals and society (McMillan & Schumacher, 1993).

The qualitative interpretivist paradigm reflects the belief that humans construct reality individually and collectively. While I research the reality created by respondents in their worlds, I also create my own reality. The interpretive approach (interpretive-subjective) has been chosen for this enquiry into learners' understanding of their right to freedom of expression as the intention is to understand and capture subjective meaning, while the respondents give meaning to their own reality (Cohen *et al.*, 2000).

2.4 QUALITATIVE RESEARCH

Accepting that there is a range of different ways to make sense of the world, a qualitative approach seems suitable. It would therefore be possible to construct the “reality” as seen from the respondents’ point of view. In this regard Lincoln and Guba (1985) argue that the epistemological foundations of qualitative research are based on value judgements. As this research is an attempt to understand learners’ understanding, i.e. the meaning of their right to freedom of expression, an interpretive research approach is appropriate. I therefore cannot lay claim to rigid objectivity, as I shall be subjectively involved in reporting or narrating my research (Adler, 1996).

The academic puzzle that guides this research pertains to learners’ understanding of their right to freedom of expression. The reality they attribute to their truth (understanding) is the focus here, therefore qualitative research is suited to this study as its intention is not to predict or generalise findings, but to describe and comprehend an existing phenomenon.

2.5 WORKING PREMISES

For the first time in the history of South Africa, all citizens’ human rights are protected and entrenched in the Constitution. This is important for all the stakeholders in education, since education focuses on the human sciences and is concerned with human beings and their interrelationships.

In his literature survey Alston (2002) explores the relevance of the right to freedom of expression to the South African school community. He focuses on the application of this freedom in respect to grooming, dress, jewellery, learner press, artistic creativity and academic freedom in schools (Alston, 2002). Alston notes critical incidents at schools, including the above-mentioned issues reflected by the media, and indicates that the school community should determine the relevance of the right to freedom of expression and the way in which to balance this right within the school sector (Alston, 2002), all the while focusing on the educators’ right to freedom of expression. There is, however, also a need to explore the learners’ right to freedom of expression and an even more imperative need to determine learners’ understanding of their right to freedom of expression. In other words, even if schools and authorities intend to respect learners’ right to freedom of expression and policies are implemented accordingly, it is uncertain whether they will know what learners understand by this right.

The interrelationships of the stakeholders are important, because in interacting with a stakeholder, one can easily infringe upon a human right and perhaps be sued. Most stakeholders in education are by now aware of the fact that their human rights are protected, but often do not know how to deal with these newly found human rights.

My working premises are that some learners:

- (1) have limited knowledge of their right to freedom of expression; and
- (2) do not know how to exercise their right to freedom of expression.

In terms of the first premise I assume that most learners will:

- (1a) know that the right to freedom of expression includes the spoken word;
- (1b) know that the right to freedom of expression includes the written word; and
- (1c) not know that the right to freedom of expression includes symbolic or creative expression.

In terms of the second premise I assume that most learners will:

- (2a) tend to absolutise the right to freedom of expression; and
- (2b) not know how to limit the right to freedom of expression.

The right to freedom of expression includes a spectrum of expressions that will be focused upon in phase 1 (see chapter 6) and phase 2 (see chapter 7), including the learners' understanding of their right to freedom of expression in terms of non-verbal and non-written expression. In terms of Guidelines for Consideration of Governing Bodies in accepting a Code of Conduct for Learners (hereinafter, the Guidelines), the right to freedom of expression is:

... more than freedom of speech. It includes the right to seek, hear, read and wear, and is extended to all forms of outward expression as seen in clothing selection and hair styles [*sic*] (RSA, 1998, section 4.5.1).

This research intends to explore freedom of expression in schools as defined in the Guidelines (RSA, 1998) as the part of freedom of expression that is "more than freedom of speech". The further intention is to explore this phenomenon only from the learners' perspectives as they understand it, and give meaning to their understanding of this right.

2.6 STYLE OF THE RESEARCH

The research seeks to explore, understand and interpret learners' understanding of their right to freedom of expression. It may therefore be described as interpretive and subjective (see § 2.3) and will be conducted as a case study. Due to its unique characteristics, this could be described as a hybrid case study. Cohen *et al.* (2000) define a case study as a study of an "instance in action". No single child or school is being studied here, but rather, the boundaries of a single topic have been selected for the respondents in an attempt to understand their reality more clearly. According to Yin (1984) this may be viewed as an exploratory case study as it opens the way for further studies and generates researchable hypotheses. This resonates with what Merriam (1998) calls the interpretive case study, which examines initial assumptions.

To balance Smit's (2002) critique against the case study as the weakest method of knowing, since it tends to treat peculiarities rather than regularities, the sample for my research consists of a relatively large group of respondents, while the data collection instruments are unconventional. Therefore as Wild, Scivier and Richardson (1992) indicate, loosely structured interviews are used to obtain simple frequency counts. While most case studies are executed by a participant observer, the data for this study will be collected by me as a non-participant in a more structured way (Cohen *et al.*, 2000).

Merriam (1988, p. 69) strengthens the advocacy for case studies when he states that the use of “multiple methods of data collection is a major strength of case study research”.

Nisbet and Watt (1984) suggest different stages for undertaking a case study. This case study will be conducted in three phases. Phase 1 will commence with a very wide field of focus, using an open-ended questionnaire to determine learners’ understanding of their right to freedom of expression in its broadest sense. Phase 2 will involve focus group interviews and narrow the field to the learners’ understanding of the non-spoken or artistic right to freedom of expression. Phase 3 will comprise an in-depth interview with the plaintiff in the *Antonie* case aimed at crystallising the understanding of the data (see § 8.1).

2.7 DATA COLLECTION

I shall start by explaining the original data collection plan and then shift to elucidate how this plan changed and was adapted during the process of the research project.

2.7.1 Data collection plan

A sequential, transformative strategy will be employed. The results of phase 1 will guide the research in phase 2 and phase 3. By using different phases “a sequential transformative researcher may be able to give voice to diverse perspectives ... or to better understand a phenomenon (Creswell, 2003, p. 217). The designs are often emergent and flexible. Because inductive reasoning is emphasised, what researchers learn in earlier stages of the research substantially affects subsequent stages of the research process. Qualitative research is often quite dynamic. The research, the research subjects and the research setting are all subject to change and development (Paechter, 2000).

The process of the qualitative research is non-linear and non-sequential. Data collection and analysis often proceed simultaneously. The data may be modified in light of earlier findings in order to gather more specific information, or explore new and unanticipated areas of interest. Early findings may suggest that the original research question should be changed because the underlying premise is not supported, or because the initial question is not salient in the context (Frankel & Devers, 2000). New questions might also be necessary, flowing from initial research questions and aims (Troman, 1996). Although the route for my research has been planned in advance, it may be necessary to adapt the plan as the research develops.

Phase 1 will entail a pilot study at a former white Afrikaans medium (Model C) secondary school (see § 2.8). The questionnaire will consist of three open-ended questions and a fourth question requiring either “yes” or “no” to be marked (see addendum D). As the only intention of phase 1 is to determine the broad scope of learners’ understanding of their right to freedom of expression, the question posed will require them to consider their understanding of the right to freedom of expression in order to determine how widely their knowledge encompasses this right. The last question, however, entails a

number of aspects of freedom of expression. Here learners have to indicate whether carrying out certain actions at school will or will not be an infringement of their right to freedom of expression.

There is a fear as to whether, when the respondents reach the final question, their thinking might be stimulated, resulting in their returning to the first three questions to add data. This could result in unreliable information, as the purpose of the study is to determine learners' understanding of their right to freedom of expression. In order to avoid this, the responses to the first three questions will be collected before the last question is issued to the respondents. After the pilot study, phase 1 will continue at the four other sampled schools (see § 2.8). I took it for granted that all learners currently receive human rights education and that they must have seen the Constitution or parts of it. Furthermore, my intention was merely to determine learners' current understanding of their right to freedom of expression. The intention was not to explore reasons for the results of my findings. As pointed out in § 9.8.3 this aspect still needs to be researched.

Phase 2 will consist of a focus group interview at each of the five sampled schools. There will be five participants in every focus group interview. Three scenarios will be read to the respondents who will be required to respond and debate orally (addendum E). The in-depth interview in phase 3 will be semi-structured in an attempt to collect as much data as possible (addendum F).

2.7.2 Adapting the itinerary in the research process

Although arrangements had been made to use a particular class with approximately thirty learners, I was disappointed to learn on arrival at the first school that only 17 had submitted their parents' consent forms (Addendum G). The educator and learners assured me that it would, however, not be a problem and that the rest would submit the consent forms afterwards. I explained the legal consequences to them and decided to continue with only the 17 respondents, as my purpose was not to generalise and I was piloting the questionnaire. I assured the learners that the questionnaires could be completed anonymously and that there was no correct or incorrect answer. As there were two pages for each learner, they had to write an allocated number on both pages. They also signed an attendance list on which they recorded their numbers next to their names in order to match the questionnaire pages with the correct respondent, as the respondents for the focus group interviews (phase 2) would be selected according to the answers in phase 1.

No questions were asked during the completion of the questionnaires – an apparent indication that the questions were all clear to everyone, although, given the general authoritarian background of not questioning authorities of the South African youth (see § 1.2), this would become clear only once the data interpretation started. During the data analysis it became clear that question three contained a positive and negative aspect and that it would be better to divide the question into two. The answers to 1.3 had by then been separated into 1.3 and 1.4. The original question “What do you think you are allowed to do (or not to do) at school under your right to freedom of expression?” was changed into two questions (see addendum I):

- 1.3 What do you think you are allowed to do at school under your right to freedom of expression?
- 1.4 What do you think you are not allowed to do at a school under your right to freedom of expression?

The data collection for the next four schools was conducted in exactly the same way. School two had 25 respondents; school three had 13; schools four and five had 22 and 12 respondents respectively.

As only five of the learners at school five had submitted their consent forms the data collection had to be postponed for two weeks until more learners had submitted their forms.

After working through the data for phase 1, five learners were selected purposively for the focus group interviews that would constitute phase 2. The criterion used was “an indication that the learner seems to have an understanding about what the right to freedom of expression entails”. The outcome for phase 2 was to hear the voices of the learners on their right to freedom of creative expression. As interviewing is one of the most powerful ways to try to understand people (Fontana & Frey, 1998) the focus group interview was implemented. In order to ensure an interactive debate during the focus group interviews, the learners who seemed to know what freedom of expression was were selected. Although the focus group interview is time-consuming in terms of transcribing and coding the data, it is inexpensive, yields rich data and has a stimulating effect on respondents.

Since the data already obtained was adequate, the initial plan to return to each school a third time to conduct an in-depth interview with a single learner was abandoned.

During phase 3 an in-depth interview was conducted with the plaintiff in the court case *Antonie* ("Antonie", 2002) with the aim of merging her data with the data received during the first two phases. The assumption was that a learner who went so far as to sue her school, would have thought clearly about the meaning of the right to freedom of expression and might understand it better than the average grade 11 learner. After explaining the reason for my research to the school principal, he supplied the contact details of the learner and the young woman agreed to be interviewed at a guesthouse in Cape Town on 2 September 2004.

The research instruments for the three phases were selected in accordance with the specific aim for each phase. I used questionnaires which could be administered without the presence of the researcher and which are mostly straightforward to analyse, for the first, exploratory phase (Wilson & McLean, 1994). Oppenheimer (1992) points out that such questionnaires also enable comparison across groups in the sample. Where rich data is sought, a word-based qualitative approach is preferable. The questionnaire applied in phase 1 had a clear structure, sequence and focus. In addition the open-ended questions enabled the respondents to respond on their own terms, resulting in honest, personal comments in regard to their understanding of their right to freedom of expression.

Additional, unanticipated data, i.e. “gems of information” (Cohen *et al*, 2000, p. 255) were obtained through the open-ended questions. The candour with which learners answered the open-ended questions will enhance the validity and reliability of the data.

Although not typically qualitative, sequential procedures expanded the findings of phase 1 in relation to phase 2, as well as those from phase 2 in relation to phase 3. The results of phase 1 indicated the type of questions to pursue in phase 2. Kvale (1996, p. 14) defines an interview as “an interchange of views between two or more people on a topic of mutual interest”. The phase 1 data analysis served as a guide to the structure of the questions for the focus group interviews.

The data collection instrument for phase 2 was the focus group interview. Cohen *et al.* (2000) identify three purposes for using interviews, viz. to gather information, to suggest or test new hypotheses and to use them in conjunction with other research methods. As all three purposes are relevant to this study, interviews were conducted. My first aim was to obtain information from the respondents to determine their understanding of their right to freedom of expression. The second was to interrogate my premise that learners do not understand their right to freedom of expression, while the third was to crystallise the findings gained through the other data (Cohen *et al.*, 2000) (see § 8.1).

The five open-ended semi-structured, focus group interviews for phase 2 aimed to determine why learners are able or unable to exercise their right to freedom of expression. The rich and detailed data yielded served to clarify the research question and to indicate the nature of the learners’ understanding of their right to freedom of expression.

The focus group interviews were not structured by means of standardised or non-directive questions (Cohen *et al.*, 2000), since the value of the focus group interview lies in the interaction within the group discussing a topic (Morgan, 1988). It should not be a dialogue between the interviewer and the group (Cohen *et al.*, 2000), to ensure that data emerge from the interaction within the group. Although focus-group interviews take place in unnatural settings, they yield information that would otherwise not be available. The focus group interviews were conducted at the five sample schools. The fact that the learners felt very secure and comfortable in the school setting enhanced the process of data collection. The spontaneous interaction during the focus group interviews indicated to me that the respondents were not afraid of participating in the research project. The focus group interview method gathered a large amount of data in a short period of time. The analysed data from phase 1 and 2 were useful in structuring questions for phase 3 and enabled an open approach to the in-depth interview, allowing more objective observation (listening) by the interviewer during the interview.

In an attempt at further clarification I conducted an in-depth interview with the plaintiff in *Antonie* (“Antonie”, 2002). This qualitative, open-ended, face-to-face interview with a learner who had lived through a harrowing court case to prove that her right to freedom of expression had been violated,

delivered a detailed account containing much data. The major disadvantage of such an interview is that it is time-consuming.

2.8 SAMPLING

As the intention here is not to determine the understanding of all learners in South Africa in regard to their right to freedom of expression, but rather only to explore a phenomenon, I chose a qualitative approach. A small sample size is characteristic of a qualitative approach, as larger groups would not necessarily guarantee more representivity (Cohen *et al.*, 2000).

I selected a purposive sample in the Gauteng Province for the fieldwork as that is where I reside and work. Furthermore, the demographics in the Gauteng Province schools are similar to the demographics of schools countrywide in terms of race, size, situation, etc. Eventually five schools representative of former traditional white and black schools, as well as urban schools, all with either Afrikaans or English as medium of instruction, were selected. An official, who works as a subject supervisor in the Gauteng Department of Education (GDE), identified five schools from his district that would serve the purpose of this research. In a sense the sampling could be regarded as convenience sampling. The five schools which yielded 98 respondents were selected purposively from the Tshwane South district in the Pretoria (Tshwane) area, and included a:

- former white Model C,¹⁴ Afrikaans medium of instruction, urban school;
- former Model C Afrikaans and English parallel medium of instruction school. This school was selected because learners there specialise in all the different art genres, and are believed to be more creative than those in other schools. Therefore the research topic could be more pertinent to them. Only English speaking learners were selected from this school;
- former Model C, English medium of instruction school; and
- two former black, English medium of instruction schools from two townships.¹⁵

My intention was to return to these five schools for the focus group interviews with five learners for phase 2. As some respondents were ill or no longer wanted to participate, some focus groups consisted of only four respondents. Learners were selected according to the analysed data obtained from the questionnaires during phase 1 (see addendum I), using the criterion of assumed knowledge about the spectrum of the right to freedom of expression. The data collection plan and analysis are summarised in Figure 2.1.

2.9 APPROVAL FOR THE RESEARCH

The official research application form (Addendum J) was submitted to the GDE with the proposal (Addendum K) and the names of the five sample schools. After the request had been approved by the

¹⁴ Model C schools were schools that were semi-private in the previous compensation. Although educators' salaries were paid by the government, the school governing body could generate their own money to govern and develop the school's own matters.

¹⁵ A township is a residential area developed in the Apartheid era for black people and was normally situated just outside the borders of a city.

GDE (Addendum L) I also had to apply to the Tshwane South School District (Addendum M) which also had to approve the school visits (Addendum N).

As the prospective respondents were all minors in grade 11 in public schools, permission was required from the relevant school governing bodies (Addendum O) and principals (Addendum P). The parents of the learners involved were requested to sign forms of consent on receipt of a letter explaining the aim of the research. As the data collection was planned to be executed in three phases, parents had to indicate the phase/s in which their child could participate.

2.10 DATA COLLECTION INSTRUMENTS

After I had designed the questionnaire for phase 1 five experts, viz. two South African and two international academics who work in the field of education law and human rights, perused it. Finally, a local qualitative research expert reviewed the questionnaire. A language expert edited the final draft.

Ten scenarios representative of the spectrum of aspects included within the protection of the right to freedom of expression (the written and spoken word excluded), were developed to be used in focus group interviews for phase 2, to explore learners' understanding of the aspects included in the right to freedom of expression (Addendum Q). Focus group interviews would yield multiple opinions on the same issue (Denzin & Lincoln, 1998).

The following aspects were addressed in the scenarios:

- Scenario 1: Jewellery at school for male learners
- Scenario 2: Hairstyle as required by a religion
- Scenario 3: Emblems to disseminate a message on school uniforms
- Scenario 4: Emblems to disseminate a religious message on school uniforms
- Scenario 5: Jewellery with a slogan
- Scenario 6: Artistic creativity (suggestive dance movements)
- Scenario 7: Tattoos
- Scenario 8: Artistic creativity (art: a nude study)
- Scenario 9: Hairstyle
- Scenario 10: Artistic creativity (lyrics: promoting an illegal substance).

Although the scenarios differ, some share the same theme or aspect of freedom of expression. In order to maintain distance and achieve objectivity, I asked ten critical friends who taught grade 11 learners and who are aware of the issues they discuss (see letter to critical friends – Addendum R) to list the scenarios in order of priority. The ten critical friends comprised of:

- two black educators from a private school;
- one white educator from a former black public school;
- two white educators from a private school;
- three white educators from former white model C public schools; and

- two black educators from black private schools.

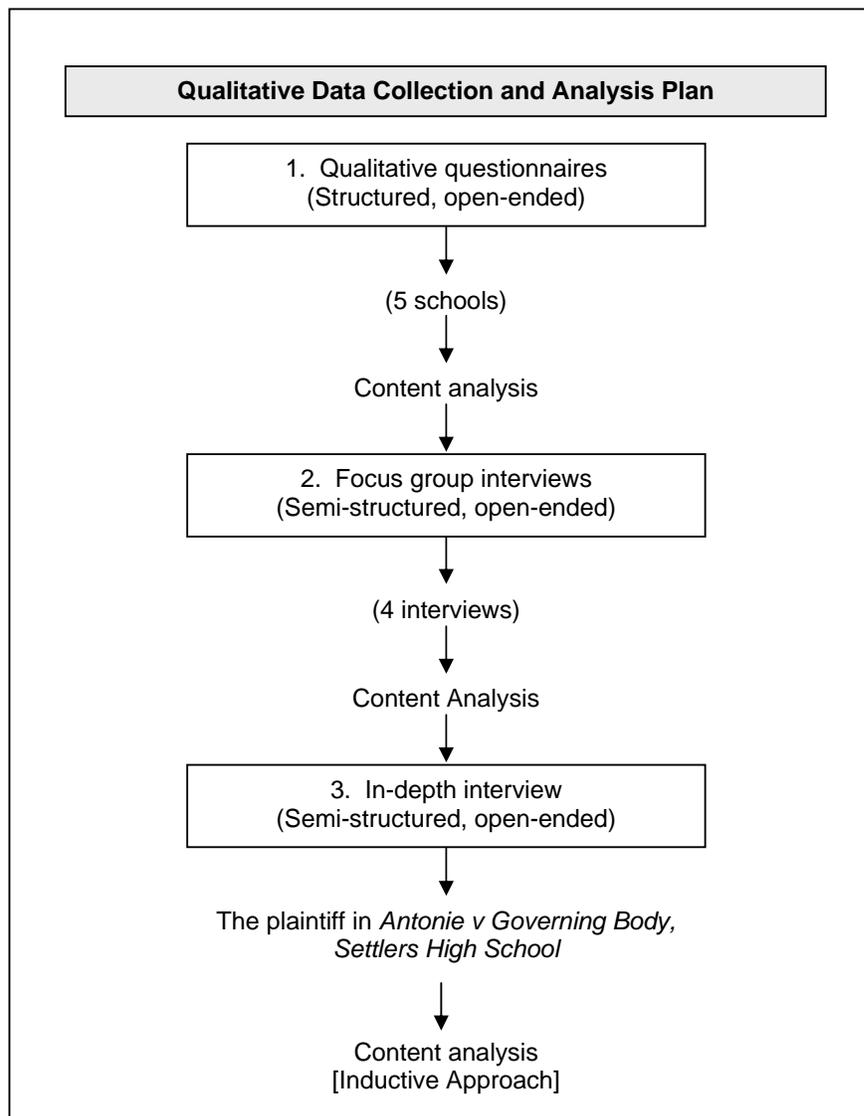


Figure 2.1: Qualitative data collection and analysis plan

The critical friends prioritised the ten scenarios according to the following criteria, viz. “this really is a burning issue among grade 11 learners” and “grade 11 learners will really want to talk about this topic”.

The following scenarios (in order of priority) were identified as most important: 1, 2, 6, 8, 5 and 4. The remaining four were not regarded as significant. Therefore, the critical friends selected scenarios 1, 2 and 6 for the data collection in phase 2, i.e. the focus group interviews (Addendum S). It is informative and significant that the themes of the three scenarios are jewellery, hairstyle and artistic creativity, which represent most of the aspects represented in the spectrum of the right to freedom of expression, excluding the written and spoken word. A set of pre-determined, open questions, as well as the scenarios, were used to stimulate the discussion and to encourage the learners to talk more widely

about the concept. The purpose was to determine their understanding of the concept and implementation of the right to freedom of expression, not to evaluate the standard of their responses. All interviews were recorded. The five focus group interviews were conducted during July and August 2004.

On beginning to transcribe the data, I experienced a setback in my journey toward understanding. I realised that three of the interviews' sound quality was inferior and I had no other option than to return to the three schools in May and June 2005 to redo the focus-group interviews. Of course I had to organise everything again, including new consent forms from the parents, as I could not use the same respondents as the first time. Although I was very frustrated by this mishap because I wanted the data to interpret, it disrupted my scheduled plan, but I realised that this is a typical encounter one could experience while doing research and this is the reality with which to cope. The disasters on my journey, however, did not stop here, as I once again experienced a setback. I could not hear what was on one of the three tapes that I had recorded again. I then decided to continue with the data from the four focus group interviews that I had conducted successfully.

Phase 3 constituted a non-standardised in-depth interview - an attempt to remain unbiased, to see whether information gleaned from the interview could resonate with previous findings and to ensure that the interview could be spontaneous to a large extent. The purpose of interviewing, according to Patton (2002), is to "allow us to enter into another person's perspective ... to find out what is in and on someone else's mind". In this way I constructed my understanding of the respondent's understanding of her perception of the right to freedom of expression.

2.11 ETHICAL CONSIDERATIONS

As my respondents for phase 1 and phase 2 were all grade 11 learners (all minors) their parents were requested to sign consent forms (Addendum G). The research purpose and process were explained to the learners who were guaranteed anonymity and confidentiality - both of the school and the respondents. Respondents were aware that they would be able to verify the findings and gain access to the final study. Although the research topic did not involve a contentious issue, there was an urgent need to debrief the respondents after the focus group interviews, since some of them, as a result of the scenarios and questions, started to question their school authorities. A ten-minute explanation of the relationship between the Constitution and the school's code of conduct, as well as the concept of the entrenchment of all rights with the proviso that the rights are not absolute and may be limited under certain conditions, sufficed.

2.12 METHODOLOGICAL LIMITATIONS

The epistemology underpinning my research is the interpretivist paradigm. I thus needed to construct my own understanding of the understanding learners gave to their reality. I can therefore not claim objectivity and acknowledge some limitations to the study.

Research dealing with the understanding of learners' right to freedom of expression, should be an inclusive study of the entire Republic of South Africa, cover all the sectors of education and focus on all the different races and ethnic groups. Since such a study would be a time-consuming research project, I have decided to focus only on the public school sector in one province. Private schools were thus not part of this research project, and it can be anticipated that the outcome regarding private schools will differ interestingly from that of public schools.

I did not focus on the highly interesting and information rich sector of higher education. Within the public school sector, I focused only on grade 11 learners in the further education and training phase. The reason for choosing the further education and training phase is that these learners are more advanced than learners in grade 1 to 9 in terms of their discretion and decision-making skills. The child (learner) is seen as a minor and has a lack of *iudicium* (Davel, 2000).

Learning Outcome 2 of the learning area Life Orientation is to develop responsible citizenship (DoE, 2002, p. 12):

The learner is able to demonstrate competence and commitment regarding the values and rights that underpin the constitution in order to practise responsible citizenship, and enhance social justice and sustainable living.

Although these learners began their school career under the previous dispensation of apartheid, they experienced the time in which human rights became contentious, and they were in the system while the school system changed. Therefore it would be ideal to gauge how they understand their right to freedom of expression, having been part of the culture of changing from the violation of human rights to the entrenchment of these rights.

Despite the limitation I intended to research a diverse school system including former black and white schools. The use of urban and rural schools ensured that the sample was representative of the total population of South Africa.

In the Gauteng province I limited my research to one region. Once again, I did not conduct my research at all the schools in this region, but only at five purposively sampled schools. I also did not research all the learners at these five schools, but focused only on one grade eleven class at every school. I therefore cannot claim that my findings can be generalised. My study is only a reflection of some learners' perceptions at a specific time and place.

Furthermore, I must acknowledge the fact that I am a white Afrikaans speaking male, influenced by history, culture and religion. Although I tried my best to be objective in conducting the research, I believe that everyone creates their own truth and cannot claim that my being did not influence my research. Although I never experienced any negative reaction from any respondent because of this, I need to acknowledge the fact that it could indeed have had an influence on my research as I grew up under the apartheid regime, and some respondents were non-white or female.

The interpretivist paradigm indicates that I construct my reality as my respondents construct their own. I thus do not claim to make humanistic value judgments or assessments that can be prescriptive to mankind. My intention is only to determine some learners' understanding of their right to freedom of expression in the South African school system ten years into democracy.

2.13 DATA ANALYSIS

The data was collected in three phases with three slightly different aims. Initially I did not plan to use computer-aided qualitative data analysis software (CAQDAS). The length of the transcribed data of the focus-group interviews (approximately 30 pages each), as well as the in-depth interview, indicated however, that CAQDAS would indeed assist in managing the huge quantity of data. Atlas.ti™ was used to code and retrieve the data (Smit, 2001).

The answers from the first four questions of the questionnaires for phase 1 were typed and coded through Atlas.ti™ which was also used to display the data in a hermeneutic unit (addendum A). It assisted in regard to associations and links within the data (Miles & Huberman, 1994). The responses in the questionnaires are referred to as post-coded since the coding was developed after the questionnaires had been administered to and answered by the respondents. As case studies are a search for patterns (Adler, 1996), much sorting and sifting (Miles & Huberman, 1994) was required to identify categories, families and common sequence patterns in the data. The codes were arranged in categories. The categories were then clustered into families from which patterns could be deduced (McMillan & Schumacher, 2001). Figure 2.2 indicates how the codes were clustered until patterns were discerned. This figure was adapted from McMillan & Schumacher and adopted to match the Atlas.ti™ terminology used. Question 5 of the questionnaire was not analysed through Atlas.ti™ as this question was more of a quantitative nature and was dealt with differently (addendum H). Question 5 had no significance for answering the research question.

The data from phase 2 were also coded with Atlas.ti™, although in a different hermeneutic unit (addendum B), as the purposes of the two phases differ slightly. The data of phase 3 was also coded by means of Atlas.ti™ in yet another hermeneutic unit (addendum C) and interpreted as a whole to correlate and crystallise (see § 8.1). Phase 1 could be divided into two sections: the four open-ended questions and the last eleven questions, where respondents had to answer only “yes” or “no”, and which tended to be of a quantitative nature. Codes were not determined beforehand and data were coded by the allocation of a code to every reason cited by the respondents. The huge variety of codes and the rich data collected were overwhelming. All the data had to be re-coded as the original coding was too detailed. The codes had to be reduced before they could be sorted into categories. Finally there were 245 different codes from phase 1. The second hermeneutic unit (addendum B) comprised 241 quotations and 52 codes while the third (addendum C) comprised 51 quotations and 25 codes. The data-managing process helped me to categorise the data from the codes into categories, which were then clustered into families. Through this process certain patterns crystallised to assist me in answering the research question (see § 8.1).

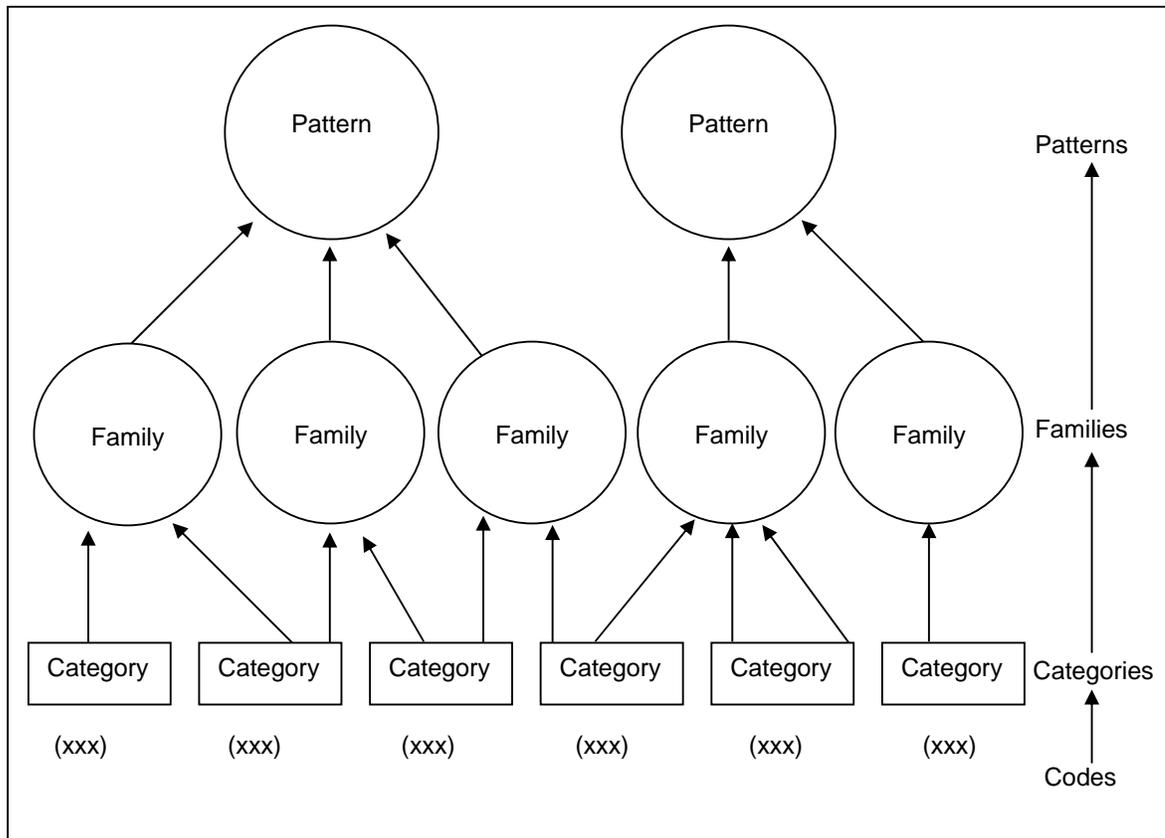


Figure 2.2 Diagram of the process of clustering the codes till patterns are identified

2.14 SUMMARY OF RESEARCH DESIGN

I decided on a qualitative approach for this study that entails an in-depth literature study (including articles and case law). As the intention was to determine *what* learners knew about their right to freedom of expression, the literature review commenced according to the traditional method of law research (see § 2.2). The assumption that multiple realities are socially constructed by individuals and society indicates that a qualitative approach will assist in determining learners' understanding of this right. Qualitative research will therefore help managers and policy makers to adopt laws that will ensure that learners understand what legislators intend them to understand. Qualitative research facilitates insight into the learners' understanding of this right from their (the respondents') perspectives. Accepting that there is a range of different ways of making sense of the world, it appeared that a qualitative approach was most suited to this research. Since the research was an attempt to understand learners' understanding of their right to freedom of expression, an interpretive research approach seemed appropriate.

From the above it is clear that the theoretical underpinning of my study stems from the interpretive paradigm (see § 2.3) and that the approach is subjectivist (or anti-positivistic). This originates from the belief that individuals create their own reality as they interpret and understand what happens around them. The academic puzzle that guides my research is what learners understand under their right to

freedom of expression. The reality they attach to their truth (understanding) is the focus here. A qualitative approach is suitable as its intention is not to predict or generalise findings, but to describe and understand a phenomenon, in this case from the learners' perspectives. My working premises are that some learners:

- have limited knowledge of their right to freedom of expression; and
- do not know how to exercise their right to freedom of expression.

Due to the uniqueness of this case study, I would describe it as a hybrid case study. No single learner or school is being studied, i.e. the boundaries of a single topic have been selected. The aim, however, is to understand the learners' reality more clearly (Cohen, *et al.*, 2000). This case study can, according to Yin (1984), be viewed as an exploratory case study as it has opened the way for further studies and generated researchable hypotheses. This also resonates with what Merriam (1998) calls an interpretive case study which aims to examine initial assumptions. This study was conducted in three phases. Phase 1 commenced with a very wide field of focus, using an open-ended questionnaire to determine learners' understanding of their right to freedom of expression at its broadest. In phase 2 the focus group interviews narrowed the field to the learners' understanding of the non-spoken or artistic right to freedom of expression. In phase 3 an in-depth interview was conducted in order to crystallise the findings (see § 8.1).

A sequential, transformative strategy was applied, i.e. the results from the phase 1 data collection guided my research in phase 2 and in turn in phase 3. The methods of data collection can be divided into three phases.

A purposive sample was selected; viz. five schools were sampled purposively from the Tshwane South district schools in the Pretoria (Tshwane) area. Table 2.1 provides a summary of the research question, working premises, assumptions, instruments and analysis used in this research.

Table 2.1: Summary of the premises, assumptions, instruments and analyses used in this research

Research question: What do learners understand under their right to freedom of expression?			
Premises	Assumptions	Instruments	Analyses
(1) Some learners have limited knowledge of their right to freedom of expression	(a) Most learners know that the right to freedom of expression entails the spoken word (b) Most learners know that the right to freedom of expression entails the written word (c) Most learners do not know that the right to freedom of expression entails symbolic or creative expression	<ul style="list-style-type: none"> • Questionnaire 	Content analysis

Research question: What do learners understand under their right to freedom of expression?			
Premises	Assumptions	Instruments	Analyses
(2) Some learners do not know how to exercise the right to freedom of expression	(a) Most learners tend to absolutise the right to freedom of expression (b) Most learners do not know how to limit the right to freedom of expression	<ul style="list-style-type: none"> • Questionnaire • Focus group interviews • In-depth interview 	Content analysis

The first premise will be dealt with in phase 1 which is also the exploratory phase. The purpose is to determine the range of understanding of learners in regard to the right to freedom of expression. This premise will be interrogated with the data collected via the questionnaire and will guide the data collection in the next phase.

The second premise will be questioned with the data collected via the questionnaires, the focus group interviews, as well as the in-depth interview. The three data collection instruments will help to crystallise the data (see § 8.1).

2.15 ROAD SIGNS AS INDICATORS ON THE JOURNEY

When touring foreign countries, it is necessary to learn all the relevant signs to guide you on your journey. I therefore will now clarify the technical jargon essential for guiding the reader along my journey.

2.15.1 Quotations

Quotations from sources within the text will be indicated by inverted commas. Should the quotation be more than 30 words, it will be blocked and the font will be Arial, 9. There will be no inverted commas if the quotation is blocked. Quotations from the respondents will always be in italics whether within the text or blocked and will not be within inverted commas.

References to the respondents will read as follows: 2:35 (123-126).

The first number will indicate the number of the school. The second number will indicate the number of the quotation and the numbers in the brackets indicate the line in which to find the quotation in the text in Atlas.ti™. The above indicated example will thus be the 35th quotation from the second school and it can be read in lines 123 to 126.

The medium of instruction of one of the five schools in the sample is Afrikaans. Where these respondents are quoted, the quotations are translated into English in the text and the original Afrikaans quotations are given as footnotes.

The Latin word *sic* is used where respondents or sources are quoted to indicate two aspects. It is firstly used to indicate something humorous in the quotation e.g. "He wears a hat on his head [*sic*]", as

you do not wear a hat anywhere else. I, however, used it mostly to indicate language errors made by the respondents.

2.15.2 Key (legend)

When interpreting and reading the network displays generated by Atlas.ti™ in chapters 6, 7 and 8, the relationships of the different links between the categories or families will be indicated with symbols. The legend to read these symbols is indicated in Figure 2.3.

CC-Link: expressing the way y.. --> express yourself phy..	
==	: is associated with
[]	: is part of
=>	: is cause of
<>	: contradicts
isa	: is a
	: noname
*}	: is property of
User defined relation	

Figure 2.3 Legends depicting the relations of the links between the categories or families

Depending on the number of codes contained in a category or family, a different anchor picture is displayed by Atlas.ti™. As I did not quantify the qualitative data of my study, these differences are not significant. All the addenda, including the three complete hermeneutic units, to my study can be viewed on a CD as a map when more detail is needed for the reader's journey through my research.

2.15.3 References

I have used Endnote 9™ to create and organise my citations and list of references according to the American Psychological Association (APA) 5.1 version of citation criteria. I have, however, decided on my own layout as the University of Pretoria has no prescriptions in this regard. As the names of court cases as well as the names of international instruments are very long, I have opted for the option of choosing the abbreviated case names in the first case and short titles for the latter. These abbreviated case names and short titles are indicated by inverted commas in the citations according to the APA criteria. The APA Proforma does not distinguish different ways of citing case law in different countries - it has one way of referring to all case law. I have opted to use the way of referring to case law in the text as the custom is in the country in question do, but the references to case law in the list of references follow one format, irrespective of the country of origin, e.g. *Thornhill v. State of Alabama* is referred to in the text as 310 US 88 (1940), while in the list of references it should according to APA criteria, be 310 88 (US 1940).

When citing, the APA format adds a "p." to indicate the page number of the citation. However, when I refer to a paragraph in case law, the "p." is changed to "at" to indicate that the citation is from a paragraph e.g. Rasnic (2001, p. 1) and ("Makwanyane", 1995, at 216). Also, with reference to already-mentioned court cases, when an author is cited and his/her name occurs in the sentence, that name is

excluded from the reference, e.g. Rasnic (2001, p. 1), since the APA Proforma offers the option to delete the author. The APA Proforma, however, has no option to delete the abbreviated case name, therefore the case that has already been named in the sentence will occur once again in the citation, e.g. Tinker (“Tinker”, 1969, at 506).

One of the advantages of Endnote 9™ is that whenever a source is cited, it automatically appears in the reference list. As I have opted to use the abbreviated form for case law, I could in some instances opt to use the plaintiff’s name, and in other cases, the respondent’s whichever is the shortest. As a result one could miss the reference in the reference list, e.g. (“Eichman”, 1990) in the text refers to United States v. Eichman, 496 310 (U.S. 1990) in the reference list.

2.15.4 The concept “to absolutise”

Although I decided not to include a glossary but rather opted to explain the concepts in the text where relevant, I find it necessary to explain the concept of “absolutising” as it features throughout as a golden thread.

When there is a tendency not to limit rights, one can say that rights are not limitable or cannot be restricted. Rights would then be unrestricted. Synonyms for this phenomenon can be that rights are non-negotiable, unquestionable, unequivocal or unadulterated. One could also say that the rights have been elevated to be absolute or tend toward the absolute. I have however, opted to use the verb “absolutise” as cited in Bosman, Van der Merwe and Hiemstra (1984, p. 571).

2.16 PLANNING FINALISED

This chapter consists of a map of the intended research journey. Although there might be some unexpected occurrences, the main route has been planned and will form the spine of the research design and the research journey which will be undertaken in order to answer the research question and substantiate my working premises.

In the next three chapters I will embark on my journey of knowledge in conducting the literature review. As I am focusing on a human right, chapter 3 will examine the literature on the issue of human rights. In chapter 4 the focus will be the specific right to freedom of expression. As case law is the primary source in this literature review, I shall conclude by discussing the development of legal principles in exercising the right to freedom of expression in case law in chapter 5.

CHAPTER THREE

HUMAN RIGHTS: The logistics for the journey

3.1 INTRODUCTION

I shall start my literature review by dealing with the concept of human rights, as the right to freedom of expression is embedded in the larger sphere of human rights. The initial focus will be on the history and development of human rights in general and will indicate how human rights have developed and how the *foci* have changed during the development process. The second focus will be on international human rights instruments as they were created to give global momentum to the development of and respect for human rights. Finally, I shall deal with the limitation of human rights. This concept is important as it concerns the fine line between the violation of a fundamental and guaranteed human right and the limitation of the right by the application of certain legal criteria. It is necessary to always remember that the theory of human rights as reflected in human rights instruments and constitutions is the ideal for which to strive. When interpreting these instruments and constitutions in practice, there is a tension between the ideal and reality.

3.2 HUMAN RIGHTS

As freedom of expression is internationally but one of several fundamental, protected human rights, the concept of human rights needs to be defined. Furthermore, human rights have developed internationally since the Second World War and greatly influence the politics of democracies worldwide (Alston, 2002; Heyns, 2004).

3.2.1 The concept of human rights

The Universal Declaration on Human Rights ("UDHR", 1948, article 1) states that "[a]ll human beings are born free and equal in dignity and rights". All humans are born with human rights inherent in their human dignity. McQuoid-Mason, O'Brien and Greene (1993, p. 8) define human rights as "generally accepted principles of fairness and justice". Such rights spell out clear values, require a commitment from fellow human beings and governments (Schwarz, 2003), and guide all policies to ensure the realisation of human rights. "Human rights are those rights that belong to every human individual, simply because he/she is a human being" (Flowers, 2000, p. 4). These rights are held to be equally important for all human beings independent of the economic, social, political, cultural and religious contexts in which they live. Although not absolute, such rights are deemed to be universal, inalienable and enforceable in organised society as represented by government and its officials. In short, human rights are universal moral rights.

Since, in the history of the world, many citizens' human rights have been violated, the aim of a bill of rights is to protect individuals from the possible abuse of power. It is therefore necessary to trace the development of human rights globally to the current stage, i.e. the modern world that is identified by collaborative decision-making and democracies that guarantee the human rights of every citizen.

3.2.2 The development of human rights

One of the earliest legal principles that addresses human rights originated among the canon lawyers of the 11th and 12th centuries, namely the legal maxim “*lex injusta non est lex*” or ‘an unjust law is not a law’ (Sieghart, 1985b, p. 22). This principle implies that unjust laws passed by rulers did not have to be obeyed (Alston, 2002).

Courts currently have the right to test the legality of the law to protect the human rights of society, hence the establishment of the above-mentioned legal maxim as a legal principle in *William Marbury v. James Madison* 5 U.S. 137 (1803) (“Marbury”, 1803, at 153) when the court stated “...[i]t can refuse justice to no man”. This legal principle guarantees that the courts will do justice to all human beings, irrespective of their social status. It further also emphasises the principle that no one is above the law. Therefore unjust law is no law.

The Roman Catholic Church and the reigning kings who were thought to possess divine authority played a vital role in Europe. As a result of this divine authority the *Magna Carta Libertatum*, which was proclaimed in 1215, was compiled by the *English émigrés barons* in protest against the kings because of the high level of social injustice, especially in regard to taxes and the clergy. Between 1200 and 1600 the people of Europe felt that they had few rights and they strove toward democracy, or at least to have a say in matters concerning themselves. The claim to divine power was diminished in Britain with the passing in Parliament during 1689 of a Bill of Rights, which, although it still bound citizens to a life with fewer rights than royalty, was a step in the “right” direction. As more information became available to all citizens, their knowledge developed, resulting in the Renaissance or new search for knowledge. This alerted people to the fact that they were entitled to rights which they had until then been denied merely because they had been born into the lower class. Alston (2002) indicates that many citizens battled specifically with their right to freedom of expression during the Renaissance period. They could be recognised only if they were “listened to”. While Renaissance philosophers commented often on the issue of the rights of the subjects who were abused by royalty, they often pleaded for freedom of speech in an attempt to establish a democracy.

John Milton (1608-1674), who was famous for writing the *Areopagitica* in 1644, made an appeal for freedom of expression, in which he argued against the new law requiring all books and pamphlets to be submitted for scrutiny before they could be published (Suffolk, 1968). Milton’s plea simultaneously advocates freedom of the media and opposition to censorship (Alston, 2002). For John Locke (1632-1704) sovereignty was responsible to society and no person had the right to exercise arbitrary power over others (Alston, 2002).

The French philosopher, Jean Jacques Rousseau (1712-1778), promoted equality and established the principle that as the individual had to sacrifice his individuality to be a citizen of the country, government in exchange, should guarantee civil rights (Alston, 2002; Dlamini, 1995).

Emmanuel Kant (1724-1804) developed the principle of “*innere Freiheit*” (inherent/inner freedom) that is used today in modern bills of rights and courts to limit the rights of citizens. It implies that in exercising one’s rights or freedom, one may not infringe the rights and freedom of others (Alston, 2002; Van der Vyver, 1979). In the early stages of human rights development the main focus was on economic and social rights (An-Na’im & Deng, 1990). The United States Federal Constitution was the very first constitution to protect human rights and was drafted in 1787, after the monarchy had been replaced by a republic with elected representatives. It begins as follows:

We the people of the United States, in order to form a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and to secure the blessings of liberty to ourselves and our posterity, do ordain and establish the Constitution of the United States of America (“United States of America Federal Constitution”, 1787 preamble).

The Declaration of the Rights of Man and the Citizen: “*Déclaration des droits de l’homme et du citoyen*”, that was followed by the French Constitution in 1791 was drafted in France in 1789 under similar circumstances to those under which the Constitution of the United States of America was written (Sieghart, 1985a).

Although the two above-mentioned are the oldest constitutions known to protect citizens from unfair rulers or governments, the principle that all men are equal, is found in the 1776 American Declaration of Independence, which begins with the words:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with unalienable rights that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ... (“American Declaration of Independence”, 1776, preamble).

It is evident that both countries became republics with representation for all citizens after overthrowing the reigning monarchs during a rebellion. Brinkley (1993) points out that amendments to the Constitution of the United States of America came into force in 1791 to offer even greater protection to its citizens than before. These amendments are currently known as the Bill of Rights. According to Adams (1997) the Constitutions of the USA and France can be viewed as the first explicit generation of human rights, and can be traced to the “ideals of the enlightenment” or Renaissance.

The US Federal Constitution became the supreme law of America and the Bill of Rights was entrenched (Alston, 2002). The objectives of the first constitutions with their bills of rights were to protect citizens against arbitrary state power (Alston, 2002), and to protect the individual against the state or society (Adams, 1997). For the first time, human rights were entrenched in a Bill of Rights according to a principle that originated with the canon lawyers.

During the 19th century the focus shifted from natural rights to evolutionism and utilitarianism (Dlamini, 1995). Mankind was introduced to great wealth as a result of the Industrial Revolution (1750 - 1850) (Alston, 2002). This wealth, however, led to even greater inequality among people. Since the poor were exploited by the wealthy, the focus shifted from freedom from government intervention in

individual lives to laws that compelled the government to intervene in order to protect the rights of citizens. This shift in focus played a significant role in the history of human rights, considering that individuals can nowadays appeal to the authorities to protect their rights (Alston, 2002). Adams (1997) points out that the nature of human and fundamental rights could become the most pressing concerns of citizens in a society.

Although human rights developed slowly over a long period of time, “governments dealt with those within their jurisdiction as they wished” (McCorquodale & Fairbrother, 1999, p. 736). Human rights were claimed to be matters of domestic jurisdiction and each government’s own responsibility. If a government violated the human rights of its citizens, there was nothing that another country could do about it.

International law was developed during the 20th century in order to ensure the human rights of every citizen in the world. The common endeavour to end slavery and piracy on the high seas could be regarded as a force in the development of international law to protect human rights (Alston, 2002).

The USA, Britain and the Union of Soviet Socialist Republics (USSR) commenced negotiations in 1944 to establish an international organisation that would “facilitate solutions to international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms” (Van der Vyver, 1979, p. 14). This evolved from the need to protect the citizens of the world against the violation of their human rights and was acknowledged by the great powers.

After the Second World War (1939-1945) there was momentum for external constraints to be imposed on all governments (Bobbio, 1996) as they could no longer be left to their own devices (Sieghart, 1985b). This first code of international human rights is known as the Charter of the United Nations, 1945. Dlamini (1995) rightfully argues that the Charter marked a new chapter in the history of human rights. The Charter was amended and in 1948 the United Nations passed the United Declaration of Human Rights (UDHR). The adoption of the declaration was recognised as a great achievement and had immediate political and moral authority (Ramcharan, 1979, p. 28). The European Convention on Human Rights (ECHR) followed in 1950, demonstrating that many countries were, at that stage, aware of the necessity for the protection of human rights.

The UDHR and the ECHR were unable to achieve immediate, unfettered success, since human rights violations were rife in many countries. In the 1960s social human rights were afforded no significant attention, consequently the rights of women, slaves and minority groups were neglected (An-Na'im & Deng, 1990). It was only twenty years later that governments began to ratify two international covenants adopted by the United Nations (UN) Human Rights Commission, viz. the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

The UDHR and ECHR declarations and conventions were intended to spell out the good intentions of most countries of the world to enhance human rights. Governments could, however, not be obliged to implement these human rights. Zuriga (1998, p. 10) describes the UDHR as “essentially a wish-list, buttressed by a series of non-binding covenants, backed only by moral sanctions”, that is “still very much without teeth”. Similarly, Kofi Annan, the UN Secretary-General, described it as “a mirror that at once flatters us and shames us” (Annan, 1999, p. 8). These examples illustrate the tension between the theory of human rights and the reality in implementing the human rights in practice.

Although the UDHR was the first comprehensive international document on human rights, it was followed by regional and international declarations and conventions which began to exert an influence only once they had been ratified by specific countries. The absence of important non-Western cultures in the drafting of human rights instruments has been a serious concern over recent years, as many of them do not share Western countries' views on human rights (An-Na'im & Deng, 1990). Although governments should guarantee the rights of every citizen, there are some that still, for cultural or political reasons, practise serious violations of the freedom and rights of citizens (Ramcharan, 1979). Human rights have been globalised and today span all borders and government mechanisms (McCorquodale & Fairbrother, 1999). Internationally, governments can intervene in one another's countries, should the human rights of the citizens be violated.

South Africa joined the international community in protecting human rights when the first democratically elected government accepted the Constitution of the Republic of South Africa, of 1996 (hereinafter referred to as the Constitution) in 1996. The Constitution is one of the most modern and advanced constitutions, especially with its Bill of Rights in chapter two (Malherbe, 2003). The new government adopted the Constitution with the Bill of Rights that entrenches the fundamental human rights of everyone in South Africa.¹⁶ It is thus imperative for South Africans to consider how international law addresses human rights, and more specifically, to become aware of how human rights are interpreted in international courts.¹⁷

3.2.3 Considering international human rights instruments

Jacobs (2001) argues that no court decision can be made without considering fundamental human rights. Courts also need to consider international law when making decisions.¹⁸ In other words, human rights are protected in the bills of rights of different constitutions of countries and constitute the core values and guidelines for court interpretations and verdicts. This principle was established in Germany in the *Stauder* case in 1969 and reads as follows:

Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of community law as protected by the Court. In other words, Communities' legislation cannot infringe upon fundamental human rights ("Stauder", 1969, at 46).

¹⁶ Section 7 of the Constitution.

¹⁷ Section 39 of the Constitution.

¹⁸ Section 39(1)(b) of the Constitution.

South Africa did not have a supreme Constitution with an entrenched Bill of Rights before it became a democracy. The development of international human rights covenants and instruments has made it clear that there is no acceptable degree of apartheid (Sachs, 1990b). One either protects or violates fundamental rights. The purpose of a bill of rights is to protect human rights from being abused by the government or any person.¹⁹

It is imperative to focus on the development of human rights on the African continent and the problem of combining African tradition with Western tradition in order to promote and develop human rights.

3.2.4 Human rights in Africa

Nguema (1990) argues that traditional rights and law as instruments do not exist in Africa. The ancestral African tradition differs from Western society in terms of the law, e.g. legal personality in African traditions is not confirmed within the limits of birth and death. For example, in Africa a man can marry an unborn girl and a widow must be taken care of by her brother-in-law. A child born from such a union becomes the child of the deceased man. Similarly, people of the same clan view one another (whether they are male or female) as brothers and will never marry one another. Members of other clans would be viewed as women (once again the gender is irrelevant) and they may marry them. Furthermore, in Africa old people are respected and children are viewed as a sign of continuation and validity of the group. It is evident that the notion of human rights is foreign to the concept and character of some African societies. Africa is an independent continent: "... reconciled with itself and the rest of the world, searching not only for its modernity but also its unity, its identity and its dignity" (Nguema, 1990, p. 268). Africa's view on the concept of human rights differs from the view of Western countries. I found Nguema's argument that traditional rights and law as instruments do not exist in Africa rigid. It would be more correct to argue that African legal systems (customary law) provide alternative and divergent ways of understanding rights. I view rights in Africa as existing within sociological frameworks that recognise individuals' rights within collectives.

It is a major challenge for Africa to amalgamate the human rights notion from Western countries with the notion of the African continent, as well as the Islamic notion or perspective on human rights (see § 3.2.3 and § 3.2.5). The challenge in establishing human rights in Africa manifests because three world-views, which Nguema identifies as the mental universe of the Islamic world, the mental universe of the "animistic" world and the mental universe of the Western world, overlap. This problematises the notion of establishing a culture of human rights on the African continent.

3.2.5 Islam and human rights

At the heart of the Islamic vision is the notion of God, and not the government (Moosa, 1998; Nguema, 1990). The Islamic religion, beliefs and rules sometimes seem clearly incompatible with human rights, e.g. the degrading treatment of women. In most Muslim countries personal codes are still governed by

¹⁹ Section 7(2) of the Constitution.

religion. Even this is not in line with most universal human rights covenants and legislation. Inequalities and the “violation” of females’ rights in terms of, among others, marriage, divorce, inheritance, polygamy, custody and guardianship, are still found in Muslim personal law (Jomier, 1989; Moosa, 1998). Muslim countries find it difficult to create a balance between a constitution that protects human rights in a bill of rights and Islamic (or Muslim) personal law. There is, in other words, a clear discrepancy between the theory and practice of human rights in Muslim countries. Moosa (1998) argues that the individual in the Islamic world is conceived as being part of the greater group. Singh (1998, p. 41) asserts: “There is a fundamental difference in the perspectives from which Islam and the West each view the matter of human rights”. The Western perspective may be called anthropocentric in the sense that man is regarded as constituting the measure of everything. He is the starting point of all thinking and action. The perspective of Islam on the other hand is theocentric, which is God - conscious. Since human rights in Islam are said to be static, because they are ruled by the Shari’ah law, the amalgamation of religious language and law with human rights is difficult to effect as smoothly as in Western society.

Although the UDHR was ratified by many countries, its content is regarded as controversial in the Muslim world because for Muslims, religious provisos take precedence over the declarations of Western society. The religiously based Muslim personal law is, in the eyes of the Muslim world, always exempt from constitutional scrutiny. It seems as if Muslims do not believe in human rights, as they believe that all rights belong to God (Moosa, 1998). One could therefore argue that cultural or religious obstacles prevent the establishment of human rights standards in Muslim countries. There is, however, a tendency for Muslims in countries where Muslims are a religious minority, to develop an interest in secular constitutionalism and respect for universal human rights (Moosa, 1998). Although some Muslim governments have been supportive of and have developed UN instruments to protect human rights, the acceptance of these instruments is always subject to the condition that their obligation be compatible with principles of Islamic law (Moosa, 1998). This clearly creates a challenge, as Muslims are required to cope with the dual identity of being both Muslim and citizen of a westernised country. From the above-mentioned it is clear that there has been little change in the Muslim personal laws which have been in use for decades (Moosa, 1998). Khan (2003) adds that the absence of a codified legal system, the legal system based on Shari’ah law, the modern Muslim nations have grossly misused the injunctions provided by sources of Shari’ah.

Moosa (2000, p. 511) names a number of reasons for the differences between Islamic and Western Human Rights:

- (1) Muslim countries do not interpret human rights documents in the same way as Western countries, especially when it comes to religion.
- (2) The use of languages in the UDHR differs from the language used in scriptures like the Koran.

- (3) There is also a clear discrepancy between adherence to international law and the actual implementation of international law. Human rights tend to be static in most Muslim countries.
- (4) Western cultures are individualistic, while in Islam the individual is seen as part of a group.

Moosa (1998) avers that although Muslim societies have an ethos of human rights, there is no doubt that “deeply” held religious or cultural beliefs and practices may to a large extent violate Western or international human rights, hence the constant tension between individual rights and the rights of society in human rights. The Islamic declaration in the Arabic version states “that all rights are guaranteed only to the extent that they are protected by Islamic law (An-Na'im & Deng, 1990, p. 138). Traer (1991) contends that the culture of Islam denies freedom of religion and conscience because under Shari'ah law, a Muslim who abandons Islam or takes another faith can be sentenced to death under Shari'ah law.

3.2.6 The dual foundations of human rights

Since “human rights lay down the basic form of the relationship between the individual and the state” (Adams, 1997, p. 505) and human rights safeguard certain aspects of freedom, allowing individuals to lead their lives according to their own views, the state should remain neutral in regard to questions of personal morality. One must, however, not lose sight of the fact that all individuals are embedded in communities that have an influence on the development of their identities. This identity affects the way people live their moral particularity, in other words, although the individual is a bearer of rights, this self-conception precludes true commitment to the community. Adams (1997) argues that human nature consists of both individual and social characteristics. To exaggerate the individual (liberalism) would deny the interdependence of members of his community (communitarianism) or *vice versa*. I support Adams (1997) and Rawls (1985) in their view that individual rights are based on the “twentieth century experience of democratic individualism”, in other words, although the individual has individual rights which the government must respect, the choice of these individual rights is based on the underpinning value system of society. Everybody has individual human rights, but these rights must be balanced with the values that underpin one's community. This tendency is also echoed in the Constitution which is underpinned by a value system.²⁰ Every decision or judgement in South Africa should be guided by this value system.

Adams (1997) argues that human rights are not necessarily individualistic in nature. Human and fundamental rights always have a social dimension and the freedom that is provided by these rights at the same time constitutes the basis of social relations. Although Adams explores this notion of individualism, it is not of importance to my study to delve further into this phenomenon.

Seeing that human rights presumably do not exist in a hierarchical order (Marcus, 1994), the courts, when interpreting the balancing of different human rights, should be guided by the value system that

²⁰ Section 1 and 7 of the Constitution.

underpins democracy in terms of section 7(1) of the Constitution, namely human dignity, equality and freedom. I believe that South Africa does have a hierarchical order of human rights (freedom of expression is the core right in a democracy) determined by the values that underpin the Constitution (section 7).

3.2.7 The development of human rights in South Africa

When looking at the history of the development of human rights in South Africa, the picture is rather bleak as South Africa had a history of human rights violation before it became a democracy in 1994. The earliest inhabitants of South Africa were the Khoi-San. In the 15th Century, Portuguese explorers “discovered” the Cape of Good Hope. On 6 April 1652 the Dutch established a temporary settlement in the Cape, which later became permanent. The British colonised the Cape during the Napoleonic wars (Davenport, 1987; Heyns, 2004; Omer-Cooper, 1987; Van Jaarsveld, 1982).

In 1910 the Union of South Africa was established. Franchise rights were preserved exclusively for white males of age. Various oppressive and discriminatory laws were introduced, e.g. the Native Land Act of 1913 and the Native Affairs Act of 1920. In 1930 white women were granted the right to vote (Heyns, 2004).

When the National Party (NP) took over government in 1948, a policy of economic, political, cultural and residential separation of white and black was introduced. This was called the separate development of the races, which was the policy of “apartheid”. In 1961 South Africa became a “white” republic independent of Britain. Leaders of the liberation movements were sentenced to life imprisonment or banned. In June 1976 school children in Soweto were shot during an unarmed and peaceful protest against the decision that Afrikaans would be enforced as a language of tuition in schools (see § 1.2.1). The violent responses of the African majority led to unrest and a state of emergency was declared (Heyns, 2004). In 1983 franchise rights were given to the “coloured”²¹ and “Indian”²² communities. A tri-cameral parliament was established and each house could legislate its own affairs. “General affairs” were still legislated by parliament.

When the State of Emergency was lifted the National Peace Accord was signed to ensure that all the political parties were committed to ending the violence in the country. The Congress for a Democratic South Africa (CODESA) negotiated the Constitution of South Africa. The Interim Constitution of 1993, was the first legal document to entrench the human rights of all people in South Africa. The new Constitution was adopted and entered into force on 4 February 1997 (“Constitution of the Republic of South Africa”, 1996).

It is evident from the development of human rights in South Africa that the majority of people’s human rights were violated over a long period of time. People were denied certain rights and equality because

²¹ In the South African context “coloured” refers to people of mixed race.

²² In the South African context “Indian” refers to people who originate from India.

of their race and ethnicity. Not everyone had voting power and, among other things, many could not stay where they preferred to stay. History has proved that whenever there is a struggle because of the violation of human rights, a bill of rights needs to be developed to entrench those rights (see § 3.2.2).

3.2.7.1 The Bill of Rights

A new government normally adopts a constitution (with or without a bill of rights) after a revolution. South Africa's new Constitution with its Bill of Rights was a negotiated document, since no revolution occurred. Some people from the now ruling majority were sceptical about the South African Bill of Rights and believed that the protection of the rights of individuals would offer reasonable protection to the white minority. Sachs (1990a), however, indicates that this misconception lies in the notion that the Bill of Rights protects everybody's rights. A second misconception was that the Constitution was designed to serve the interests of whites and to prevent the effective redistribution of wealth and power in South Africa. The aim of a bill of rights, however, is to extend and not to restrict a democracy. The South African Bill of Rights was created to enable people to debate national issues freely. I agree with Sachs on the grounds of my findings that a problem in South Africa concerning democracy and freedom of expression is the notion of authoritarianism (see § 1.2). South Africans often allow officials to take decisions on their behalf. People are hardly able to decide anything for themselves or do anything on their own (Sachs, 1992). The Bill of Rights makes government accountable to its people - it is a tool, which can be used to shape the nation (Langa, 2000).

The Bill of Rights lists all the human rights that are entrenched in the Constitution, and all other laws must be tested against the Bill of Rights (Alston, 2002; Bray, 2000b). One must always remember the history of the concept of "Bills of Rights". It resulted from struggles during which human rights were violated and it is thus an imperative to "consolidate principles that have been established in struggle, to block retrocession and to impede new modes of violation" (Sachs, 1992, p. 177).

The Bill of Rights constitutes the second chapter of the South African Constitution, which through its strong emphasis on values, something that was lacking in the previous dispensation, has brought a new dimension to legislation. The implementation of the Constitution is one of the most significant events in recent world history. South Africans have shown the world that the values so convincingly formulated by leaders such as Nelson Mandela and Martin Luther King, can be achieved through negotiation (Bray, 2000a; Van Vollenhoven, 2003) and successfully applied in Africa. South Africans, especially educators, should teach and nurture these values.

Bray (2000b) avers that people tend to think that they are literally entitled to each of the rights contained in the Bill of Rights. The Constitution, however, should serve merely as a frame of reference. Only the Constitutional Court may interpret the Constitution. When the judges make a ruling, the ruling becomes law, which becomes enforceable and must be applied in future. Therefore, educators who implement constitutional values in society are obliged to follow and apply these values, as they are spelt out in the Constitution and other law generally, and by the Constitutional Court

specifically. If the Bill of Rights guarantees citizens' fundamental rights and is guided by the value system that underpins the Constitution, it is necessary to acknowledge the criteria that courts need to apply when interpreting the Bill of Rights.

3.2.7.2 *The interpretation of the Bill of Rights*

The Constitution states:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill ("Constitution of the Republic of South Africa", 1996 section 39)

The courts have frequently stated that interpretation of the Bill of Rights must:

- happen in light of the values which underpin the Constitution;
- be situated "against the backdrop of the values of South African society"; and
- involve assessment of the values the South African people find inherent in or worthy of pursuing in this society ("Makwanyane", 1995, at 216).

Educators must attempt to deal with these values in the classroom, as well as in society in general. During the *State v. Makwanyane 1995 (613) SA 665 (CC)* case ("Makwanyane", 1995, at 216) the decision was that human rights in South Africa should be interpreted against the backdrop of past human rights violations.

The following section will provide an overview of the development of a number of international human rights instruments that are binding to the countries that ratified them.

3.3 INTERNATIONAL HUMAN RIGHTS LAW

This section focuses on the development of the most important international instruments in regard to enhancing human rights globally. These international instruments need to be ratified by the different countries before they become binding on them. Heyns (2004) states that South Africa needs first to ratify these instruments and then to adopt them through parliament. These instruments will become binding on South Africa on condition that the provisions are consistent with the Constitution.²³ Under the apartheid regime South Africa did not participate in international human rights agreements (Olivier, 2003), in contrast, the new democratic South Africa stated the intent to support major international

²³ Section 231(3) of the Constitution.

human rights agreements. In this section I shall discuss human rights in general as the right to freedom of expression will be addressed in the next chapter.

3.3.1 The United Nations Charter (UNC) of 1945²⁴

This Charter binds the United Nations (UN) legally to adhere to its provisions and is the result of the suffering of many human beings during World War II, which aroused the conscience of humankind (Patel & Watters, 1994). The UNC arose from the ruins of World War II “to reaffirm faith in fundamental human rights, in the dignity and worth of human persons, in the equal rights of men and women and of nations large and small” (“UNC”, 1945, preamble). Its purpose was to reaffirm fundamental human rights, to promote social wellness and an improved standard of living characterised by more freedom than before. In fact, it is with and through the UNC that the international organisation known as the UN was established.

The purpose of the UNC is confirmed as

- (1) the maintenance of international peace;
- (2) the development of friendly relations among nations, based on respect for the principle of equal rights;
- (3) the achievement of international cooperation in solving international problems and to promote respect for human rights and fundamental freedoms; and
- (4) being the centre for harmonising the actions of nations in the attainment of these common ends (“UNC”, 1945, article 1).

The importance of the human rights and fundamental freedom of the individual, as well as a good relationship between nations, is clear in the purpose noted in the excerpt from article 1 of the UNC. Because the fundamental freedom of the individual and human rights were violated during World Wars I and II, the UNC can be viewed as a signal to humankind that all human beings have protected human rights and fundamental freedom merely because they are human beings (see § 3.2.1). It is crucial to remember that although the UNC was the seminal point of international human rights, it does not contain a bill of rights.

3.3.2 The Universal Declaration of Human Rights (UDHR) of 1948²⁵

The Universal Declaration of Human Rights (UDHR) was a protest action against the atrocities that occurred during World War II. For the first time in history a document set out the human rights and fundamental freedoms of all people in all nations (McQuoid-Mason, O'Brien, Greene, & Mason, 1993; Schwarz, 2003).

In terms of the preamble to the UDHR, the declaration recognises the inherent dignity of the human family of which all humans are equal members. The intention of the declaration is to ensure that all

²⁴ The Charter was signed on 26 June 1945 at the conclusion of the United Nations Conference on International Organisation and came into force on 24 October 1945.

²⁵ The UNC was amended and the General Assembly of the United Nations adopted and proclaimed the UDHR on 10 December 1948. There was no vote against this proclamation, but eight countries, including South Africa, abstained.

human beings “shall enjoy freedom of speech and belief and freedom from fear” as common people of the world (“UDHR”, 1948) their human rights should be protected by the rule of law. With this preamble the nations of the world agree that the right to freedom of speech is the core of a democracy and individual freedom (see § 1.5). It was in this preamble that I discovered a purpose for my research, i.e. if the right to freedom of expression is the core of individual development and democracy (see § 4.2.1), it is imperative to determine what learners (the leaders of tomorrow) understand in regard to this specific right.

When the UDHR was adopted most Third World countries were still under colonial rule (Moosa, 2000) and did not accept the UDHR as readily as First World countries did. This underscores the view expressed in the 18th century work of Giambattista Vico, namely that “a nation at one state of development could not possibly take over the laws of another nation at a different stage of development” (Alston, 2002, p. 33). This statement does not imply that I intend becoming involved in the debate on which nations are more highly developed than others, but I do agree that technically or constitutionally speaking, one country’s laws cannot be transposed to another. As the concept of human rights has developed over time, countries will have different views on it in conjunction with their unique underpinning value systems. Despite the purpose of the UDHR to develop and protect human rights internationally, history has proved the continuance of human rights violations worldwide, e.g. the blockading of Berlin in Germany; the Communist takeover of China, the Korean War (Alston, 2002) and the development of apartheid in South Africa. This again highlights the tension between intended theory and implementation in practice. The UDHR is not a legal document, but rather a statement of intent or a vision, a dream for every nation. The UDHR nevertheless “set the direction for all efforts in the field of human rights and provided the basic philosophy for the legally binding international instruments that followed” (Schwarz, 2003, p. 1).

3.3.3 The International Covenant on Civil and Political Rights (ICCPR) of 1976²⁶

The purpose and aim of the International Covenant on Civil and Political Rights (ICCPR) are similar to those of the UDHR. Although this is not a legal document, it needed to be ratified by a number of countries to influence the development and respect of human rights in countries worldwide. It would exert a practical influence on a country only if ratified by that country.

3.3.4 The American Convention on Human Rights (ACHR) of 1978²⁷

In its preamble the American Convention on Human Rights (ACHR) recognises that one’s human rights are derived from “attributes of the human personality, and that they therefore justify international protection ...” for every person in the world, and that the rights and freedoms of every individual must be respected (“ACHR”, 1978, preamble). This resonates with the global development of human rights after World War I and II, during which human rights were violated (see § 3.2.2).

²⁶ This Covenant was also adopted by the UN General Assembly on 16 December 1966 and came into force on 23 March 1976.

²⁷ This convention was signed at San José, Costa Rica on 22 November 1969 and came into force in 1978. It is also known as the “Pact of San José”.

3.3.5 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1953²⁸

This declaration was adopted by the member-countries of the Council of Europe. The aim of the ECHR was summarised by Mr Rolv Ryssdal, the president of the ECHR: “to lay the foundations for the new Europe which they hoped to build on the ruins of a continent ravaged by a fratricidal war of unparalleled atrocity” (Robertson & Merrills, 1993, p. 189). The countries that adopted this Convention supported the UDHR and expressed their willingness to strive for the further realisation of human rights. In its preamble the UDHR, which is not a legal document, but needed to be ratified by certain countries to influence the enhancement of human rights, reaffirms the “profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend” (“ECHR”, 1953, preamble).

3.3.6 The African Charter on Human and Peoples’ Rights of 1986²⁹

Africa was the last continent to develop an instrument to protect human rights, and the development of this Charter was an important step in the continent’s human rights development (Alston, 2002; Nguema, 1990).

In the preamble to the African Charter, the aims and purpose of the document are stated with reference to other legal documents that are regarded as the underpinning values of the charter, e.g. it considers the Charter of the Organisation of African Unity,³⁰ which stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African people” (“Charter of the Organisation of African Unity”, 1963, preamble). The African Charter reaffirms its promise to heed the UNC and the UDHR. It also takes cognisance of the virtues of the traditions and values of African civilisation, as these could guide reflections on the concept of human and peoples’ rights. It is stated in the preamble that they, as international covenants do, recognise the origin of fundamental rights as coming from human beings, but also that reality and respect for peoples’ rights should necessarily guarantee human rights. It holds that the countries are:

... [c]onscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion (“The African Charter”, 1986, preamble).

It appears certain, judging from the preamble, that the people of Africa fully ratify all international covenants on human rights but that they have added a further dimension, namely “peoples’ rights”, which tends to focus more collectively on the African human rights than on individual fundamental

²⁸ It was signed in Rome on 4 November 1950 and came into force on 3 September 1953.

²⁹ The African Charter on Human and Peoples’ Rights (also called the Banjul Charter) was adopted on 17 June 1981 and implemented on 21 October 1986.

³⁰ The Charter is the constitutive document of the Organisation of African Unity. It was adopted at Addis Ababa on 25 May 1963 and came into force on 13 September 1963.

rights in the international arena. The African Charter was developed with an unambiguous protective function, but unfortunately had no credible enforcement mechanism (Mutua, 1999).

The African Commission on Human and Peoples' Rights (the African Commission) was founded on 2 November, 1987 to "enforce" the African Charter, but the African Commission is not operational due to lack of adequate equipment and resources. Therefore the impact of the African Charter in Africa was not far-reaching (Alston, 2002; Ankumah, 1996; Benedek, 1990). Only commissions, state parties or African governmental organisations had access to the African Human Rights Court. Consequently the Court could not be used by individuals or non-governmental organisations (NGOs) for protection against the violation of their rights (Mutua, 1999), hence it did not contribute to the improvement of awareness and establishment of human rights in Africa. According to Nguema (1990) Africa was slow to ratify the African Charter on Human and Peoples' Rights because firstly, human rights (as known and developed in Western countries) do not feature in traditional African societies (see § 1.2.1) and secondly, the policy for promotion and protection of human rights was imposed on African governments by the UN.

Africa is well known for its arbitrary nature and dictatorship. Nguema (1990) argues that the notion of human rights in Africa was imposed as a result of Western nations' search either for raw materials to exploit in complete peace, or for new markets to be conquered. The fact that some African leaders attach little importance to respecting human rights is part of a reaction against imperialism. Several other factors, such as illiteracy, also play a role in the slow development of human rights in Africa. Nguema (1990) argues that Africa has a "colonial mentality" where the fate, behaviour and gestures of each individual are controlled by norms, practices and traditions created and consecrated by the community or the group, to the exclusion of all individual or personal action or innovation. The modern African countries which, in many respects, are colonial to the core, still have a sense of scepticism toward a system designed to enhance human rights (Mutua, 1999). The reason is that Africa has been traumatised by human rights violations over a period of five centuries. Zimbabwe is a case in point - President Robert Mugabe, in his campaign for the 2005 elections, attacked the United Kingdom and still blames colonialism for the slow economic development in Zimbabwe. In a country where there is no economic development it is not easy to maintain human rights, e.g. how can one have the right to education unless there is funding to ensure its provision?

Furthermore, in Africa old people are respected and children are viewed as a sign of continuity and validate the group (Nguema, 1990). One could thus argue that the notion of human rights is foreign to the concept and identity of African societies. This different worldview of people on the African continent, brought about by colonial influences and awareness of human rights, contributes to Africans' unique character. The uniqueness in culture of the African continent must be considered when dealing with human rights issues in any country on this continent. While the concept of human rights in the rest of the Western world emphasises the right of the individual, there is a tendency for human rights in Africa to consider the relationship between collective and individual rights (Alston,

2002; Benedek, 1990; Mboya, 1992). However noble the original intention of the African Charter, it was not self-functioning or directly applicable in most African countries, as it seemed to view Africa as an entity, but failed to recognise diversity in culture (Benedek, 1990).

3.3.7 The Universal Declaration of Islamic Human Rights (UDIHR) of 1981³¹

Certain authors, against historical evidence, insist that human rights were developed by Islam and that they were introduced in the seventh century (Mayer, 1995). Diplomats and scholars argue that the basic concepts and principles of human rights were embodied in Islamic law from the outset (Donnelly, 1982). A survey of pre-modern Islamic intellectual history, however, reveals that there was no settled Islamic doctrine on rights or proto-rights during that period (Mayer, 1995) although Muslim law provides for rules in regard to high moral values, similar to human rights.

The first five centuries of Muslim civilisation bear strong testimony that Muslims followed the major teachings of the Koran (Khan, 2003). At the height of the Industrial Revolution most Muslim nations found themselves under colonial rule (Khan, 2003) and their human rights were violated. Muslims saw the rise of European democratic institutions and concepts as a threat, because these elements redefined the power and functions of governments, and Muslims believed that such methods and strategies could not *per se* be religious (Khan, 2003).

Muslim countries eventually achieved independence from colonial rule, but only after the violence to which they had been subjected during colonial rule had intensified their commitment and support to the conviction that the Western model of the relationship between religion and politics was inherently unjust (Hollenbach, 1982). In most cases Muslims who ruled after decolonisation were not *au fait* with developing a legal system incorporating human rights. The absence of such a legal system ignored the interests of common people in the name of national and religious causes (Khan, 2003).

Many Muslim scholars mistakenly took the detailed rules and regulations of Islamic rituals to be the core of Islamic legality. Christian nations have, since the fifteenth century of the Christian era, been developing a blueprint for their own legal system. The majority of Muslim nations, on the other hand, either wanted no guiding principles for a constitutional system, or deemed a constitutional system unnecessary (Khan, 2003).

There is no common understanding of Islamic law, especially in regard to human rights, and Muslims themselves are deeply divided on this subject (An-Na'im & Deng, 1990). The UDIHR can be regarded as the equivalent of the UNC regarding all forms of discrimination and can be considered an authoritative view on human rights, which places it in a religious, rather than a social context (Moosa, 2000; Moosa, 1998).

³¹ The Universal Declaration of Islamic Human Rights (UDIHR) was proclaimed under pressure from the international community by the Islamic Council of Europe in Paris in September 1981.

Its preamble states that the purpose of the UDIHR is to establish an Islamic order in which humans are equal (Moosa, 2000). In addition, the Arabic version states “that by the terms of our primeval covenant with God, our duties and obligations have priority over our rights”, thereby reaffirming the traditional idea that Islam provides a scheme of duties, rather than rights. It stipulates that nothing is equal in the world and that man was “created to fulfil the Will of God on earth” (“UDIHR”, 1981, preamble). In this notion that the individual was born to fulfil the “Will of God on earth” rather than have personal, protected human rights and freedoms, it is clear from the outset that the UDIHR will have the effect of denying rights, including those that are guaranteed by international human rights law (Mayer, 1995). This is demonstrated in the preamble that holds that the duties and obligations of Muslims have priority over their rights.

Islam emphasises the relationship between governments and Islamic citizens and although Islamic law includes basic values that do not differ greatly from the human rights of countries and international covenants, the Law of Allah takes precedence over human rights.

3.3.8 The Cairo Declaration on Human Rights in Islam (Cairo Declaration) of 1990³²

Although article 12 signifies that all people are equal, it is limited in terms of article 24: “... [a]ll the rights and freedoms stipulated in this declaration are subject to the Islamic Shari’ah [law]” (“The Cairo Declaration”, 1990, article 24). This Declaration also strives to reconfirm that equal fundamental rights of man should be respected. The preamble concludes with the reassurance that no one has the right to suspend the fundamental rights and universal freedoms of Islam as they are an integral part of the Islamic religion.

Muslims believe that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no-one, as a matter of principle, has the right to suspend them as a whole or in part, or to violate or ignore them, inasmuch as they are binding, divine commandments contained in the *Revealed Books of God* and sent through the last of His Prophets, thereby making their observance an act of worship and their neglect or violation an abominable sin. Accordingly, every person is individually responsible and the *Ummah*³³ are collectively responsible for their safeguarding.

It is clear from the UDIHR and the Cairo Declaration that, although Islam places a high value on human dignity and human rights, the rules of Muslim law have priority over human rights in the bills of rights of countries. The 1972 Charter of the Organisation of the Islamic Conference reaffirms nations’ “... commitment to the UNC and fundamental human rights, the purposes and principles of which provide the basis for fruitful cooperation amongst all people” (“Charter of the Organisation of the Islamic Conference”, 1972, preamble). In Muslim countries every law or right would be tested by the Law of Allah, therefore the absolute power of the state is denied by the forces of civil society:

³² This declaration was adopted on 5 August 1990 by the member-states of the Organisation of Islamic Organisation in Cairo.

³³ Followers of the Islamic faith (Brotherhood of Muslims).

Such democracy clearly precludes any state from being the enforcer of absolutely revealed and unquestionable faith and law and is accountable only to God for such implementation, allowing no room for the possibility of opposition or allowing people to differ from it (Alston, 2002, p. 79).

Mayer (1995) indicates that all human rights can be limited by Muslims to enforce policy, as human rights are justified by Islamic beliefs, even if involving beatings, imprisonment, torture and execution.

3.3.9 Declaration of the Rights of the Child of 1959

The preamble to this declaration reaffirms the fundamental rights as proclaimed for all people in the UNC and the UDHR. It also recognises that children require special care because of their physical and mental immaturity. The need for such special safeguards is stated in the Geneva Declaration of the Rights of the Child (1924) that was proclaimed to ensure a happy childhood. Principle 1 provides that the child shall enjoy all the rights set forth in this declaration without discrimination against any child whatsoever. It holds that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before, as well as after birth” (“Geneva Declaration of the Rights of the Child”, 1924, principle 1).

3.3.10 The Convention on the Rights of the Child (CRC) of 1990³⁴

The preamble of the Convention on the Rights of the Child (CRC) reaffirms the fundamental human rights for everyone, as proclaimed in the above-mentioned international declarations on human rights. It recognises that the child should grow up in a happy family environment for the full and harmonious development of his/her personality. It also considers that the child should be fully prepared to live an individual life in society in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. Every child is entitled to all the rights, regardless of where s/he was born or to whom, regardless of gender, religion or social origin. Article 1 of the CRC defines a child as “every human being below the age of 18, unless according to the law applicable to the child, majority is attained earlier.” Article 2 of the CRC provides that the child’s rights should be respected “without any discrimination and that authorities will intervene to ensure these rights” (“CRC”, 1990, article 1 & 2).

The view of the Convention is that children are neither the property of their parents nor helpless objects of charity. The Convention has, in a relatively brief period, become the most widely accepted human rights treaty and has been ratified by 191 countries. The right to freedom of expression is the focus in the following section.

3.4 LIMITATION OF HUMAN RIGHTS

While the aim of the legal system is to create order and harmony in society (Van Vollenhoven, 2003), the purpose of a bill of rights is to protect the human rights of people. In other words, the human rights of all people are entrenched or guaranteed in a bill of rights. Yet, if everyone demands human rights

³⁴ This Convention was adopted on 20 November 1989 and was ratified by South Africa in 1993.

without respecting other people, democracy will end in chaos and human rights will continue to be violated. Human rights are therefore not absolute and can be limited.

3.4.1 Limitations of human rights in the United States of America (USA)

When plaintiffs claim that their human rights have been violated, the courts have to interpret the law and determine legal principles to balance the rights and to gauge whether the human rights have indeed been violated. The limitation of human rights has become a very vague area as at first there were no clear rules or legislation on how to deal with limitations of human rights. Once the notion that human rights are absolute was developed in society, people began to institute legal proceedings when they believed that their rights had been infringed. Case law thus served to develop legal principles as tools to limit human rights. This was a slow and often contradictory process. Since the USA Constitution contains no limitation clause, some citizens have the perception that their rights are absolute and that they can exercise them without responsibility. We can therefore assume that South Africa has benefited from the long history of American case law and that there will be fewer court cases in South Africa, since the legal principles were developed by USA courts.

3.4.2 Limitations of human rights in South Africa

Fundamental human rights are entrenched in chapter 2 of the Constitution which is called the Bill of Rights. This means that the rights are guaranteed according to the supreme law of the country and that they may never be violated. Every constitutionally entrenched and guaranteed human right has a corresponding duty or responsibility, as rights and duties are reciprocal. One can therefore not claim a right unconditionally. If the corresponding duty to the right is disregarded, that right may be limited. In the process of exercising (or claiming) one's fundamental human rights, one should thus be careful not to violate someone else's human rights. Although all people have the same guaranteed and protected human rights, these rights are not absolute. There would be no peace and harmony in a community if individuals could exercise their rights at all times (Malherbe, 2004; Rautenbach & Malherbe, 1996) as this would create disorder. Absolutising human rights will result in chaos; therefore in a democratic society rights should be balanced. No right is absolute, but can be limited under certain circumstances. According to De Waal, Currie and Erasmus (2001, p. 144), "[g]enerally, it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights". All fundamental rights can thus be limited in terms of the general limitation clause in section 36 of the Constitution, which, according to Malherbe (2001), is a pivotal provision in the Bill of Rights. There are three ways in which rights can be limited, viz.:

- through the limitation clause;
- through inherent limitation; and
- in a state of emergency.

I shall now discuss the three ways in which human rights can be limited.

3.4.2.1 *The limitation clause*

The general limitation clause applies to all the rights provided for in the Bill of Rights and is the most common form of limitation. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. There must be an appropriate balance between the limitation of the right and the purpose for which it is being limited. All factors relevant to the issue must be taken into account and be considered.

The South African Constitution, as one of the most modern and advanced constitutions in the world, has a limitation clause which reads:

- (1) The rights in the Bill of Rights may be limited only in terms of the 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, taking into account all the relevant factors, including:
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve its purpose.
- (2) Except as provided for in subsection (1) or in any other provision in the Constitution, no law may limit any right entrenched in the Bill of Rights ("Constitution of the Republic of South Africa", 1996, section 36).

This provision limiting the rights is of vital importance. Without the application of this criterion, i.e. if government could limit any right unrestrictedly, human rights would hold no power. Although one could argue that a limitation is a legal way of "violating" a right, it is not permissible to violate any human right in an unlawful manner as such rights are guaranteed and entrenched in the Constitution. Yet, since no right is absolute, a right can be limited legally under certain conditions when constitutional values are reinforced. Rights may therefore be limited if these limitations are reasonable and justifiable. A right must be read in conjunction with other rights. For example, section 16 of the Constitution gives a person the right to freedom of expression but it gives nobody the right to slander someone else, because everybody's good name is protected against defamation, by the law (section 10 of the Constitution). The question arises as to whether a limitation of the right is admissible in terms of the Constitution, since one cannot limit rights in the Constitution at will.

In practice, when a right is exercised, it is balanced by all the other rights and responsibilities of every person involved in the situation. This balancing process is authorised by the limitation clause. Rights are balanced or limited by "law of general application" in terms of the limitation clause. When balancing rights, the value whose protection most closely illuminates the Constitutional scheme should receive appropriate protection in that process. In this sense, one's right can be balanced (limited) because it is justifiable in an open democratic society based on human dignity, equality and freedom.³⁵

³⁵ Section 36 of the Constitution.

Judge Sachs states in *Christian Education South Africa v. Minister of Education 2000 (4) SA 757 (CC)* that "... believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land". This principle seems to suggest that learners cannot without further ado claim, for instance, to wear religious attire to school because of their right to freedom of religion and/or the right to freedom of expression. Sachs further states that "... the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law" ("*Christian Education South Africa v. Minister of Education*", 2000, p. 779). From this judgment the principle is thus deduced that personal human rights, e.g. to freedom of religion or freedom of expression, can be limited, provided that it is done in a reasonable manner. In other words, it would be absurd to expel or even suspend a learner for breaking a school rule by wearing religious attire or a Rastafarian hairstyle to school.

The term "law of general application" refers to those laws, which are equally applicable to all (De Waal *et al.*, 2001), i.e. all the laws in any sphere of government (Malherbe, 2004), which also include common law. Alston (2002) states as an example, that the subordinate legislation that applies to all educators in South Africa, is classified as "law of general application". Rights may also be limited in terms of common law and can thus be limited only if authorised by a law.

The phrase "reasonable and justifiable" contains elements that are related to "the reasonable person test". The reason behind the limitation should be reasonable, acceptable and justifiable in a democratic country. The limitation should be limited according to the criteria of section 36 which clearly spells out the relevant factors that need to be taken into consideration when limiting a right by applying the values of human dignity, equality and freedom. In other words, a balance must be sought between the limitation and its purpose in order for the limitation to be reasonable and justifiable (Malherbe, 2004). When limiting rights by using the limitation clause, in other words by way of law of general application, there are relevant factors to consider in terms of section 36(1)(a-e). I shall now briefly discuss these factors.

- ***The nature of the right***

The closer the nature of the right is to the values of human dignity, equality and freedom, the less it should be limited, as these values underpin democracy and the Constitution.³⁶ This is in agreement with the view of De Waal *et al.* (2001) who argue that it will be more difficult to justify the limitation of rights that carry more weight than others. It is therefore important to realise that the South African Bill of Rights has a hierarchy of rights and that the closer the right is to the values that underpin the Constitution, the more weight it carries, e.g. the right to life³⁷ ("*Makwanyane*", 1995, at 144),³⁸ human

³⁶ Sections 1; 7(1) of the Constitution.

³⁷ Section 11 of the Constitution.

³⁸ *S v Makwanyane at 144* The judge determined that "the right to life and dignity are the most important of all human rights ...".

dignity,³⁹ equality⁴⁰ ("Brink", 1996, at 33), and freedom of expression⁴¹ carry more weight than others, e.g. the right to property⁴² and housing.⁴³

- ***The importance of the purpose of the limitations***

The question arises as to whether the limitation serves the values that underpin the Constitution.⁴⁴ Reasons for limitations must be formulated in terms of the principles that underpin the democratic Constitution of South Africa and the limitation must promote a lawful public interest.

- ***The nature and extent of the limitation***

The concern is to ensure that the cost of the limitation imposed on the "holder of the rights", is not greater than the benefit gained by society at large. In summary, a right can be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁴⁵ Malherbe (2004) points out that this can be measured by the proportionality test, viz. "whether the limitation of a right is not more extensive than is warranted by the purpose which the limitation seeks to achieve". The law must tend to serve the purpose that it is designed to serve (De Waal *et al.*, 2001).

- ***The relationship between the limitation and its purpose***

There must be a causal connection between the limitation and its purpose (De Waal *et al.*, 2001), i.e. one should determine how and to which extent the right is affected by its limitation. If the rule that boys' beards must be shaved were scrapped, the question to ask would be whether it could be detrimental to school discipline. If the answer is no, the relationship between the limitation and its purpose has no value.

- ***Less restrictive means to achieve a purpose***

If there is a less restrictive way to achieve a purpose than by limiting a right, that should be the method to use, e.g. if there is a less restrictive way to maintain discipline at school, other than by shaving off the boys' beards, the less restrictive means must be applied.

3.4.2.2 Inherent limitation

In addition to section 36 of the Constitution, the Bill of Rights contains several inherent limitations or internal qualifiers that apply to particular rights. This includes an inherent limitation in the way the right is phrased in the Constitution, e.g. the inherent limitation to the right to freedom of expression⁴⁶ is provided in subsection 16(2) of the Constitution. Although section 16(1) of the Constitution articulates

³⁹ Section 10 of the Constitution.

⁴⁰ Section 9 of the Constitution.

⁴¹ Section 16 of the Constitution.

⁴² Section 25 of the Constitution.

⁴³ Section 26 of the Constitution.

⁴⁴ Section 1 of the Constitution.

⁴⁵ Section 1(a); 7(1); 36(1) and 39(1)(a) of the Constitution.

⁴⁶ Section 16(1) of the Constitution.

the right to freedom of expression and points out what it entails, section 16(2) of the Constitution provides certain criteria that limit the right to freedom of expression. Therefore, although one has a right to freedom of expression, one is not, in terms of section 16(2) of the Constitution, allowed to use it for war propaganda.

Another example of an internal qualifier is section 29(1) of the Constitution, which guarantees the right to education. The right to education is inherently qualified by section 29(2) of the Constitution that states that a person has the right to receive education in the official language of his/her choice in public educational institutions. This right to education is limited only to an official language and not to just any language. This right is further limited by the provision “where such education is reasonably practicable” (“Constitution of the Republic of South Africa”, 1996).

3.4.2.3 State of emergency

Section 37 of the Constitution provides for the declaration of a state of emergency, which will limit a number of fundamental rights, for example one cannot claim one’s right to freedom of movement and residence or freedom of expression if the country is waging war and a state of emergency is declared.

3.4.2.4 In conclusion

While different constitutions, conventions and treaties have different limitation clauses, Alston (2002, p. 112) defines elements common to the limitation of rights internationally. These include that:

- there is no unlimited right;
- limitations are themselves not unlimited;
- limitations are permissible only to protect another valid, competing interest;
- there is a relationship between the interest protected by the fundamental right, the competing interest and the means to protect the competing interest; and
- there is some form of proportionality or balancing applied in matters of limitations.

3.5 HUMAN RIGHTS IN SCHOOLS

The development of human rights has an impact on the culture of learning in schools, as well as on the management of schools (Van Staden & Alston, 2000). *Shelton v. Tucker 354 U.S. 479 (1960)* (“Tucker”, 1960, at 487) indicates that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”. The balance between the rights and responsibilities of the stakeholders is an imperative to maintaining a learning climate.

Lieuallen (2002) regards education as the most important function of the government. This viewpoint is also emphasised in *Brown v. Board of Education 347 U.S. 483 (1954)* (“Brown”, 1954). Van Vollenhoven and Glenn (2004) point out that, although the primary purpose of schools is to educate, it has long been understood that education consists of more than the development of academic skills and the accumulation of knowledge. One of the central purposes of schools in a democratic society is to encourage the critical and independent thinking necessary for effective participation as citizens.

This was emphasised 250 years ago by Montesquieu in *The Spirit of the Laws* (Cohler, Miller, & Stone, 1989, p. 5)

It is in republican government that the full power of education is needed ... one can define this virtue as love of the laws and the homeland. This love, requiring continual preference of the public interest over one's own, produced all the individual virtues; they are only that preference ... in a republic, everything depends on establishing this love, and education should attend to inspiring it.

Similarly, James Madison, one of the American “founding fathers”, pointed out in *Federalist* that:

Republican government presupposed the existence of these qualities [of civic virtue] in a higher degree than any other form (Mill, Hamilton, Madison, & Jay, 1952, p. 207).

3.6 CONCLUSION

This chapter is an overview of the development of human rights and international instruments that have as principle the protection of the human rights of the citizens of the world. I have discussed the ways in which these human rights are guaranteed in bills of rights and determined that the rights are not absolute and can be limited under certain criteria that are determined by values. Once the culture and development of human rights are understood, human rights in particular can be focused upon. In the next chapter the focus will shift to the right to freedom of expression, as this right is viewed as the core right in a democracy. After the initial focus on international law in regard to the right to freedom of expression, the focus will shift to the right to freedom of expression in schools.

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 Yusuf 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.

CHAPTER FIVE

CASE LAW: Speeding and appearing in court

5.1 INTRODUCTION

In the previous chapter I conducted a literature review on the right to freedom of expression. This journey took me to international instruments and I then focused on the USA and South Africa before investigating freedom of expression in schools.

Case law is the primary source for the literature review (see § 2.2). In this chapter, I shall therefore analyse case law to trace the development of legal principles regarding the right to freedom of expression⁸⁵. I intend to illustrate the practical interpretation of the right to freedom of expression in schools and the USA will be my main focus, since it is a country with a wealth of case law, but I shall also touch briefly on certain European and South African cases.

As South Africa only recently entered its second decade of democracy, it would be prudent to consider foreign law. The concepts “due process” and “equal protection” that have emerged from American (USA) case law form the basis of education law. “Due process” refers to the correct legal procedure to ensure that government may not deprive an individual of a life, liberty or other human right without first providing due process. “Equal protection” holds that “similarly situated individuals be treated similarly” (Russo & Stewart, 2001, p. 21). Russo (1996) emphasises the fact that many legal systems look to the American approach for guidance and comparison.

American, and to a lesser extent, European case law, will be used to indicate the development of certain legal principles in the field of freedom of expression, as South Africa does not yet have case law concerning certain specific issues.

5.2 CASE LAW IN THE USA

While the USA is known for a wealth of cases that, I shall investigate the development of the interpretation of the right to freedom of expression in promoting legal principles, during the last century⁸⁶.

⁸⁵ Since the South African Constitution has existed for only 11 years, it is relatively immature in regard to case law. As a result legal principles concerning freedom of expression in South Africa are developed from foreign case law. In addition; while South African case law is still young we need to borrow principles on a broader sense. To this end I studied case law on freedom of expression globally to determine relevant legal principles, instead of focusing only on freedom of expression in schools.

⁸⁶ Readers should be aware that although the focus of this chapter is the development of legal principles on freedom of expression, not all federal cases have equal presidential value, judicial approaches to free expression are not always governed by *Tinker*, and “freedom of expression” has a number of connotations.

5.2.1 Schenk v. United States, 249 US 47, 39 S. Ct. 247 (1919)

One of the earliest court cases on freedom of expression was that of *Schenk* ("Schenk", 1919), secretary to the Socialist Party, who printed pamphlets to disseminate to US military draft recruits, encouraging them to be critical and not to accept the draft, and thus boycotting participation in the First World War. As Schenk's intention was to jeopardise the army's recruitment process, his right to freedom of expression was implied to be limited. The courts determined that a person could not just falsely cry "fire" in public places because of the right of people to freedom of expression. *Schenk* emphasised the principle that other rights could limit the right to freedom of expression. This early case also indicated that the right to freedom of expression could be restricted by means of place, as persons were not allowed to say whatever they wanted to in certain (public) places.

5.2.2 Stromberg v. People of State of California, 283 US 359, 51 S. Ct. 532 (1931)

Yetta Stromberg was convicted of violating a statute prohibiting the display of the red flag as an emblem of opposition to organised government, as an invitation to anarchistic action or as an aid to propaganda of seditious nature. She violated Section 403a of the Penal Code of the State of California, which provides that:

Any person who displays a red flag, banner or badge or any flag, badge, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organised government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony (*"Stromberg"*, 1931, at 361).

The argument was that the statute was invalid because it impugned the Fourteenth Amendment, which embraces the right of free speech. The 19 year-old Yetta Stromberg, a member of the Young Communist League, an international organisation affiliated with the Communist Party, was a summer camp supervisor of children aged 10 to 15. She directed the children daily in raising and saluting a red flag representing the flag of Soviet Russia, and reciting a pledge. The red flag in question was protected by the USA Constitution as a symbol of freedom of speech, but the fact that it was used intentionally as propaganda for a revolution, limited this right. It was determined that the concept of liberty under the due process clause of the Fourteenth Amendment embraced the right of free speech which was, however, not absolute. The state might, in the exercise of its police power, punish the abuse of this freedom. This verdict was consistent with the belief that people did not really have a right to freedom of expression until after the *Tinker* case (*"Tinker"*, 1969). Yet the verdict was overturned when the court argued that everyone had the right to freedom of speech to discuss different political views.

This reversed verdict was one of the first case law interpretations that actually respected the right to freedom of expression of citizens.

5.2.3 Thornhill v. State of Alabama, 310 US 88 (1940)

This case concerned freedom of speech and freedom of the press rights, which are secured by the First Amendment of the Constitution of the USA. In this regard, the Fourteenth Amendment also

secures personal rights and liberties. Byron Thornhill was convicted for contravening section 3448 of the Alabama State Code of 1923 which reads:

Loitering or picketing is forbidden. Any person or persons, who, without a just cause or legal excuse therefore, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or including other persons not to trade with, buy for, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanour, but nothing herein shall prevent any person from soliciting trade or business for a competitive business ("Alabama", 1923, section 3448).

Thornhill was charged with loitering on the premises of the Brown Wood Preserving Company with the intent to influence people to adopt one of the enumerated courses of conduct. He therefore interfered with the company's lawful business and was found guilty, but appealed, stating that the clause in question deprived him of his right to freedom of speech. In his appeal he questioned the constitutionality of the named statute, as he had talked to employees about a strike peacefully. One has the right to freedom of expression on matters vital to one, even if falsehoods may be exposed through this freedom of expression. The argument in this case was that Thornhill had been convicted in terms of an unconstitutional statute, since it denied him his constitutional right to freedom of expression. Since such a statute is inconsistent with the USA Constitution it cannot be used to convict a person. The freedom of speech guaranteed by the USA Constitution embraces the liberty to discuss publicly all matters of public concern, without fear of subsequent punishment. The Supreme Court reversed the *Thornhill* verdict, stating that the preserving company owned a substantial part of the town and that the employees' right to freedom of expression on private property would indeed be infringed by the application of the statute.

The essence of this case is that one has a constitutional right to disseminate speech relevant to the public (employees) even if others (employees) may thereby be persuaded to take action inconsistent with another's (the employer's) interests.

5.2.4 West Virginia State Board of Education v. Barnette, 319 US 624, 63 S. Ct. 1128 (1943)

Walter Barnette and others sued the West Virginia State Board of Education for an injunction to restrain the enforcement of a regulation requiring children in public schools to salute the American flag. The court affirmed that "Freedom" to differ was not limited, under the Constitution, to things that did not matter much, but the test of its substance was the right to differ regarding issues that touched the heart of the existing order ("Barnette", 1943, at 274).

After the decision by the Court in *Minersville School District v. Gobites* 310 U.S. 586 (1940) ("Gobites", 1940) all schools in West Virginia were legally required to offer courses of instruction in history, civics, the Constitution of the USA and of the state for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism and increasing the knowledge of the organisational machinery of the government. On 9 January 1942 the West Virginia Board of Education

adopted a resolution ordering that “the salute to the flag become a regular part of the program of activities in the public schools, that all educators and pupils shall be required to participate in the salute honouring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination and be dealt with accordingly. When saluting the Flag, the salute should repeat the words: ‘I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all’” (“Barnette”, 1943, at 628-629). This was against the religious beliefs of the Jehovah Witnesses, founded on Exodus 20:4-5 and they refused to salute the flag:

Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them (“Barnette”, 1943, at 269).

Failure to conform resulted in expulsion from school and the statute denied re-admission before compliance with the requirement. The expelled child was seen as being unlawfully absent and could face further procedure as a delinquent. Such a child’s parents were also liable to be prosecuted.

The principle that the refusal of such persons to participate in a pledge of allegiance ceremony does not interfere with or deny rights of others to do so is important in this case. Furthermore, the behaviour of the people involved in the case under scrutiny was peaceful and caused no disruption in the school. The conflict between the authority and the rights of the individual was at issue here. The Board of Education prescribed a salute, which if denied by the learner, would result in the punishment of the learner and the parents. The denial, on the other hand, was based on the right of self-determination in matters pertaining to individual opinion and personal attitude. The problem in this case was constituted by the enforcement of the instruction to salute, learners had no option.

Individuals have a right either to speak or not to speak their mind. The question arises as to whether public authorities can compel individuals to utter what is not in their minds. Judge Jackson, in delivering the court’s opinion, noted that the flag-salute controversy had confronted the court with the problem which Abraham Lincoln, many years prior to the case under discussion, had articulated as a dilemma, viz.: “Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?” (“Barnette”, 1943, at 636).

He noted that the expulsion of a handful of children from school because of such an issue would be an over-simplification of maintaining the strength of the government. He did, however, call for an assurance that secure rights tend to diminish fear and jealousy of a strong government, and that rights therefore need to be balanced. Judge Black and Judge Douglas concurred:

... the Jehovah’s Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God’s displeasure, that they not go through the form of a pledge of allegiance to any flag (“Barnette”, 1943, at 643).

The Jehovah’s Witnesses would rather suffer the consequences than pledge allegiance to the flag. The question arises as to whether any government can leave to individuals an absolute right to make final decisions on what they wish to do or not. No right is absolute and, in the process of exercising a

right one needs to respect other laws and the fundamental rights of other people. Laws must, however, be of such a nature that they permit the widest toleration of conflicting viewpoints consistent with a society of free men. Judge Murphy supported the view expressed by Judges Black and Douglas, stating that the right to freedom of thought and religion included both the right to speak freely and the right to refrain from speaking.

The Constitution places an imperative on the government to protect citizens “against the State itself and all of its creatures – Boards of Education not excepted” (“Barnette”, 1943, at 637). The court upheld the principle that persons had the right to keep quiet if they disagreed, as long as they did so peacefully, as part of the right to freedom of expression (“Barnette”, 1943, at 645). The principles established in this case can be applied to other cases, e.g. the Bata incident (see § 2.5.2.1). The wearing of a beard did not interfere with or deny the right of others at school. Yusuf’s behaviour was also peaceful and caused no disruption at school. One can therefore deduce that the school would have lost this case, had it been taken to court.

5.2.5 James Edwards v. South Carolina, 372 US 229 (1963)

A group of 187 Negroes⁸⁷ was arrested for breach of the peace after marching peacefully on a sidewalk around State House grounds to publicise their dissatisfaction with discriminatory actions against Negroes. They felt that the discriminatory actions infringed, among others, their constitutionally protected right to free speech. The Supreme Court reversed the verdict, finding that the State of South Carolina had infringed the petitioners’ constitutionally protected rights to free speech, assembly and freedom to petition for the redress of their grievances.

The protection of First Amendment rights by the Fourteenth Amendment is important in this case, as it does not permit the state to make criminal the peaceful expression of unpopular views. The right to freedom of expression can be limited if it occurs with violence, but if the message is peacefully disseminated, it is legally correct. The intention of free speech is to allow citizens their view, although it can be provocative and challenging. In *Terminiello v. Chicago* 337 U.S. 1 (1949) (“Terminiello”, 1949, at 5) the principle was established that freedom of expression could be limited if it could stir people to anger, invite public dispute or bring about a condition of unrest.

Judge Clark, dissenting, stated that people had been arrested purely because officials believed that the situation would lead to a breach of safety. He affirmed that officials would be constitutionally prohibited from refusing the petitioners access to the State House grounds merely because they disagreed with their views (“Niemothko”, 1951, at 71). He further stated that the city officials had granted the petitioners the right to assemble peacefully, and had allowed them their right to freedom of expression to the point at which they believed that disorder and violence were imminent.

⁸⁷ I use the term “Negroes” as this is the term used in the literature and case law. I distance myself from this racial term and have no racist intention in using it.

5.2.6 Mrs Margaret Burnside *et al.*, Appellants v. James Byars *et al.*, 363 F. 2d 744, 749 (1966)

High school regulations prohibited learners from wearing freedom buttons containing the words “One man one vote” and “SNCC”⁸⁸ on them. Since the wearing of the buttons did not disrupt the classrooms the US Supreme Court reversed the verdict. School officials cannot infringe on their learners’ right to free and unrestricted expression as guaranteed under the First Amendment, where the exercising of such rights in the school buildings and school rooms does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.

When Mr Moore, the principal of the Booker T Washington High School of Philadelphia, Mississippi learnt that some of his learners had worn freedom buttons, he announced on 21 September 1964 to the entire learner body, that they were not permitted to wear such buttons at school. On 24 September 1964 Mr Moore was summoned to the school by one of the educators who reported that approximately 40 learners were displaying the buttons and causing a disturbance. He assembled the learners in his office and gave them the choice of removing the buttons or being suspended. The majority refused and were suspended for a week. Negro learners, who attended an all-Negro high school, wore the freedom buttons as a means of silently communicating an idea and to encourage members of their community to exercise their civil rights such as freedom and equality (“Burnside”, 1966). The interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights, with the duty of the state being to further and protect the public school system. The establishment of an educational programme requires the formulation of rules and regulations necessary for the maintenance of an orderly programme of classroom learning. State officials can abridge the liberty of expression guaranteed by the First Amendment if their protection of legitimate state interests necessitates an invasion of free speech. Therefore a reasonable regulation that infringes upon the right to free speech is acceptable if it contributes to the maintenance of order within the educational system. In this case, the learners were suspended for the contravention of a school regulation and not for disrupting the order and discipline at school. The court therefore held that the regulation forbidding the wearing of the buttons on school grounds was arbitrary and unreasonable. The court further held that school officials could not ignore the expression of feelings with which they did not wish to contend. They could infringe their learners’ right to free and unrestricted expression only if the exercise of such a right did not materially and substantially interfere with the requirement of appropriate discipline (“Burnside”, 1966, at 749). The verdict was reversed. In this case the school had violated the learners’ right to freedom of expression.

5.2.7 Harnett Louise Adderley *et al.*, Petitioners v. State of Florida, 385 US 39, 87 S. Ct. 242 (1966)

Judge Black of the Supreme Court held that the arrest and subsequent conviction for the violation of the Florida statute on trespassing with malicious and mischievous intent of learner demonstrators who had:

- entered jail grounds to protest against prior arrests and city segregation policies;

⁸⁸ Student Non-violent Coordinating Committee.

- blocked a driveway to the jail entrance not normally used by the public;
- did not disperse after being warned by a sheriff;

did not deprive them of their constitutional rights to freedom of speech, press, assembly, or petition.

Advocates who support protests or views do not have a constitutional right to do so whenever, however and wherever they please. The petitioners had gone from the school to the jail about a mile away, to demonstrate their protest against the arrests of some protesting learners at the jail the previous day. The county sheriff had tried to persuade the learners to leave the jail grounds and then arrested those who refused on account of the trespass statute. This arrest denied them their right to free speech, assembly, petition, due process and equal protection under the law.

The US Supreme Court affirmed these judgements on the basis that the learners had trespassed. Thus, the right to free speech and assembly does not imply that everyone with opinions or beliefs to express may address a group in any public place and at any time in any manner.

5.2.8 Blackwell v. Issaquena County Board of Education, 363 F. 2d 749 (1966)

Civil rights law was used to prohibit school officials from enforcing regulations forbidding the wearing of buttons. The appellants argued that the enforcement of regulations forbidding the wearing of freedom buttons was an infringement of the First and Fourteenth Amendments. On 29 January 1965 approximately 30 pupils at the all-Negro Henry Weathers High School wore freedom buttons to class depicting a black and white hand joined together with "SNCC" inscribed in the margin. Three learners were summoned to the principal's office for creating a disturbance by talking loudly in the hall when they were supposed to be in class. They were told by the principal that no one could be permitted to create a disturbance and that they had to remove their buttons. On Monday, 1 February 1965, approximately 150 pupils came to school wearing buttons. They distributed the buttons to other pupils and also pinned buttons on pupils who had not requested them to do this. A younger learner started to cry when another pupil tried to pin a button on him. The resulting confusion and disruption of instruction resulted in a general breakdown of orderly discipline, after which the principal assembled the learners in the cafeteria to forbid the wearing of the buttons to school. Two learners were particularly hostile and displayed a disagreeable attitude.

On 2 February, however, approximately 200 learners wore buttons to school. Learners were once again assembled and informed that the wearing of buttons was forbidden because it created chaos and disruption, and that they would be suspended for wearing such buttons to school. When the learners again wore the buttons on 3 February, the principal sent them home. Some of them disrupted classes even further by trying to distribute more buttons ("Blackwell", 1966).

It is recognised that the right of learners to express and communicate an idea by wearing a freedom button inscribed with "One man one vote" is protected by the First Amendment guarantee of freedom of speech. On the other hand, however, orderly conduct at school is imperative. Therefore reasonable

regulations necessary for maintaining such order, could limit such First Amendment rights. The school officials won the *Blackwell* case as the wearing of the freedom buttons had substantially disrupted the school.

The Constitutional guarantee of freedom of speech therefore does not confer an absolute right to express and can be limited in schools if it disrupts the school process and works against the educational mission of the institution.

5.2.9 Cox v. State of Louisiana, 379 US 536, 85 S. Ct. 453, 13 L Ed 2d 471 (1969)

B. Elton Cox led a group of learners who assembled peacefully at the State Capitol building to protest against segregation, discrimination and the arrest of fellow learners. They marched to the courthouse where they sang, prayed and listened to a speech by Cox. He was convicted of disturbing the peace and of obstructing public passage in violation of state statutes ("Cox", 1969). The US Supreme Court held that, amongst others, Cox's right of free speech had been infringed. If a person is convicted for peacefully expressing unpopular views, it violates the constitutional right of free speech.

The group of learners were demonstrating because 23 learners had been arrested the previous day for picketing stores that maintained segregated lunch counters. Although the demonstration was peaceful, Cox was arrested the following day for violating the "disturbing the peace" statute. It was argued that this statute was unconstitutional and an infringement of the appellant's right to free speech, because it allowed people to be arrested merely for expressing unpopular views peacefully. Since speech is often provocative and challenging, it may strike at prejudices and preconceptions and have profoundly unsettling effects as it presses for the acceptance of an idea. The view of the Louisiana court was that the statute allowed for conviction for innocent speech ("Cox", 1969).

5.2.10 Brown v. State of Louisiana, 383 US 131, 86 S. Ct. 719 (1966)

In this case five Negroes were convicted of violating the Louisiana breach of peace statute for refusing to leave the racially segregated public library after the sheriff had requested them to. The Supreme Court reversed the decision.

The Supreme Court had reversed three similar decisions before. The first was *Garner v. State of Louisiana* 368 U.S. 157 (1961) ("Garner", 1961) where Negroes sat at lunch counters catering only for whites. In *Taylor* ("Taylor", 1975) Negroes were sitting in a waiting room allocated to whites at a bus depot, and in the third, *Cox v. State of Louisiana* 379 U.S. 536 (1969) ("Cox", 1969) a Negro leader demonstrated in the vicinity of a courthouse and jail to protest the arrest of fellow demonstrators (see § 5.2.9). In each of these cases the demonstration was orderly with the purpose to protest the denial to Negroes of their constitutionally protected rights. In none was there evidence that the participants had planned disorder. In none were there circumstances that could have led to a breach of the peace, chargeable to the protesting participants. The courts held that if they were found guilty of the breach of peace statute, persons would be punished for merely peacefully expressing unpopular views. In the

Brown ("Brown v. Louisiana", 1966) case there was also, as in the previously mentioned cases, no disturbance of others, no disruption of library activities and no violation of any library regulations.

The issue at stake in these four cases, for the purpose of this research is, however, not the breach of peace statute, but respecting the Negroes' right to freedom of speech. This right is not confined to verbal expression and embraces appropriate types of action which include the right to, in a peaceful and orderly manner, protest by silent and reproachful presence in a place where the protester has every right to be, against the unconstitutional segregation of public facilities (Brown & Osterhaven, 1977).

The above-mentioned decisions were reversed, because the essence of the State of Louisiana's peace statute is an infringement of the right to freedom of speech and the right to assemble principles. In *Cox* ("Cox", 1969, at 551-552), the court declared the statute "... unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly" (see § 5.2.9).

In *Garner* ("Garner", 1961), it is clear that the Negroes sitting at white lunch counters knew that they would not be served. They sat there intentionally to demonstrate that the rule was an infringement based on race, of their right to equality. This demonstration can be viewed as the protesters' free trade in ideas, which is constitutionally protected in the Fourteenth Amendment as part of their right to free speech.

These four cases show that the right to freedom of expression cannot be limited in public places where this expression does not disturb the peace. Furthermore, the right to freedom of expression cannot be limited merely because it expresses an unpopular point of view.

5.2.11 Pickering v. Board of Education of Township High School District, 391 US 563 (1968)

This case addressed the right to freedom of expression of educators. Pickering, an educator was dismissed for publishing a letter in the local newspaper in criticism of the board's allocation of funds for educational and athletic programmes. The Supreme Court reversed the dismissal in favour of the plaintiff, stating that educators' right to freedom of expression is protected if they speak out on matters of public concern. Although it is expected from employees to be loyal to their employer, this loyalty can be broken in the public interest ("Pickering", 1968).

One could argue that this ruling resonates with the principle that a learner's right to freedom of expression can be limited if it is in the public's interest, or that his/her right to freedom of expression must be respected.

5.2.12 Tinker v. Des Moines Independent Community School District et al., 393 US 503 (1969)

In December 1965, a group of adults and learners in Des Moines, Iowa, held a meeting to publicise their objections to the hostilities in Vietnam and their support for a truce, by wearing black armbands during the holiday season and by fasting on 16 December and New Year's Eve. After the officials of the Des Moines schools became aware of the plan to wear armbands, they met on 14 December, adopting a policy that any learner wearing an armband to school would be asked to remove it and would be suspended on refusal. Although the petitioners were aware of the regulation that the school authorities had adopted, Mary Beth Tinker and Christopher Ekhardt wore black armbands on 16 December, while John F Tinker wore his armband on 17 December. As a result they were all suspended and told to return without the armbands. They returned only after New Year's Day, as they had planned to stop wearing armbands then. The plaintiffs pleaded for an injunction restraining the school officials (respondents) from disciplining the learners and sought nominal damages. The district court dismissed the complaint, upholding the constitutionality of the school authorities' action on the grounds that it was reasonable in attempting to prevent the disturbance of school discipline ("Tinker", 1969). This was in accordance with the verdict of the court in similar cases before the *Tinker* case ("Tinker", 1969) which indicated that learners did not have a right to freedom of expression at schools. It was, however, in contrast with the court's decision in *Burnside v. Byars* 363 5th Cir. 744 (1966) ("Burnside", 1966, at 749), which stated that the wearing of symbols like the armbands could not be prohibited, unless they "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school".

On hearing appeal by the plaintiffs, Judge Forcas for the United States Supreme Court, held that in absence of demonstration of any facts, which might reasonably have led school authorities to forecast the substantial disruption of, or material interference with school activities, or any showing that disturbances or disorders on school premises occurred when learners wore black armbands on their sleeves to exhibit their disapproval of Vietnam hostilities, regulations prohibiting the wearing of armbands to schools and providing for suspension of any learner refusing to remove such was an unconstitutional denial of the learners' right to expression of opinion. The wearing of armbands in protest was the type of symbolic act that placed the learners' actions within the free speech clause of the First Amendment (Russo, Underwood, & Cambron-McCabe, 2000).

This verdict changed the argument in regard to freedom of expression. It was argued that the circumstances of this case were separated from actual or potentially disruptive conduct. The gesture was akin to "pure speech", which is entitled to comprehensive protection under the First Amendment. It became clear that learners would no longer shed their constitutional right to freedom of speech at the school gate, as they had during the previous fifty years ("Tinker", 1969, at 506).

Prior to the *Tinker* case ("Tinker", 1969), learners could not clash with the school authorities, since they had no right to freedom of expression once they were at school. After the *Tinker*-ruling this

became a problem because authorities could not blindly limit learners' right to freedom of expression. School authorities are unlikely to regain absolute power.

The problem in the *Tinker* case ("Tinker", 1969) did not relate to school uniform or hairstyle, but could be viewed as being on the opposite side of the continuum of pure speech. Pure speech refers to a silent, passive expression of opinion, unaccompanied by any disorder or disturbance. In *Tinker* ("Tinker", 1969) there was no evidence of petitioners' interference, actual or nascent, with the schools' work, or of interference with the rights of other learners to be secure and to be let alone. Of the 18 learners in the school system who wore the black armbands, only five were suspended. There was no evidence that the work of the school or any class had been disrupted. Although a few learners made hostile remarks outside the classrooms to the learners wearing the armbands, there were no threats or acts of violence on school premises.

When the Supreme Court overruled the district court's conclusion, it indicated that an undifferentiated fear of disturbance was not enough to overcome the right to freedom of expression. Any spoken word that deviates from the views of another person may start an argument or cause a disturbance ("Lehman", 1974). The USA Constitution, however, allows this and the courts see this kind of openness as the basis of the independence and vigour of Americans ("Terminiello", 1949, at 69), who live in a relatively permissive society. It is evident that freedom of expression is to a large extent viewed by American courts as a core freedom in a democracy.

School authorities can limit the right to freedom of expression only if they can prove that the expression is more than a mere desire to avoid an unpopular viewpoint or viewpoint with which they disagree. Apropos this issue, *Burnside* ("Burnside", 1966, at 749) held that one could limit the right to freedom of expression only if it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (see § 5.2.6).

Authorities in the *Tinker* case ("Tinker", 1969, at 89), however, limited this right only because they believed that "the schools are no place for demonstrations" and if the learners "did not like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools".

The mistake of the school authorities in the *Tinker* case ("Tinker", 1969) was that they did not follow a clear principle and that they handled the incident on an *ad hoc* basis because of its sensitivity countrywide. A protest march against the Vietnam War had been held in Washington DC and there were many incidents of burning draft cards to protest against the war. While the wearing of the black armbands was prohibited, learners in some of the schools wore buttons relating to national political campaigns. Some even wore iron Nazi crosses. Clearly, the prohibition of the expression of one particular opinion, without evidence that the prohibition was necessary to avoid material and substantial interference with schoolwork or discipline, was not constitutionally permissible. The

principals' "undifferentiated fear or apprehension of disturbance (was) not enough to overcome the right to freedom of expression" ("Tinker", 1969, at 508-509). As long as school administrators are able to prove a "reasonable likelihood of substantial disorder" ("Karp", 1973) at school, they are legally entitled to restrict learners' expression. School authorities do not have absolute authority over their learners, as learners (in school, as well as out of school) are classified as "persons" under the American Constitution that allows them the right to freedom of expression.

In the absence of a specific showing of constitutionally valid reasons to regulate their speech, learners are entitled to the freedom to express their views. This is also evident in *Shelton* ("Tucker", 1960, at 487) that spells out that the classroom is the market-place of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth in multitude of tongues, rather than through any kind of authoritative selection. Therefore the learners' right to freedom of expression must be respected on the school premises, even on controversial subjects like the Vietnam conflict. Freedom of expression would not exist if it could be exercised only in specific areas. According to the USA Constitution, Congress may not abridge the right to free speech.

The *Tinker* case, however, does not give unconditional protection to learners' right to freedom of expression. It clearly states that the right to freedom of expression can be limited when it "critically disrupts class work or involves substantial disorder or invasion of the rights of others" ("Tinker", 1969, at 513).

The first question the *Tinker* ("Tinker", 1969) court had to answer was whether school officials could prohibit learners from wearing non-disruptive political symbols on school premises. The court concluded that the wearing of armbands was symbolic speech, and therefore akin to pure speech. The second task was for the court to balance the school's need to maintain discipline against the learners' right to freedom of expression. Furthermore, public schools are an appropriate place to exercise symbolic speech as long as normal school functions are not unreasonably disrupted. Of course the interpretation of "reasonable" is relative, and needs to be determined in each court case. School authorities can limit learners' right to freedom of expression only if they can demonstrate that the limitation was "necessary to avoid material and substantial interference" ("Tinker", 1969, at 509) with school work or the rights of others.

In view of the fact that, since *Tinker* ("Tinker", 1969), learners' rights have been acknowledged and schools no longer have sole authority over learners at schools (Russo, Underwood, & Cambron-McCabe, 2000), the *Tinker* case ("Tinker", 1969) is regarded as a turning point in American legal history (Alston, 2002). Learners' freedom of speech has since been guaranteed and they are "entitled to freedom of expression of their view". It has also resulted in minors (learners) being entitled to their constitutionally protected right to freedom of expression. Learners remain citizens inside or outside the

school and therefore the government must respect their fundamental right ("Tinker", 1969, at 511). When limiting rights, public and private interests should be balanced.

The *Tinker* verdict involves freedom of expression in terms of learners' personal views (Fischer, Schimmel, & Stellman, 2000), hence it respects this silent or "personal" academic freedom of expression of learners: " ... [s]tudents in school as well as out of school are [persons] under our Constitution ... [and] may not be regarded as closed-circuit recipients of only that which the state chooses to communicate" ("Tinker", 1969, at 511).

This implies that learners may have their own personal views as citizens in a democratic society and may express them, even if the expression of such views is not in keeping with the beliefs or views of the school authorities. The court concluded that the "comprehensive authority" delegated to school officials did not extend to intrusion upon First Amendment rights without evidence that the learners' conduct would either "materially disrupt classwork" or substantially invade the privacy rights of others ("Tinker", 1969, at 513).

5.2.13 Guzick v. Drebus, 305 F. Supp. 472 (1970)

Thomas Guzick, a 17 year-old, eleventh grade student at Shaw High School, was denied the right of free speech when he was suspended for wearing a button which solicited participation in an anti-war demonstration.

Using the *Tinker* principle it was claimed that Guzick's constitutional right to free speech had been denied. On comparing this case with earlier free speech cases, one notes a difference. In the *Tinker* case ("Tinker", 1969, at 513) it was held that a regulation forbidding any expression, which opposed the Vietnam conflict, anywhere on school property, would violate the learners' constitutional rights "at least if it could not be justified by showing that the students' activities would materially and substantially disrupt the work and discipline of the school". Shaw High School had a history of incidents that resulted in substantial disruption of the school discipline and work. Buttons previously worn at Shaw High School displayed the words "Black power", "Say it loud, black, and proud", while others depicted a black fist. The previous year a button containing a message referring to the assassination of Martin Luther King during the Easter period in 1968, viz. "Happy Easter, Dr King", worn by a white learner, triggered a fight in the school cafeteria. There was evidence therefore that the wearing of buttons could provoke fighting among the learners and lead to the material and substantial disruption of the educational process ("Drebus", 1970).

The *Tinker* case ("Tinker", 1969, at 510-511) addressed only the wearing of black armbands to exhibit opposition to the American nation's involvement in Vietnam. No racial issue was at stake and there was no indication that the wearing of the black armbands would disrupt the educational process. Given, however, the history of Shaw High School and the fact that it underwent a change in racial composition from all white to 70% black, as well as the enforcement of a rule prohibiting learners from

wearing buttons, it was not a denial of their right to free speech. The rule applied at Shaw High School was of long standing and forbade the wearing of all buttons, badges, scarves and other means whereby the wearers could identify themselves as supporters of a cause, or bearing messages unrelated to their education. If all buttons had been permitted at Shaw High School, it could have resulted in a serious discipline problem, racial tensions could have been exacerbated and the educational process could have been significantly and substantially disrupted ("Drebus", 1970, at 478).

Although it was held in the *Tinker* case that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" ("Tinker", 1969, at 508-509), it was proved at Shaw High School that there definitely was a differentiated fear and evidence that disturbance might occur ("Drebus", 1970, at 479).

The difference in the *Guzick v. Drebus* 305 U.S. 472 (1970) case ("Drebus", 1970) lies in the fact that there had been a previous rule of general application prohibiting the wearing of all buttons at Shaw High School and there was substantial proof that the wearing of the buttons would cause disturbances, as had happened in the past. Further, in the *Blackwell v. Issaquena Public School* 363 5th Cir 749 (1966) case ("Blackwell", 1966) the button was an invitation to friendship between blacks and whites (see § 5.2.8). This non-controversial message led to serious disruption of the educational process: "all hell broke loose" ("Blackwell", 1966, at 754). Certainly the message of the *Drebus* button, supportive of a divisive demonstration, was more provocative than the *Blackwell* button's reach for friendship. One could thus have anticipated that "all hell" would break loose when such buttons were worn at Shaw High School.

If Shaw High School had been denied the rule of not wearing buttons, it would have resulted in an infringement of the learners' right to education and the right of educators to fulfil their duties. The court held as follows:

Thus, it appears that the presence of freedom buttons did not hamper the school in carrying on its regular schedule or activities, nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so. Wearing buttons on collars or shirt fronts is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speechmaking, all of which are protected methods of expression, but all of which have no place in an orderly classroom. If the decorum had been so disturbed by the presence of the freedom buttons, the principal would have been acting within his authority and the regulation forbidding the presence of buttons on school grounds would have been reasonable ("Drebus", 1970, at 748).

The *Guzick v. Drebus* verdict was similar to the *Tinker* verdict. Where the *Tinker* judgement enforced the fact that learners did not lose their right to freedom of expression at the school gate ("Tinker", 1969, at 506), this verdict held that the right to freedom of expression could be limited if a rule prohibiting it was in place, if there was evidence of the need for such a rule and if it could be proved that the exercise of the right to freedom of expression would lead to the disruption of the educational process.

5.2.14 Cohen v. California, 403 US 15, 91 S. Ct. 1780 (1971)

Paul Robert Cohen was convicted of violating the California Penal Code, Section 415,⁸⁹ which prohibits “insidiously and wilfully” disturb(ing) the peace or quiet of any neighbourhood or person by offensive conduct, for wearing a jacket bearing the words “Fuck the draft” in a corridor of the Los Angeles courthouse. He wore the jacket to express his feelings against the Vietnam War and the draft. Neither the defendant, nor anyone else committed any act of violence. His actions did not wilfully and maliciously incite others to violence nor did he engage in conduct likely to incite others to violence. As long as there was no indication of intent to incite disobedience to or disruption of the draft, Cohen could not be punished for asserting the evident position on the senselessness or immorality of the draft as reflected by the message on his jacket (“Cohen”, 1971). The words on the jacket were not a direct personal insult and did not constitute defamation see § 4.4.3.2).

His conviction was rejected, using the *Tinker* principle that an “undifferentiated fear or apprehension of disturbance is not sufficient to overcome the right to freedom of expression” (“Tinker”, 1969, at 508-509).

5.2.15 Bannister v. Paradis, 316 F. Supp. 185 (1971)

Kevin Bannister claimed that the school’s dress code was unconstitutional as it prohibited boys from wearing dungarees or blue jeans. Although this was not a freedom of expression case *per se*, it can be viewed as such under symbolic speech. While it is legally allowed that the School Board must adopt a dress code that can be enforced, this code may not infringe on any of the learners’ rights. It could not be proved that the wearing of blue jeans would lead to disruption or inhibit the educational process, the rule was therefore held to be unconstitutional and an infringement of Kevin’s personal liberty (of which freedom of expression is one aspect) (“Bannister”, 1971).

5.2.16 Bethel School District No 403 v. Fraser, 478 US 675 (1986)

Where educators in the *Tinker* case (“Tinker”, 1969) had been given almost no say in limiting the right of learners to freedom of expression, *Fraser* (“Fraser”, 1986) brought a change of emphasis to the issue. In this case the Supreme Court held that firstly the school, in imposing sanctions upon a learner in response to his offensive, lurid and indecent speech, was not violating his right to freedom of expression. Furthermore, it held that the school disciplinary rule prescribing obscene language and free speech admonitions by educators had adequately warned the learner that such speech could subject him to sanctions.

⁸⁹ Every person who maliciously and wilfully disturbs the peace or quiet of any neighbourhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarrelling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town; or upon the public highways in such unincorporated town, runs any horse race, either for a wager or for amusement, or fires any gun or pistol in such unincorporated town, or uses any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanour, and upon conviction by any Court of competent jurisdiction, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment or either, at the discretion of the Court.

Mathew Fraser, a high school learner, presented a speech during a voluntary assembly that was held during school hours as part of a school-sponsored educational programme in self-government, to nominate a fellow learner as a learner elective officer. Approximately 600 learners attended the assembly and a fair percentage of the attendants were as young as 14 years. They all heard Fraser refer to his candidate “in terms of an elaborate, graphic, and explicit sexual metaphor” (“Fraser”, 1986, at 678). The response had varied effects on the audience, viz. as some hooted and yelled during the speech, others mimicked the sexual activities alluded to in the speech, while a number appeared to be bewildered and embarrassed. One could argue that a reasonable person would not have used this metaphor in front of an audience including 14 year-olds. This is evident from the fact that the respondent himself felt the need to discuss this issue (the using of the metaphor) with several educators, of whom two advised him that it was inappropriate and should not be used.

After assembly the assistant principal notified Fraser that the school considered his speech to have been a violation of the school’s “disruptive-conduct rule” which prohibited conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures. The *audi et alteram partem* principle⁹⁰ was applied. The respondent admitted that he had deliberately used sexual innuendo in the speech and was informed that he would be suspended for three days and would no longer be considered as graduation speaker at the school’s commencement exercises. He was allowed to return to school after serving only two days of his suspension.

Although Fraser’s appeal by means of the grievance procedure failed, the United States District Court for the Western District of Washington overturned the finding and held that the school’s sanctions had violated Fraser’s right to freedom of speech, that the school’s disruptive-conduct rule was unconstitutionally vague and broad, and that the removal of his name from the graduation speakers’ list had violated the due process clause, because the disciplinary rule made no mention of such removal as a possible sanction.

The court appealed to the Ninth Circuit by holding that the speech was indistinguishable from the wearing of the protest armband in the *Tinker* case (“Tinker”, 1969). They argued that the speech, like the wearing of the black armband, had no disruptive effect on the educational process. The court also rejected the School District’s argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a school-sponsored setting, reasoning that the School District’s “unbridled discretion” to determine “decent” discourse would “increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behaviour in our public schools”.⁹¹ It also rejected the School District’s argument that it had the power to control the language used to express ideas during a school-sponsored activity because of its responsibility for the school curriculum.

⁹⁰ The other side must be heard.
⁹¹ 755 F 2d, at 1363.

The court thereby acknowledged in the *Tinker* case that learners did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (“*Tinker*”, 1969, at 506). The court held that the use of lewd and obscene speech in order to make what the speaker considered to be a nominating speech for a fellow learner, was essentially the same as the wearing of the armband in the *Tinker* case (“*Tinker*”, 1969), as a form of protest or expression of a political position. The court, however, was careful to note that this cause did “not concern speech or action that intrudes upon the work of the schools or the rights of other students” (“*Tinker*”, 1969, at 508).

The Bethel School District appealed to the Supreme Court that overturned the lower court’s decision and held that freedom of expression “... must be balanced against society’s countervailing interests in teaching students the boundaries of socially appropriate behaviour ... consideration for the personal sensibilities of the participants and audiences” (“*Fraser*”, 1986, at 681).

It is therefore necessary to look again at the purpose of public schools since, in a democracy, public education must prepare pupils to fulfil their citizenship (see § 4.2.1.3). It must also inculcate the habits and manners of civility as values in themselves (Beard & Beard, 1968) and these values must include tolerance of divergent political and religious views, even when the views expressed may be unpopular (“*Brown v. Louisiana*”, 1966; “*Burnside*”, 1966; “*Cox*”, 1965; “*Edwards*”, 1963; “*Garner*”, 1961; “*Niemotko*”, 1951; “*Stromberg*”, 1931; “*Taylor*”, 1975; “*Thornhill*”, 1940; “*Tinker*”, 1969). As no right is absolute and can be limited, these values must take into account the sensibilities of others. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society’s countervailing interest in teaching learners the boundaries of socially appropriate behaviour. The USA Constitution does not prohibit the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is the work of the schools (“*Tinker*”, 1969, at 508). Schools as agents of the state may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates such lewd, indecent, or offensive speech and conduct as *Fraser*’s.

The pervasive sexual innuendo in *Fraser*’s speech was offensive to both educators and learners. The court held that the right to freedom of expression could be limited if the expression could undermine the school’s basic educational mission, which is in agreement with the fundamental values of public school education (“*Fraser*”, 1986, at 685-686). Alston (2002) summarises the *Fraser* verdict as stating that freedom of expression can be limited under certain circumstances and that these limitations will be determined by time, manner and place. The *Fraser* case (“*Fraser*”, 1986) gave high school authorities greater control over the learning environment than the *Tinker* case (“*Tinker*”, 1969). School authorities may use their discretion to include the values of society and thus balance the learners’ right to freedom of expression against this value system. When testing the limitation of *Fraser*’s speech by using the five factors in section 36 of the Constitution, one realises why his right to freedom of expression could be limited.

When the fundamental human rights of others are violated when exercising one's own right, one's right can be limited in terms of section 36 of the Constitution, as it would then be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Rights need to be balanced against other rights.

School authorities can thus limit learners' right to freedom of expression at school – even if the speech does not cause disruption and is not legally obscene. To summarise, the principle developed in the Fraser case states that the right to freedom of expression in schools may be balanced against society's countervailing interest in teaching learners the boundaries of socially appropriate behaviour.

5.2.17 Gano v. School District No 411 of Twin Falls County, 674 F. Supp. 796 (1987)

Rod Gano was requested by senior learners to draw a caricature of three administrators to print on T-shirts that would be sold to learners to wear during homecoming week. It showed the three administrators sitting against a fence labelled "Bruin Stadium, home of the Bruins". Each administrator was holding a different alcoholic beverage and appeared to be drunk. A slogan, "It doesn't get any better than this" appeared just below the caricature. When the administrators discovered the T-shirts and the intention to sell them, Gano was suspended for two days. He returned to school wearing the T-shirt and was sent home to change shirts. This happened on more than one occasion. Gano then claimed that his right to freedom of expression had been violated.

Using the Fraser principle, i.e. that learners are not allowed to use lewd, indecent, or offensive speech, the court held that Gano's right to freedom of expression had not been violated, as the depiction on the T-shirts would teach learners that falsely accusing someone of being drunk was acceptable. Although it is determined in court cases that one has the right to freedom of expression, even if what is said is false, there is a tendency to limit false speech, especially if it occurs in a school where teaching the learners decent values is part of the school's mission and purpose.

5.2.18 Hazelwood School District v. Kuhlmeier, 484 US 260 (1988)

In this case school officials censored two pages from a learner newspaper on the grounds that the article unfairly impinged on the privacy rights of pregnant learners and others. The court held that this was not a violation of learners' right to freedom of expression. One article that was censored by the school's principal described school learners' experiences with pregnancy and another discussed the impact of divorce on learners. It is important to note that the newspaper in question was written and edited by a journalism class as part of their school curriculum. Although the names of the pregnant learners were not disclosed, the principal feared that their identity might be deduced from the text. He also argued that the article's references to sexual activity and birth control were inappropriate for the younger learners. The principal objected to the divorce article because a learner who had complained of her father's conduct was identified by name. Believing that there was not enough time to review the newspaper for publication before the end of the school year, the principal directed the pages on which

the two articles appeared to be withheld from publication even though the pages contained other unobjectionable articles.

The court held that the respondents' first amendment rights had not been violated and argued that even though government could not censor similar speech outside the school, a school need not tolerate learner speech that is inconsistent with its basic educational mission ("Hazelwood", 1988, at 567), which is in agreement with the argument in the *Fraser* case ("Fraser", 1986, at 675). As this was part of the journalism class curriculum, the paper could not be viewed as a forum for public expression. School officials could thus regulate the paper's contents in any reasonable manner ("Hazelwood", 1988, at 567-569). At this point it is necessary to differentiate between a "public forum" and "school-sponsored learner publication". The Student Press Law Center (SPLC) defines the first as a "... forum created when school officials have by policy or practice opened a publication for unrestricted use by students" (Anon, 2005a, p. 4). The Supreme Court of the USA cites three criteria for the latter: school-sponsored learner publications are supervised by a faculty member and are designed to impart particular knowledge or skills to learner participants or audience and use the school's name and resources (Anon, 2005a, p. 4).

The *Tinker* case established the legal principle that learners do not lose their freedom of expression at the school gate ("Tinker", 1969, at 506). *Hazelwood*, however, argued that school officials would not offend freedom of expression by exercising editorial control over the style and content of learner speech. Expression activities could be limited if they were in school-sponsored expressive activities so long as the activities were reasonably related to legitimate pedagogical concerns ("Hazelwood", 1988, at 569-571).

This was, however, reversed by the Court of Appeal. The court held that the newspaper was not only "a part of the school-adopted curriculum" ("Hazelwood", 1988, at 1373), but also a public forum", as its intention was "... to be used and operated as a conduit for learner viewpoints" ("Hazelwood", 1988, at 1372). Thus the newspaper as a public forum precluded school officials from censoring its contents, except when necessary "to avoid material and substantial interference with schoolwork or discipline ... or the rights of others" ("Hazelwood", 1988, at 1374).⁹² The court could find no evidence that the censored articles would have materially disrupted class work or given rise to substantial disorder in the school ("Hazelwood", 1988, at 1375). Accordingly, the court held that the school officials had violated the respondents' First Amendment rights by deleting the two pages of the newspaper.

Hazelwood ("Hazelwood", 1988) thus advanced the *Tinker* case verdict, i.e. that learners do not "shed their constitutional rights to freedom of speech or expression at the school gate" ("Tinker", 1969, at 506), unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students" ("Tinker", 1969, at 509).

⁹² At 1374 quoting *Tinker v. Des Moines* 393 US 503, 511 89 S Ct 733, 739, 21 L Ed 2d 731 (1969).

The Supreme Court, however, reversed this verdict. The first issue at stake was whether the newspaper *Spectrum*, might appropriately be characterised as a forum for public expression. The second issue was whether school officials had authority over school-sponsored publications, theatrical productions and other expressive activities that learners, parents and other people might reasonably perceive as bearing the imprimatur of the school. The question arises as to whether the school's newspaper could be viewed as a public forum.

Differently from streets and parks where citizens can assemble at any time to communicate thoughts among citizens, e.g. by discussing public issues, public schools are not open to public forums full-time. Public schools can be deemed to be public forums only if school authorities have by "policy or by practice" opened those facilities "for indiscriminate use by the general public" ("Perry", 1983, at 47).

The Hazelwood School Board Policy states that "... [s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities". In the Hazelwood East curriculum guide the Journalism II course is described as a "laboratory situation in which the learners publish the school newspaper applying skills they have learned in Journalism I" ("Hazelwood", 1988, at 11). According to the curriculum guide, Journalism II has as its aim, the development of journalistic skills under deadline pressure, "the legal, moral and ethical restrictions imposed upon journalists within the school community", and "responsibility and acceptance of criticism for articles of opinion" ("Hazelwood", 1988, at 11). The production of *Spectrum* was part of the educational curriculum and a regular classroom activity. Therefore the journalism teacher had the authority to exercise control over *Spectrum*. This was indeed done by Robert Stergos, the journalism teacher, during the 1982-1983 school years. Finally, each publication had to be reviewed by the principal prior to publication. There was no indication that learners could publish practically anything.

The Policy of the Hazelwood School Board states that "... [s]chool sponsored learner publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism" and that such publications were "developed within the adopted curriculum and its educational implications" ("Hazelwood", 1988, at 22). This implies that the learners' right to freedom of expression will be respected in *Spectrum*, which can thus be viewed as a curricular newspaper and not a public forum. The intended purpose of the newspaper *Spectrum*, was to create a supervised learning experience for journalism learners.

The US Supreme Court determined that a school-sponsored newspaper could not be viewed as a public forum and that educators were entitled to exercise control over learner expression if it was part of curriculum development (Hoover, 1998). This would ensure that the learners learned whatever lessons the activity was designed to teach, that readers or listeners were not exposed to material that might be inappropriate to their level of maturity, and that the views of the individual speaker were not attributed to the school. The court held that a school had to be able to set high standards for the

learner speech that was disseminated under its auspices and that its standards might be higher than those demanded by some newspaper publishers or theatrical producers in the “real” world. The school thus could refuse to disseminate learner speech that did not meet those standards. A school had to take into account the emotional maturity of the intended audience and could limit learner speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex or conduct otherwise inconsistent with “the shared values of a civilized social order” (“Fraser”, 1986, at 106). The overarching aim of education, namely to develop all children to fulfil their place in a democratic society, was to be kept in mind constantly. Therefore schools needed to create an awareness among learners to cultural values and supply professional training to assist them to adjust to the public environment (“Brown”, 1954, at 493).

The *Tinker* case determined the principle that learners did not shed their right to freedom of expression at the school gate as long as the exercising of that right to freedom of expression would not materially disrupt and substantially interfere with the educational processes at school (“Tinker”, 1969, at 506). The *Fraser* judgement determined that learners’ speech could be limited if it was offensive and could undermine the school’s basic educational mission. In the *Hazelwood* case it was determined that school-sponsored newspapers or forums to disseminate freedom of speech were not public forums and had to serve an educational purpose (“Hazelwood”, 1988). Even if it would not materially and substantially interfere with the requirements of appropriate discipline in school, freedom of expression in school-sponsored newspapers could be limited if the content was not in line with the value system used as basis for the educational purpose of the school. It afforded school principals a large extent of latitude in controlling the content of learner publications (Dvorak & Dilts, 1992).

In the *Tinker* case (“Tinker”, 1969) the symbolic speech was constituted by personal expression that happened to be expressed on school premises. This could be limited only if it was proved that it would materially disrupt class work or involve substantial disorder. It could not be limited merely because educators disagreed with the content. In the *Fraser* case (“Fraser”, 1986), the assembly was part of a school-sponsored educational programme in self-government and learners were required to attend the meeting. It could be limited to protect the rights of other learners in the audience and also if it was not in line with the educational goal of the school.

One could argue that the *Hazelwood* verdict changed the focus of freedom of expression in schools. Before the *Hazelwood* case (“Hazelwood”, 1988) the right to freedom of expression was protected as a core right, which could be limited only if the content of communications was not in agreement with the educational goal or if it could result in material disruption in the school. While the *Hazelwood* case (“Hazelwood”, 1988) proved that school-sponsored newspapers were not public forums, but extensions of the curriculum, the focus has been changed to the establishment of good relationships with school authorities and to teach learners to be responsible journalists, knowing that their writing will have consequences (Hoover, 1998). The *Hazelwood* case brought the problem to principals to find a balance in the process of limiting the right to freedom, between the best interests of the school and

the development of learners' critical thinking, in allowing them their right to freedom of expression (Dvorak & Dilts, 1992). The *Hazelwood* case ("Hazelwood", 1988) also indicated that educators had the freedom to choose their study material (see § 4.5.1), as well as their methodology to ensure the development of critical thinking in a democracy. This also enhanced the "search for truth" paradigm (see § 4.2.1.1).

For many critics the problem with the *Hazelwood* decision is that it emphasised Judge Brennan's dissenting opinion that the case "aptly illustrates how readily school officials can camouflage viewpoints and discrimination as the mere protection of learners from sensible topics" (Goodman, 1988, p. 41). This placed the responsibility for what is written in the ambit of the school principal, who previously had no say in such matters. Although one could argue that censoring the learners' newspaper is an infringement of the search for the truth (see § 4.2.1.1), Gill (1991, p. 225) points out that "school officials are permitted to take editorial decisions ... so long as they are reasonably related to legitimate pedagogical concerns". If this is not the case, it will amount to an infringement of the right to freedom of expression. While some people feared that the *Hazelwood* decision would give the green light to censorship cases, Dickson and Paxton (1997) mentioned that the *Hazelwood* case ("Hazelwood", 1988) did not lead to a significant increase in censorship cases. The problem lies in the interpretation of the *Hazelwood* verdict. Some principals felt that it gave them *carte blanche* to censor any controversial issues (Hoover, 1998).

The *Hazelwood* case ("Hazelwood", 1988) shifted the focus of freedom of expression, while the *Tinker* verdict stated that learners did not shed their right to freedom of expression at the school gate, meaning that school authorities no longer had full power over learners. In *Hazelwood* ("Hazelwood", 1988, at 266), the court held that:

"First Amendment rights of students in the public school are not automatically coextensive with the rights of adults in other settings and must be applied in the light of the special characteristics of the school environment".

One could thus argue that the *Hazelwood* decision balanced the right to freedom of expression in a social context, taking into account that learners have a lack of *iudicium* and that their right to freedom of expression has to be balanced against the rights of other learners, educators and society.

In short, the *Hazelwood* court held that the First Amendment and then the *Tinker* principle had to apply to protect a learner's personal expressions on controversial issues in the school grounds. When it was part of the school curriculum, however, like a school-sponsored publication, a drama or revue, the speech could be limited.

The important issue is that school-based freedom of expression can be limited only if there is a valid educational purpose. Therefore, schools cannot easily censor learners' newspapers that are published without school sponsorship or support and that are not part of the curriculum. In this case, the *Tinker* principle will apply, which means that it can be censored only if school authorities can prove that it will

cause substantial disruption, interfere with others' rights or promote illegal activities (Fischer, Schimmel, & Stellman, 2000). In other words, learners would be able to criticise school officials or publish unpopular views without fearing interruption from school as long as they, in the process, do not infringe some fundamental human right. The *Hazelwood* verdict confirmed control over curriculum-related activities.

5.2.19 Burch v. Barker, 861 F. 2d 1149 9th Cir (1988)

In this case, five learners from Lindbergh High School in Renton, Washington, distributed *Bad Astra*, a newspaper they had written, to 350 fellow learners at a school-sponsored barbecue on the school premises. It was even placed in the staff members' mailboxes by the president of the Parent Teacher Association, who was the father of one of the five learners. *Bad Astra* was privately sponsored and initiated without the knowledge of any educator. The paper included amongst others, a mock educator evaluation poll.

The school had a policy requiring all learners' written materials to be reviewed by school authorities prior to distribution. The policy indicated that the distributed material "had to be free from 'libel, slander, obscenity, personal attacks or incitement to illegal action[s]' and ...' from 'unauthorised solicitation'" ("Burch", 1988, at 1151).⁹³ It also authorised the principal to control the distribution to ensure that it would not "interfere with" or "disrupt the normal educational process" ("Burch", 1988).

A suit was filed, amongst others, to declare the policy unconstitutional. The authorities responded, indicating that the policy was to protect all stakeholders from harm and to avoid potential school liability and disruption of education. The court held that although no one had been harmed and the school discipline was not disturbed, the policy was "substantially constitutional" ("Burch", 1988, at 1152). Since student-written materials have the potential to cause substantial disruption, a policy of prior review of student-written material is not a violation of the First Amendment (Quast, 1989).

The Ninth Circuit Court of Appeals reversed the verdict. The issue at stake was "whether ... the first amendments permitted the school to require prior review for possible censorship of objectionable content, of all student-written, non-school sponsored materials distributed on school grounds" ("Burch", 1988, at 1150).

Bad Astra was not a form of school-sponsored expression. This differs from the *Hazelwood* case in which the newspaper was school-sponsored and part of the curriculum. Using the *Tinker* standard, the court found that the distribution of *Bad Astra* had not interfered with the functioning of the school or with the rights of specific learners. The problem with prior approval is that it aims "at suppressing speech before it is uttered, as opposed to punishment of individuals after the expression has occurred" ("Burch", 1988, at 1154). One could argue that the difference between a prior approval policy and the possibility of punishment after learners' expression is semantic, as both methods have the same effect

⁹³ At 1151 (quoting from Renton School District Policy of 1977).

as official censorship (Quast, 1989). The court agreed with Emerson (1970) that a system of post-conduct punishment would rather allow learners to communicate at risk of the possibility of punishment. Under the system of prior review there is a possibility that no one will hear the expression. The court views these expressions as the market-place of ideas through which learners can learn how to exercise their rights in society (see § 4.2.1.1).

Where the *Hazelwood* case determined that school-sponsored expression could be limited ("Hazelwood", 1988), *Burch v. Barker 861 9th Cir 1149 (1988)* ("Burch", 1988) held that, although distributed on school premises, the newspaper could not be limited if not funded by or associated with the school. The latter would then be viewed as non school-sponsored as it was privately funded and edited. The *Hazelwood* case ("Hazelwood", 1988) also articulated the principle that schools could limit the right to freedom of expression of school-sponsored expression only, which included expressive activities that were school-funded and closely associated with the school's pedagogical concerns. The *Burch* case ("Burch", 1988) narrowed the school-sponsored criterion to school funding rather than association with the school.

To summarise, *Burch* ("Burch", 1988) "suggests that courts must be extremely hesitant before labelling expression that is not both funded by the school and bearing the school's imprimatur as school-sponsored speech" (Quast, 1989, p. 589). *Burch* ("Burch", 1988) established the *Tinker* principle in the non school-sponsored area and also recognised the fact that speech could enrich the market-place of ideas.

5.2.20 Kimberly Broussard v. School Board of the City of Norfolk, 801 F. Supp. 1526 (1991)

When Kimberly Broussard was suspended for a day for wearing a T-shirt with the words "Drugs suck" on it, she argued that her right to freedom of expression had been violated. When using the *Tinker* principle, the school should have been able to prove that there had to be at least a reasonable forecast that the wearing of the T-shirt would lead to disruption at school, to legalise the suspension. Testimonials were given that proved that learners of eight to fourteen would be disturbed by the words, therefore the school had not violated her right to freedom of expression. When using the *Fraser* case ("Fraser", 1986), no proof of a reasonable forecast of disruption was required. The expression could be limited if proved to be contrary to the basic educational mission of the school. Thus, using both the *Tinker* and *Fraser* principles, the court held that her right to freedom of expression had not been violated, as the words were not in agreement with the educational purpose of the school ("Broussard", 1991).

I do not think that this principle can be applied like this in South Africa today. Courts have to decide whether the word "suck" has a sexual connotation to learners aged 8 to 14. Although the court decided that this was the case, I personally believe that the current semantic value of the word "suck" among the youth, means nothing more than something they regard as undesirable, which then actually means

that the message disseminated on the T-shirt was of positive value and the message on the T-shirt was one that *is* actually in agreement with the basic educational mission of the school.

5.2.21 Bivens v. Albuquerque Public Schools et al., 899 F. Supp. 556 (1995)

Richard Bivens, a ninth grader was suspended from school for breaking the school's dress code after several warnings. He continued to attend school wearing sagging pants. The court held that his right to freedom of expression had not been violated although he claimed that the wearing of the sagging pants was a reflection of who he was and a statement of his identity as a black youth with black culture and the style of black urban youth ("Bivens", 1995).

The school stated that they had experienced problems with gangs and, in an attempt to control the problem, abolished the wearing of sagging pants in terms of their dress code. The policy was already in place at the time of the incident involving Bivens. As the school could prove that the wearing of sagging pants was related to the gang problem at school, and that it could lead to disruption, the court held that the school had not violated the learner's right to freedom of expression.

5.2.22 Cecilia Lacks v. Ferguson Reorganised School District R-2 (1989) 147 F. 3d 718

Cecilia Lacks, an English and journalism educator who sponsored the school newspaper, was dismissed for allowing learners to write their own short plays to perform in class. These plays, which contained profanities like "fuck", "shit", "ass", "bitch" and "nigger", were also videotaped. Ms Lacks also encouraged learners to read their own poems, which often contained profanities and graphic descriptions of oral sex, aloud in class. She reviewed the scripts beforehand and also attended rehearsals prior to the performance of the plays. The School Board held that she had violated the board's policy requiring educators to enforce the section of the learners' discipline code which prohibited the use of profanity.

The first issue here is whether a school's policy prohibiting profanity has the power to limit a learner's right to freedom of artistic expression. Profanity is viewed as a Type II behaviour problem for which learners are subject to a verbal reprimand. The question then is why an educator was dismissed (punishment for a Type 1 behaviour problem) while learners in the same situation would merely have been reprimanded. One could, however, argue that a higher standard of values is expected from an adult and educator who teaches learners and guides them to adulthood. The court also held that, although it was debatable whether the policy to prohibit profanity could extend to creative written work, and despite the educator's *bona fide* belief that the anti-profanity policy did not apply to learners' creative assignments, allowing learners to call one another a "fucking bitch" and a "whore" in front of the class and allowing the reading of a poem that described sexual encounters in the most graphic detail, did not promote the shared values of a civilised social order ("Lacks", 1998).

As stated in the *Tinker* verdict learners did not shed their constitutional right to freedom of expression at the schoolhouse gate ("Tinker", 1969, at 506), *Fraser* held that learners' First Amendment rights in

schools and classrooms had to be balanced against society's countervailing interest in teaching learners the boundaries of socially appropriate behaviour ("Fraser", 1986, at 3159). In *Hazelwood* the court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of learners' speech in school-sponsored expressive activities as long as their actions were reasonably related to legitimate pedagogical concerns" ("Hazelwood", 1988, at 592).

The guidelines provided by the above-mentioned court cases, motivated the court to hold that Cecilia Lacks had been rightfully dismissed. One could also argue, using the *Hazelwood* principle, that the learners' right to freedom of expression in this case would have been limited if they had used these words, because it would not be in line with society's countervailing interest and value system.

5.2.23 Pyle v. South Hadley School Committee, 55 F. 3d 20 (1995)

Jeffrey and Jonathan Pyle wore T-shirts bearing different slogans to school and got into trouble. Jeffrey's message was an anti-alcoholic message with sexual innuendo, stating: "See Dick drink. See Dick drive. See Dick die. Don't be a Dick". The message on Jonathan's T-shirt was: "Co-ed naked band, do it to the rhythm". The court held that the school had not violated their right to freedom of expression ("Pyle", 1995). The sexual innuendo on the T-shirts equalled that in the Fraser case ("Fraser", 1986) and was inconsistent with the school's basic educational mission.

5.2.24 Conclusion

It is evident from the perusal of the above-mentioned court cases that it took USA case law a number of decades to develop the interpretation and balancing of the right to freedom of speech with other rights and the values of a democracy. The pre-*Tinker* court cases did not give learners much freedom to exercise their right to freedom of expression in schools and they indicate a number of interesting, yet contradictory legal principles in the implementation of the right.

The *Tinker* case ("Tinker", 1969) was the first USA court case ever to address learners' freedom of expression, referring neither to the written nor the spoken word, but addressing "speech plus". It determined the principle that learners do not lose their right to freedom of expression at the school gate ("Tinker", 1969, at 506). Before the *Tinker* case ("Tinker", 1969) learners had no right to freedom of expression and had to obey school authorities unquestioningly. The *Tinker* case ("Tinker", 1969) served to shift this focus, hence the fact that learners have the right to freedom of expression at school, which can be limited only if there is a reasonable forecast that the material or freedom of expression will substantially disrupt the order and harmony in the school. If an already existing rule limits (forbids) the right to freedom of expression in a specific way, it will be accepted. School rules can, however, not be changed at the whim of authorities who disagree with the content of an expression and therefore change the rules to abolish the expression.

The *Guzcik* case ("Drebus", 1970) determined that it would be preferable for school authorities to be proactive and to formulate a school rule long before an issue developed. The learners in this case

were denied the right to wear buttons and hats for political reasons because of an already existing school rule prohibiting it, and it could be motivated by the fact that there were clear indications that the wearing of buttons would lead to disruption in the school. It is important to note that a proactive school rule prohibiting the right to freedom of expression, however, will constitute a violation of the right to freedom of expression if no proof exists that the situation could lead to the disruption of school discipline and negatively affect the realisation of the school's educational mission.

The *Fraser* case ("Fraser", 1986) added a new dimension to the interpretation of the right to freedom of expression. In this case, the spoken word was at stake. The courts used the *Tinker* principle and stated that the speech bearing sexual content could be limited as the learner had been warned not to use it. It was deemed that the use of such speech could lead to substantial disruption and that it was also not in agreement with the educational mission of the school.

Fraser ("Fraser", 1986) determined that the school did not have to tolerate indecent and offensive speech. After the *Fraser* case ("Fraser", 1986) a number of courts held that the right to freedom of expression had not been infringed by the school. The court upheld amongst others, the schools' decisions in the wearing of T-shirts caricaturing administrators under the influence of alcohol ("Gano", 1987), the gang-related wearing of earrings by male learners ("Oleson", 1987) and the wearing of T-shirts with sexual innuendo ("Broussard", 1991; "Pyle", 1995).

The 1988 *Hazelwood* case addressed the written word and served to emphasise the variables of time, manner and place ("Hazelwood", 1988) and the verdict determined that learner newspapers were not a public forum and that the right to freedom of expression of learners at school was not automatically concurrent with the rights of adults in other settings.

Nolte (1973) summarises the court decisions on freedom of expression, saying that learners' right to freedom of expression prevails as long as they do not engage in activities that substantially disrupt the school programme, invade the rights of others or present a danger to the health, safety and welfare of the general public. It is clear from the court cases that the territory that is protected or limited under this right is the result of a developing process of interpretation and setting of precedence by the courts. Although courts made many inconsistent and ambiguous rulings on freedom of expression through the years, a number of legal principles have been determined, but it is difficult to implement such principles. Courts, authorities, educators, learners and parents are still uncertain as to how the right to freedom of expression should be exercised and limited. Table 5.1 is a summary of the different legal principles developed in American case law in regard to the right to freedom of expression.

5.3 CASE LAW IN EUROPE

I shall also examine a number of European cases about learners' symbolic freedom of expression to determine whether courts in Europe view freedom of expression according to similar principles as courts in the USA.

5.3.1 Austria

Two Austrian cases will be discussed only briefly as they do not involve learners, but spell out the legal principles implied by the Court of Human Rights. Both concern freedoms of the press and in both the plaintiff is the same person, a journalist.

5.3.1.1 *The First Lingens Case No 8803/79*

Lingens ("First Lingens", 1979) published an article stating that a member of parliament had lied when he stated that he knew of a case where the Association of Austrian Manufacturers had incited an enterprise to dismiss employers for the purpose of political propaganda. Lingens was found guilty of defamation, because he could not prove the truth of his statement. The court held that freedom of expression could be limited for the protection of a person's reputation.

In South African law this implies that the right to freedom of expression may be balanced by other human rights, like the right to human dignity. It also resonates with other case law, viz. that although even false expressions are protected under the right to freedom of expression ("Thornhill", 1940), the tendency is rather to limit the right if the falseness was disseminated intentionally ("Hamata", 2000; "Bogoshi", 1998; "Gano", 1987).

5.3.1.2 *The Second Lingens Case No 9815/82 (1983) DR 34*

In this case Lingens was found guilty of defamation for using words such as "based opportunism", "immoral" and "undignified" in his report on Chancellor Kreisky, because he once again could not prove his facts. He argued that he had published value-judgements, part of a journalist's duty and that he was beyond reproof. The Court of Human Rights disagreed ("Second Lingens", 1983).

5.3.2 Germany

The three German court cases concern the wearing of headscarves and the hijab⁹⁴.

5.3.2.1 *Federal Labour Court (BAG): 10 October 2002, 2 AZR 472/01, NJW 2003, 1685*

In this case a female employee was dismissed because she refused to remove her headscarf while selling cosmetics. The employer feared that sales would drop, as the shop was situated in a small, conservative town. The court held that the employee's right to freedom of religion had to be balanced with the employer's economic interests, but that she could therefore have been moved to work in another department, rather than sell perfume or be dismissed. The employer lost the case because there was no substantial proof that he would lose economically. Therefore the employee's right to freedom of religion could not be limited against her will. The finding in this case ("2 AZR 2003, 1685",

⁹⁴ The term used to describe the full dress code for women to keep them from unwelcome attentions and to preserve their modesty. It includes rules for covering the feet, what jewellery can be worn and even the limits of modern make-up that are permitted. In the UK, it is commonly used to describe only the headscarf that is worn by Muslim women to cover their hair at all times.

2003) is in agreement with the South African way of interpreting the Bill of Rights in the respect that the court held that the issue could have been resolved by less drastic or restrictive means (see § 3.4.2.1). This is consistent with the South African Constitution that needs to be interpreted against the value system by which it is underpinned, and in which the notion of tolerance is evident. It is noteworthy that this issue was addressed in terms of the right to freedom of religion, without any reference to the right to freedom of expression.

5.3.2.2 Federal Constitutional Court (B Verf G): Judgement of 24 September 2003, 2 BvR 1436/02, NJW 2003, 3111

Feresta Ludin, born in Afghanistan, immigrated to Germany with her mother, spent her school career in Germany and obtained German citizenship. She obtained a degree and received permission from the Minister of Education to wear her headscarf during practical training while studying to become an educator. Although she passed with high marks, she could be employed only on condition that she would not wear the headscarf. She claimed in court that her right to human dignity, personal rights and equal rights had been infringed. In light of Germany's policy of separating state and religion, the court feared that her religious attire might influence the learners. The purpose behind this legislation was to ensure that the school remained a neutral place as state and church were also separated in Germany (Simonneau, 2005). Although the court held that her rights had been violated, it denied that the violation of the mentioned rights was unlawful ("Ludin", 2003) and suggested establishing a dress code for educators. The right to freedom of expression was not at issue in this case either.

5.3.2.3 Dortmund Labour Court, Decision of 16 January 2003, Case No 6 Ca 5743/02, NJW 2003, 1020

In this case a kindergarten educator employed at a private school wore her *hijab* to school. The court argued that she could not be dismissed as parents had the choice of sending their children to other schools and because of the fact that religious neutrality could not be achieved while the learners' curriculum included Easter and Christmas preparations ("Dortmund Case", 2003). Again no mention was made of the right to freedom of expression.

5.3.3 France

I do not want to examine a specific French court case, but wish to discuss the recent situation regarding the wearing of headscarves to school by Muslim girls. France has the largest Muslim population in Europe and the wearing of headscarves to school has been a contentious issue for the past two decades. A new law was promulgated which abandoned the wearing of headscarves to school from September 2004, an attempt by government to end the continuous debates at schools that expel girls for wearing headscarves to school. The new law prohibits learners from wearing to school any accoutrements that "openly manifest a religious affiliation".

In 1989 a court held that religious attire could be worn to school as long as it was not done with the aim of "pressure, provocation proselytism or propaganda" (Anon, 1989). As debates to determine

whether certain issues fit under this definition continued, government promulgated the September 2004 law. Muslims have since indicated that they will encourage girls to wear headscarves to school and that they will offer legal aid and private tutoring should such girls be expelled. The constitutional human rights law of the country is in conflict with the Muslim Shari'ah law, which to the Muslim, has higher authority than other (French) law (Moosa, 1998) (see § 3.2.5).

This legislation seems very rigid and extreme if measured against the South African value system of tolerance in an open and fair democracy. It is likely that there will be a court case on this issue in France soon.

5.3.4 Switzerland

Lucia Dahlab, a Swiss-born national, abandoned the Catholic faith and converted to Islam in March 1991 while teaching at a public school as a primary school educator. The director-general of education requested that she discontinue wearing a headscarf while carrying out professional duties, especially since she was employed in a public, secular education system. She appealed and lost the case. The court argued that the state had to observe denominational, religious neutrality ("Dahlab", 2001).

5.3.5 Turkey

The *AB2004.06.BPV Nr 44774/98* case ("AB", 2004) was heard before the European Court for Human Rights. Although the case was heard in terms of freedom of religion, it concerned the wearing of a headscarf by a Muslim woman, something regarded by her as her right to freedom of "religious" expression. The principles determined in this case would be able to be used effectively in similar cases on freedom of expression.

The University of Istanbul promulgated a rule that no student wearing a beard or headscarf would be allowed to attend classes. By this time the applicant was a medical student in her fifth year and she had worn the headscarf to classes for four years. When she continued wearing the headscarf, she was suspended. The fact that Turkey is the only Muslim country with a "liberal" constitution is significant in this case.

The Turkish Constitution states that the state should be secular, since this was the only way through which this Muslim country can have a democratic government. It is also the only way that Turkey can apply the ECHR. This prevents government from showing preference for a specific religion. Therefore if government grants legal recognition to a religious symbol, it will not be compatible with the principle that government has remained neutral. The applicant claimed that her wearing of the headscarf had not led to disruption or disturbance and that she would not be able to continue her studies at any other university in Turkey.

The court argued that the right to freedom of religion was not absolute. Furthermore, headscarves could be classified into different styles that differed from country to country. The bandanna, which

Table 5.1 Legal principles developed in USA case law

Case	Incident	Date	Legal principle
<i>Schenk</i>	Shouting "fire" in public building	1919	(1) Other rights can limit the right to freedom of expression (2) Right to freedom of expression can be limited in terms of place (3) Right to freedom of expression can be limited if it poses a clear and present danger
<i>Gitlow</i>	Distributing material advocating the overthrow of the government by force and violence	1925	(1) May limit freedom of expression if it corrupts public morals (2) May limit freedom of expression if inciting or disturbing public peace
<i>Stromberg</i>	Display of red flag	1931	Right to display different political views
<i>Thornhill</i>	Propaganda for peaceful protests	1940	(1) Have a right to freedom of expression on private property (2) Have a right to freedom of expression even if the expression is unpopular or false
<i>Barnette</i>	Salute the USA flag at school	1943	Right to peacefully keep quiet if you disagree
<i>Lehman</i>	Political advertisement on public transit system	1949	Freedom of expression invites disputes
<i>Terminiello</i>	Christian Veterans of America speech criticised political and racial groups	1949	Freedom of expression can be limited if it invites public dispute and unrest
<i>Dervis</i>	Communist party plan to overthrow government	1951	(1) Limit freedom of expression when right to freedom of expression poses a clear and present danger (2) Limit freedom of expression when right to freedom of expression involves hate speech, incitement, invalidates the rights of others
<i>Niemotko</i>	Jehovah Witnesses use public park for Bible talks	1951	Right to express unpopular view
<i>Yates</i>	Communist party advocates overthrow of government	1957	(1) May limit freedom of expression when posing a threat to society (2) May limit freedom of expression if it amounts to hate speech (3) May limit freedom of expression if others' rights are invaded
<i>Shelton</i>	Educators' affidavit listing every organisation belonged to the past 5 years	1960	Classroom is a market-place of ideas
<i>Garner</i>	Negroes sat at lunch counters for whites	1961	Citizens may peacefully express unpopular views at any place
<i>Edwards</i>	Peaceful demonstration outside public buildings	1963	Citizens may express unpopular views at any place peacefully
<i>Burnside</i>	Wearing of freedom buttons to school	1966	(1) Freedom of expression in schools can be limited only if it results in material and substantial interference, i.e. if it disrupts school (2) May peacefully express unpopular views
<i>Adderley</i>	Learners demonstrate at jail	1966	May not use freedom of expression in any manner at any time at any public place
<i>Blackwell</i>	Wearing of freedom buttons at school	1966	Freedom of expression in schools can be limited only if it results in material and substantial interference, i.e. if it disrupts school
<i>Brown</i>	Negroes do not leave racially segregated public library	1966	Citizens may peacefully express unpopular views at any place
<i>Pickering</i>	Educator dismissed for publishing critique of the board	1968	Citizens may speak out if in public interest
<i>Cox</i>	Speech outside the court house	1969	Citizens may peacefully express unpopular views outside public building
<i>Tinker</i>	Wearing black armband to protest against Vietnam war	1969	(1) Learners do not shed their right to freedom of expression at the school gate (2) Freedom of expression must not materially and substantially disrupt the school (3) Undifferentiated fear or apprehension of disturbance is not enough to limit the right to freedom of expression (4) May not violate the rights of other learners (5) May express unpopular views peacefully

Case	Incident	Date	Legal principle
<i>Drebus</i>	Button at school	1970	(1) Freedom of expression can be limited if can proved that it will materially and substantially disrupt the work and discipline at school (2) Existing rule prohibited the wearing of all buttons: (2.1) freedom of expression may be limited if it corrupts public morals (2.2) freedom of expression may be limited if it incites or disturbs public peace (2.3) freedom of expression can be limited when it poses a clear and present danger
<i>Cohen</i>	"Fuck the Draft" jacket worn in corridor of courthouse	1971	Undifferentiated fear or apprehension of disturbance is not enough to limit the right to freedom of expression No limitation if words are not a direct insult
<i>Bannister</i>	Blue jeans	1971	Infringement of liberties does not interfere with educational process
<i>Stull</i>	Hairstyles	1972	(1) Freedom of expression in schools can be limited only if it results in material and substantial interference, i.e. disrupts school (2) Citizens may express unpopular views peacefully
<i>Oiff</i>	Hairstyle	1972	Hairstyle is a family matter: cultural attire more important than school code of conduct
<i>Karp</i>	Protests against school's refusal to renew teacher's contract	1973	Right to freedom of expression may be limited at school if likelihood of substantial disorder
<i>New Rider</i>	Cultural hairstyle	1973	One organisation cannot countenance different groups
<i>Hatch</i>	Cultural hairstyle	1974	School code of conduct has authority
<i>Taylor</i>	Negroes sit in waiting room for whites at bus depot	1975	Citizens may peacefully express unpopular views anywhere
<i>Zeller</i>	Hairstyles	1975	Hairstyle is a private school matter
<i>Fraser</i>	Use of pervasive sexual innuendo in a school speech	1986	(1) Freedom of expression can be limited in terms of time, manner and place (2) Freedom of expression can be balanced by other rights (3) Freedom of expression can be limited if it is against society's countervailing interest in teaching learners the boundaries of socially appropriate behaviour (4) Freedom of expression can be limited if against educational mission
<i>Gano</i>	T-shirt with caricatures of administrators	1987	Offensive "speech" not allowed if message is not in agreement with school's mission, even more so if false
<i>Hazelwood</i>	Censoring of articles in learner newspaper	1988	(1) Place: freedom of expression can be limited if it contradicts the school's basic educational mission (2) Schools have control over school-sponsored publications
<i>Burch</i>	Unsponsored newspaper distributed at school with mock educator evaluation poll	1988	Freedom of expression may not be limited by school officials if in non-school-sponsored newspaper because it enriches the market-place of ideas
<i>Broussard</i>	T-shirt "Drugs suck"	1991	Freedom of expression can be limited if inconsistent with basic educational mission of school
<i>Pyle</i>	T-shirt : sexual innuendo	1995	Freedom of expression can be limited if against educational mission
<i>Bivens</i>	Dismissed for wearing sagging pants	1995	Freedom of expression can be limited if posing a threat, e.g. school could prove a gang problem
<i>Lacks</i>	English journalism educator dismissed for allowing profanities in learners' work	1998	Freedom of expression can be limited if it is against society's countervailing interest in teaching learners the boundaries of socially appropriate behaviour
<i>Boring</i>	Play showing dysfunctional family	1998	Cannot use private right to freedom of expression against employer

leaves the hair partly visible, is worn to funerals by modern women; the burka is a full veil covering the entire body and face and is worn by Afghan women; and the chador or abaya, is a black veil which covers the entire body from head to ankles, and is worn by women in Arabic countries.

The fact that style varies from country to country nullified the claim of submission to divine, immutable laws. Furthermore, medical studies for a conservative Muslim woman would definitely not be in agreement with the divine, immutable Shari'ah law. If she was ready to sacrifice the divine laws to study medicine, she could surely sacrifice them in a secularist government and refrain from wearing the headscarf. The court held that her right to freedom of religion had not been violated.

These arguments in their entirety could be used in terms of the right to freedom of expression. This would fit South African judgements where the principle is that laws of minorities cannot be used to violate the Constitution ("Christian Education South Africa v. Minister of Education", 2000).

This complicated argument has two angles. Firstly, in a secularist government the value to tolerate implies that people do not wear religious attire as part of either their freedom of religion or their freedom of expression, to respect the secularism of government. The second angle is that in a country like South Africa where the values that underpin the Constitution involve tolerance of diversity, the wearing of a headscarf could be accepted as part of freedom of religion and freedom of expression, rather than be forbidden.

5.4 CASE LAW IN SOUTH AFRICA

Although South Africa is still a young democracy with only a decade of case law, the following three cases show how South African courts have addressed the implementation of the right to freedom of expression.

5.4.1 Antonie v. Governing Body, Settlers High School and Others 2002 (4) SA 738 (C)

In *Antonie* ("Antonie", 2002) the applicant, a 15 year-old grade 10 female learner who embraced the principles of the Rastafarian religion, grew her hair in dreadlocks and covered her hair by wearing a cap. Although she had several times asked the principal's permission to wear this style to school, he forbade it. Believing that her right to freedom of religion and expression was being infringed, she attended school wearing a black cap that matched the prescribed school colours, to cover her dreadlocks. She was suspended from school for five days for serious misconduct because she had disobeyed the code of conduct for learners and disrupted the school. According to the code of conduct for learners hair had to be neat and tidy and this was specifically detailed in ten subsections. Not one of these, however, prohibited the growing of dreadlocks and the wearing of headgear. One could argue then, that legally, no misconduct occurred.

When dealing with the code of conduct for learners, one should consider the schedule issued by the Ministry of Education (RSA, 1998) dealing with guidelines for consideration by school governing

bodies in adopting a code of conduct for learners.⁹⁵ The focus in the schedule is on positive discipline⁹⁶ and the need to achieve a culture of reconciliation, teaching, learning and mutual respect, and the establishment of a culture of tolerance and peace in all schools.⁹⁷ These principles are underpinned by the democratic values of human dignity, equality and freedom as enshrined in section 1 of the Constitution. Freedom of expression is specifically provided for in section 4.5.1 of the Guidelines.

The court argued that the growing of dreadlocks was prohibited by the code of conduct for learners as underpinned in the Constitution (even if hypothetically). To assess this prohibition in a rigid manner, however, would be in contrast with the values and principles of justice, fairness and reasonableness set forth in the schedule as underpinned in the Constitution.⁹⁸ Adequate recognition had to be given to the offender's need to indulge in freedom of expression, and this could not be seen as "serious misconduct". The school argued that the wearing of headgear and dreadlocks had caused "disruption and uncertainty" at school, but the court found that the school had not acted in a spirit of mutual respect, reconciliation and tolerance, hence the rejection of its defence by the court.

It seems that school governing bodies and school managers are eager to manage schools and learners according to legislation because it supplies a clear guideline. In the process, they easily forget the values that underpin the Constitution, since these are, to them, still vague principles.

South African courts, 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 freedom⁹⁹ in a spirit of mutual respect, reconciliation and tolerance as stipulated in the Constitution.

If the legal principles developed from USA case law were applied to this case, the right to freedom of expression would not be limited as the wearing of the Rastafarian hairstyle did not lead to disruption at school ("Blackwell", 1966; "Burnside", 1966; "Drebus", 1970; "Karp", 1973; "Stull", 1972; "Tinker", 1969). In light of the *Olf* case ("Olf", 1972), the school would not win either, as cultural attire is seen by this court as a family matter which has more authority than the school code of conduct. In terms of the *New Rider* case ("New Rider", 1973), the *Hatch v. Goerke 502 10th Cir 1189 (1974)* case ("Hatch", 1974) and the *Zeller* case ("Zeller", 1975), however, the school's case could have merit. The court in the *New Rider* case argued that one organisation (the school) could not cater for different groups, therefore the school code of conduct had to be adhered to, which was the argument of the *Hatch* court. The *Zeller* verdict was also in line with these two verdicts as it stated that hairstyle was a private school matter. One could argue that these three verdicts are in agreement with Judge Sachs'

⁹⁵ Section 8(1) of South African Schools Act provides that a school governing body must adopt a code of conduct for learners after consulting all the stakeholders.

⁹⁶ Section 1.4 and 1.6 of Notice 776 of 1998.

⁹⁷ Section 2.3 of Notice 776 of 1998.

⁹⁸ Section 1 of the Constitution.

⁹⁹ Section 36 of the Constitution.

statement in *Christian Education South Africa v. Minister of Education* that "... believers cannot claim an automatic right to be exempted by their beliefs from the law of the land" ("*Christian Education South Africa v. Minister of Education*", 2000, p. 779) and that "... the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law". To summarise, learners cannot claim an absolute right to freedom of religious expression, but school authorities should be tolerant according to the values that underpin democracy. Apropos these arguments, my view is that the plaintiff in the *Antonie* case could not demand an absolute right to freedom of religious expression, but in light of her willingness to negotiate and to accommodate the school by wearing a black cap to cover the Rastafarian hairstyle, the school did not act according to the principles that underpin democracy, as it was actually far-fetched to suspend a learner for wearing a hairstyle that did not disrupt the school.

5.4.2 Hamata and Another v. Chairperson, Peninsula Tech ID 2000 (4) SA 621 (C)

In *Hamata and Another v. Chairperson Peninsula Tech ID 2000 (4) SA (C)* ("*Hamata*", 2000) the court held that although untrue information could be protected under the right to freedom of expression ("*Thornhill*", 1940), this false dissemination could be limited when balanced by other constitutional rights ("*Hamata*", 2000, at 632).

A journalism student at the Peninsula Technikon co-authored an article entitled: "Sex for sale on campus", which was published in the *Mail and Guardian*, and was subsequently expelled. It was argued that his right to freedom of expression had been ignored. The writing of the article was in agreement with his constitutional right to freedom of expression in terms of section 16 of the Constitution. The Technikon had thus violated his freedom of the press and other media¹⁰⁰ and the freedom to receive or impart information or ideas,¹⁰¹ as well as his academic freedom.¹⁰² Furthermore, it was argued that speech that shocks and displeases is protected to the same extent as speech that brings pleasure and comfort ("*Zundel*", 1992).

Speech that shocks does not necessarily equal false speech, although false speech is also protected under the right to freedom of expression ("*Bogoshi*", 1998, at 1212G; "*Thornhill*", 1940). As the right to freedom of expression must be balanced with other rights or considerations, the court held that countervailing interests more easily override untrue speech than true speech. Moreover, untrue speech published while the author is well aware that it is untrue or misleading, will be even more easily overridden by countervailing interests. As the content of the article in question was not only false, but deliberately false, it was overridden by the Technikon's right to protect its reputation. The court rejected the claim. This verdict was in agreement with the *Rod Gano v. School District No 411 of Twin Falls County 674 D Idaho 796* (1987) decision ("*Gano*", 1987).

¹⁰⁰ Section 16(1)(a) of the Constitution.

¹⁰¹ Section 16(1)(b) of the Constitution.

¹⁰² Section 16(1)(c) of the Constitution.

The principle that developed from this case is that although false speech is protected under the right to freedom of expression, if it is deliberately false, it can be more easily balanced with the interest of other rights.

5.4.3 Acting Superintendent-General of Education of KwaZulu-Natal v. Ngubo and Others 1996 (3) BCLR 369 (N)

In *Acting Superintendent-General of Education of KwaZulu-Natal v. Ngubo and Others 1996 (3) BCLR 369 (N)* ("Ngubo", 1996) police evicted college students who slept on campus, damaged college property and harassed college staff while protesting. The court held that their right to freedom of expression had not been violated, as "freedom of expression does not extend to justify harassment or clear tortuous actions ..." ("Ngubo", 1996, at G1).

In this case, a number of persons demonstrated at the campus of the Natal College of Education under the auspices of the college Crisis Committee. They demanded that the college be transformed into a full-time teacher training institution. The senior executive official responsible to the minister of education of KwaZulu-Natal sought an interdict against the demonstrators. Although this case addressed the right to demonstrate and picket, the right to freedom of expression was included, as they demonstrated in order to speak their mind. The judge was guided in his judgement by Judge Kelly in the Canadian case of Halifax. She stated that:

... if the method of expression used by the defendants ... had involved harassment or clear tortuous actions or criminal actions, or other considerations that would have been unfair to parties than the one directly involved, I might have found their actions were in substance more than an attempt to express their opinions and to convey their message ("Ngubo", 1996, p. 375)¹⁰³

The right to freedom of expression does not extend to justify harassment or clear tortuous or criminal actions. In other words, persons can speak their minds without causing harm. Causing any type of harm is more than what is necessary to convey a message. This is in keeping with the inherent limitation in section 16(2) of the Constitution.

In South Africa it is much easier to determine when the right to freedom of expression should be limited, as it has an inherent limitation in terms of section 16(2) of the Constitution. Secondly, any right in South Africa can also be limited by the limitation clause in terms of law of general application in an open and democratic democracy based on human dignity, equality and law of freedom. Wood (2001, p. 45) argues that the Guidelines contain basically the same principle as created in the *Tinker* case. Since this principle is not always clear in specific cases, courts need to determine whether the "disruption test" is in agreement with the Constitution.

5.5 CONCLUSION

In this chapter I discussed the primary sources used in this research, as well as the development of legal principles to balance the right to freedom of expression through case law, as developed in case

¹⁰³ Quoted from the *Halifax* case ("Halifax", 1985, at 298)

law in the USA. The right to freedom of expression, and more specifically the right to symbolic and creative freedom of expression as balanced in schools by case law were examined. Due to the absence of a limitation clause in the Constitution, USA case law has, through a lengthy and difficult process developed various principles to implement and balance these rights in practice. It seems, however, that case law in South Africa has taken a more transparent route, as it is guided by a limitation clause, inherent limitations and the values that underpin the new democracy.

I continued my journey of understanding with some brief sightseeing in regard to European and South African case law to illustrate the development of case law in the rest of the world. After a visit to court, I began to understand the practical implementation of the understanding of the right to freedom of expression. The literature review in earlier chapters guided me in planning my journey to understand learners' understanding of their right to freedom of expression. It prepared me for the final phase of my journey, and I am looking forward to reaching my destination.

The next chapter will focus on data analysis in order to determine learners' understanding of their right to freedom of expression, and whether it correlates with the literature discussed in chapters 3 to 5. I shall determine how my detour to court has enhanced my understanding of learners' understanding of their right to freedom of expression.

CHAPTER SIX

DATA ANALYSIS: First glimpses of the destination

6.1 INTRODUCTION

After choosing the final route to my destination, I began to explore the understanding of the respondents in regard to their right to freedom of expression.

The reasons for selecting a qualitative approach were explained in chapter 2. My choice of an interpretive approach is the result of an attempt to understand learners' understanding of their right to freedom of expression.

The academic puzzle that guides my research is: *What is learners' understanding of their right to freedom of expression?* I believe that individuals create their own reality while interpreting events and through this process create their own understanding of their reality. As I explore the realities they use to construct their perceptions and worlds of understanding I intend to understand the phenomenon from the learners' perspectives. My intention therefore, is to reconstruct the reality as I understand it, based on the very large data set.

The literature review constitutes chapters 3 to 5. In chapter 3, in an attempt to gauge what I can learn from the literature about the concept of human rights, I describe the development of human rights and the different shifts in foci during the exploration process. On discussing the literature regarding the right to freedom of expression in chapter 4, I realised that this right tends to be viewed internationally as a core right in a democracy. The global perspective is that it falls just short of being regarded as an absolute right. In chapter 5 I discuss case law, my primary source for this research. The aim is to determine the different legal principles which have been developed through case law and that are used to balance and limit the right to freedom of expression.

In this chapter I deal with the data used to answer my first premise, namely that some learners have limited knowledge of their right to freedom of expression (see § 2.5). This can also be viewed as an exploratory phase of which the aim is to determine whether learners are aware of the entire spectrum of the right to freedom of expression. The assumptions that underpin this premise are that most learners:

- know that the right to freedom of expression entails the spoken word;
- know that the right to freedom of expression entails the written word; and
- do not know that the right to freedom of expression entails symbolic or creative expression.

6.2 PREMISE 1: Some learners have limited knowledge of their right to freedom of expression

After writing the literature review, I was prepared to collect data to interpret learners' understanding of their right to freedom of expression. The process that I followed was firstly to investigate in phase 1 the entire spectrum of learners' understanding of the right to freedom of expression before focusing on specific types of expression. Phase 1 of the data collection consisted of four open-ended questions and one including statements with which learners only had to agree or disagree. My first premise was that some learners have limited knowledge of their right to freedom of expression. I therefore had to determine whether learners were aware of the entire spectrum included in the right to freedom of expression. I anticipated that learners would understand by their right to freedom of expression only that they could speak their minds and write what they liked. The first question was asked to determine how widely learners understood the spectrum included in the right to freedom of expression viz.: "What does freedom of expression mean to you?" (see Addendum I). The second question was asked to explore my premise: "What do you think you are allowed to do under the protection of your right to freedom of expression?"

Table 6.1 provides an indication of the range of respondents' understanding of the right to freedom of expression. The data summarised in table 6.1 will be used as basis for the discussion.

I used Atlas.ti™ to analyse the data, as it is effective for organising large quantities of data (see § 2.12). I made use of post-coded responses as I had not decided on specific codes beforehand. I coded every detail in order to include all the nuances contained in the data (Smit, 2001). During a second attempt I reduced some of the codes and eventually worked with 245. These codes were then classified into twelve categories, which were in turn classified into three families within which two patterns evolved, which enabled me to respond to my premises.¹⁰⁴ Phase 1 included 690 quotations.

The data collected from 89 respondents by means of the questionnaires in phase 1 is summarised in table 6.1. I analyse the respondents' responses. The data in table 6.1 shows that the respondents indicated twelve different types of expression under the right to freedom of expression. At first glance this information indicates that the learners have a relatively deep knowledge of their right to freedom of expression. This would render the premise that some learners have limited knowledge of their right to freedom of expression incorrect, as it seems to indicate that learners have an understanding of the entire spectrum of the right to freedom of expression. On closer examination, however, the data reflects a different picture. Although I thought it significant that the respondents had indicated twelve different types of expression, only a few indicated most of the different modes of freedom of expression. The majority (71 of the 89; 79,9%) only know that one is allowed to *speak* one's mind under the right to freedom of expression. The data in the table therefore indicates that learners know that they may speak their mind in terms of their right to freedom of expression. The 19 respondents

¹⁰⁴ See § 2.13 and figure 2.2 for clarification of the terminology that is used.

Table 6.1: Range of understanding of the right to freedom of expression

	Types of expression	School 1	School 2	School 3	School 4	School 5	Total	% ¹⁰⁵
1	Speak	17	15	13	15	11	71	71.9
2	Write	1		2	2		5	5.6
3	Listen/Receive	0	0	0	0	0	0	0.0
4	Read			1			1	1.1
5	Hair		2	1	1		4	4.5
6	Uniform		4	2	2		8	9.0
7	Appearance		1	2	1	4	8	9.0
8	Acting		1			1	2	2.3
9	Music			1			1	1.1
10	Art				1		1	1.1
11	Religion		1			2	3	3.4
12	Culture				1	1	2	2.3
13	Dance				1		1	1.1
14	Mismatch		10	1	7	1	19	21.4
	Number of respondents	17	25	13	22	12	89	

who did not indicate that they knew that one can speak one's mind in terms of one's right to freedom of expression, are listed in row 14 under "Mismatch", indicating that they do not have an understanding of the meaning of freedom of expression.

All the respondents either stated that the right to freedom to expression includes the right to speak one's mind, or that they do not have any understanding of the meaning of freedom of expression at all. Other types of expression were mentioned by the respondents who had already indicated that they knew that the right to freedom of expression includes the right to speak. They indicated that they knew that their right to freedom of expression includes more than just speaking. This is the reason the figures in the last column do not add up to 100%.

Of the 690 responses, only eight indicated that they are obliged to wear school uniform and another eight indicated that they are allowed to wear whatever they want. On viewing these two questions as a unit, one could argue that 16 indicated awareness that the right to freedom also encompasses their apparel. Only five responses indicated that their expression of freedom in regard to writing would be guaranteed under the right to freedom of expression. Four indicated that they could wear a hairstyle of their choice. A mere three responses knew that they could express their religion freely. Only two respondents (2,3%) indicated that they could express freedom by acting out or expressing their culture. A single respondent (1,1%) indicated that the right to freedom of expression includes dancing according to his/her preference, listening to any type of music, expressing him/herself through art, or by reading what he/she prefers.

¹⁰⁵ This column does not add up to 100% as the respondents from row 1, "Speak" are the same respondents as in the other rows.

part of conveying one's message publicly and is a non-verbal way of expressing oneself. I refer to this as the symbolic or artistic expression which is, of course, associated with the categories of speaking, listening and writing as one symbolically speaks one's mind and people need to listen to one's message as one has "written" it symbolically. I, however, classify symbolic expression as a separate family since it encompasses various modes of expression.

In regard to table 6.1 one could argue that almost 80% of all the respondents know that verbal expression is guaranteed under the right to freedom of expression. Only 36 out of 690 responses indicated non-verbal expression as part of this right. Only six responses mentioned that they could express themselves through writing and reading. Of the responses 29 indicated an understanding that this right entails symbolic or artistic expression.

The discussion will commence in regard to verbal expression, the type of expression indicated overwhelmingly by the majority of the respondents. The following quotation is an example of what most respondents indicated and understood in terms of the right to freedom of expression:

Freedom of expression is when a person has a right to say what they want to say, and talk out their opinions as human beings. So everyone has the right to say out their thoughts 4:19 (86:89).

6.2.1 Verbal expression

Most learners indicated that they know they can communicate or speak their minds according to their right to freedom of expression. From all the identified codes, the code to "speak your mind" was assigned by far the most, i.e. 63 times. This resonates with my assumption that learners do know that they can speak their mind under the protection of their right to freedom of expression. It appears that learners understand under their right to freedom of expression that they may speak freely (see § 6.2 and quotation 4:19). The assumption that learners do know that they can speak their mind under the right to freedom of expression appears to have been affirmed easily. The focus will now be on the findings related to non-verbal expression.

6.2.2 Non-verbal expression

Although the majority of respondents believe that the right to freedom of expression entails only the spoken word, a number of respondents indicated an awareness that it also includes non-verbal expression. Non-verbal expression includes three categories, viz. writing, reading and listening.

6.2.2.1 Writing

I assumed that learners would understand that they could use their right to freedom of expression verbally (orally) and in writing (see § 2.5). On examining the data in regard to writing, only three responses indicated that the respondents believe that they can exercise their right to freedom of expression by writing in the media while only one respondent believes that people can exercise the right by using posters:

You can voice your expression in school in many ways; through letters, posters, ear to ear ... 5:33 (155:160).

The data shows that most learners do not seem to know that they can exercise their right to freedom of expression through the medium of writing, e.g. through the media, letters, posters, etc. My assumption was therefore disproved, as I believed that the respondents would know that their right to freedom of expression can be exercised through writing. Nevertheless, this finding supports my premise that learners have limited knowledge regarding their right to freedom of expression. As reading entails the ability to read, the focus will now be on indications in the data in regard to exercising the right to freedom of expression by means of reading.

6.2.2.2 Reading

I assumed that learners would understand that they can speak and write their mind according to their right to freedom of expression. This assumption too, seems unsubstantiated, as only a single comment was received in the category *reading*, from a respondent who mentioned reading by stating that the right to freedom of expression allows a person to read what they want to read, in other words, to decide what they want to read or not: *I can read what I like* 3:10 (36:36).

I assumed that learners would be more aware of this aspect. The finding confirms the previous point, i.e. if learners are not aware that they can exercise their right to freedom of expression by writing, then surely they will not understand that according to this right they may choose what to read. This finding supports my premise that some learners have limited knowledge about their right to freedom of expression.

As *listening* goes hand in hand with *speaking*, *reading* does with *writing*. The analysis will now focus on aspects of *listening* evident in the data.

6.2.2.3 Listening

Only three comments are indicative of knowledge that the right to freedom of expression encompasses a choice for someone to be heard and a choice to decide what they wish to listen to:

- *That everyone has the right to speak his mind and to be listened to*¹⁰⁷ 1:21 (49:50).
- *I am allowed to ask questions, receive answers, conduct myself accordingly, respect teachers and expect teachers to respect me in return, and to express my view on certain things at school* 2:69 (253:256).
- *I am allowed to discourage anyone who feels the need to express their feelings or opinions. Other people have a right to be listened to, just like I do* 5:46 (221:224).

The crux of the above quotations is not really for people “to listen to what they want to” but rather for their voices to be heard. The quotations do not indicate that the respondents are aware of the fact that they also have a choice as to what to listen to in terms of the right to freedom of expression. The fact that only three quotations indicate that someone’s voice must be heard (listened to) and that no respondent indicated what s/he would choose to listen to, supports the finding that learners do not have a broad understanding of what the right to freedom of expression entails. I therefore assume that

¹⁰⁷ Dat elkeen die reg het om sy siening te stel en dat daar na hom/haar geluister sal word.

learners do not know that their right to freedom of expression extends beyond the spoken and the written word. This type of freedom of expression is symbolic or artistic creative freedom of expression. The data on *symbolic or artistic freedom of expression* will be discussed under the headings: appearance, action, art, religion and culture.

6.2.3 Symbolic and artistic expression

Although symbolic and artistic expression is *per se* a type of non-verbal expression, I have isolated it to discuss it separately, as a variety of expressions are classified under the right to symbolic and artistic expression. In this section I discuss aspects not covered in the previous three sections (see § 6.2.2.1 - 6.2.2.3).

6.2.3.1 Appearance

The respondents indicated in regard to appearance that they understand that they can appear in public dressed according to their own preference. According to them this right allows them to express themselves through their clothes, e.g. *Dress as I like ...* 5:17 (88:89). The fact that they may dress as they like, also gives them the freedom to represent what they stand for: *I can show myself in public as I want to show myself. Show my expressions or show myself wherever and whenever I can* 3:19 (59:61). This same tendency was expressed by the respondent who stated that s/he could express him/herself through choice of clothes: *Wear [sic] clothing that reflects my personality ...* 3:30(112:115). Appearance, however, includes more than just clothes. It includes the hairstyle: *To do hairstyles that I want in my hair, e.g. braiding, "scruling" ...* 2:81(301:303).

6.2.3.2 Action

A relatively large number of respondents indicated that they can do anything anywhere, at any time in terms of their right to freedom of expression without fear of consequences:

- *Freedom of expression means you have to express your freedom and be focus [sic] on your things. You have a right to do anything you really wanna [sic] do* 2:4(22:25).
- *Freedom of expression means being able to express yourself about things that occur in life. It's like being free without any oppression from other people. You can do things without anyone saying no to those things* 4:4 (24:28).
- *Everyone should have freedom of expression in any activity. Every person must have a say, no one must do that for you. If something is wrong you must show or say. Every person has a right to do everything, everywhere and any time* 4:8 (40:44).

The quotations indicate a pattern in the data, viz. that there is a tendency for respondents to think that the right to freedom of expression is absolute.

6.2.3.3 Art

Only four respondents indicated that the right to freedom of expression allows them to disseminate ideas or messages via art. They mentioned, *inter alia*, that they can express themselves through dance and that they may create poetry, for instance to engender peace:

- *It means that you can say anything you want to in words, mouth, dance, art [sic]* 3:22 (71:72).
- *I am allowed to do free speeches or poetry having in mind it will bring peace not actually hurt others. I am allowed to bring peace among others* 2:54 (201:204).

One respondent also indicated that his/her right to freedom of expression allows him/her to listen to any type of music: *I can listen to any music* 3:9 (35:36).

Four respondents indicated that they can use their right to freedom of expression through art, i.e. only 4,5% of the 89 respondents who participated in phase 1. Since appearance and religious expression are linked, I shall now focus on the data relevant to religion.

6.2.3.4 Religion

Only eight respondents indicated that their religious expression is guaranteed according to their right to freedom of expression. One mentioned that it allows people to pray at any time and anywhere: *I dress as I like, pray wherever and whenever, make my own choices in life. Stand up for my own beliefs whatever it is wrong or right* 5:17 (88:90). One respondent mentioned that the right to religious expression allows people to express their religion by wearing religious (traditional) attire: *You can state your viewpoint on certain things. Maybe even fashionably, e.g. if you are a Muslim woman, you'll express parts of your religion through your traditional attire* 5:24 (115:118). One respondent even said that the right to freedom of expression allows a person to be moved from one class to another because of religion: *If we are belittled in school, because of our beliefs, we are allowed to be moved to a different class* 3:42 (163:165). This respondent does not really understand the right to freedom of expression clearly, as it is actually the right to freedom of religion that will allow them to be moved from one class to another in the circumstances described.

The pattern continues. Very few respondents are aware of the fact that the right to freedom of expression allows them to express their religion, viz. only eight of the 245 codes indicated that respondents were aware of the fact that freedom of expression includes the right to religious expression. The pattern is the same as that in all the previous modes. Almost no respondents were aware of the fact that the right to freedom of expression encompasses more than just the right to speak.

6.2.3.5 Culture

Three respondents understand that according to their right to freedom of expression they are allowed to publicise their culture. One stated that the right to freedom of expression allows a person to participate in any cultural activity: *I am allowed to take part in any activity, sport or culture, and may choose any subjects. This is a form of freedom of expression as individuality is developed* 3:41 (159:162). This respondent has confused the right to freedom of expression with the right to freedom of association¹⁰⁸ which guarantees, among other things, that people can choose with whom or what they want to associate/be associated. In other words, the right to freedom of expression, among other things, allows them to make choices about subjects and extramural activities.

¹⁰⁸ Section 18 of the Constitution of the Republic of South Africa.

Two other respondents stated that according to their right to freedom of expression they are allowed to express themselves through their culture, e.g.:

- *That you have the right to express who you are and your religion/culture ... 5:5 (28:30).*
- *It means that I can express myself in any way that I want and not get in trouble. Like get arrested or thrown out of school. I can express myself in different ways like clothing, art and even my culture ... 4:10 (48:52).*

Again, almost none of the respondents are aware that the right to freedom of expression allows them to share their cultural beliefs. Very few respondents are aware that the right to freedom of expression encompasses more than verbal expression.

6.2.3.6 Informing

Some respondents did not necessarily indicate how they would use their right to freedom of expression but believe that it allows them to inform people about themselves or to disseminate a clear message: *I am free to express myself in any way 3:12(37:38).*

Respondents indicated that the right to freedom of expression allows them to express their sexual orientation, express themselves physically or in any way they wanted to be heard, e.g.: *Expressing my religion, my sexual orientation and expressing the way I want to be heard 2:49 (175:176).*

It also allows them to advertise, form their own opinion, be taken seriously and regard their opinion as acceptable. Learners want to speak out if they disagree with someone or something, yet these respondents feel that no one else is allowed to disagree with his/her point of view:

- *It also means that if I feel strongly about a situation (right or wrong) I am allowed to voice my opinion on that subject and be taken seriously 3:15 (42:45).*
- *No one may tell me that my opinion is incorrect 3:3 (20:21).*

The emerging pattern is reinforced by the fact that these and other respondents seem to absolutise the right to freedom of expression.

6.2.4 Mismatched data

After interpreting the data on the right to freedom of expression, I received a substantial amount of data indicating that some respondents do not understand the right to freedom of expression. As I may not disregard mismatched data, I shall now discuss this rich data which will be interpreted according to two categories, viz. understandings not linked to the right to freedom of expression or other rights, and confusing freedom of expression with other rights.

6.2.4.1 Misconception

Some data indicated that respondents who do not understand the right to freedom of expression link it to something very different, e.g. being protected by the police, choosing their own food, ensuring a good life by doing things for pleasure, being allowed to participate in any activity of their choice, sharing ideas, acting correctly and being proud of the African National Congress (ANC):

- *I have a right to be under the protection of the police 4:34 (150:151).*

- *To eat what I want to eat during lunch as long as I have money to pay for it* 2:35 (122:124).
- *The law of good leave [life]. Things you do you do it for enjoyment. To leave [live] better than the law of apartheid* 2:15 (46:48).
- *I want to be proud, including of my party, the ANC* 4:27 (124:126).

Furthermore, it is clear that some respondents have vague knowledge of rights and do not have detailed knowledge about different rights, or are unable to differentiate among rights. To them rights entail something like possessing a passport, doing activities or possessing things. The rights to freedom and equality are intertwined with all the rights.

6.2.4.2 Other rights

Some respondents confuse different rights with one another. They know something about human rights, but do not understand the differentiation of the rights: *You know your basic rights, but you don't know all of them [rights] in detail* 1:315 (1058:1061). The initial focus will be on respondents who intertwine the right to freedom of expression with any type of human right and then on those who confuse the right to freedom of expression with the right to education.

- ***Intertwined rights***

Many respondents fail to see their right to freedom of expression as a right on its own as described in the Bill of Rights, but rather view it as a collective norm governing a variety of other rights. Eight respondents believe that all their rights can be demanded according to their right to freedom of expression, while six view the right to freedom of expression as equal to freedom:

- *Means to be free everywhere like when you are walking along the way and also when you are talking with different races in South Africa. And means everyone in South Africa has the human rights for his/her life* 4:5 (29:33).
- *The freedom of expression means to me to be free in this country I live in and to go where I want because no one can tell me anything. We live in South Africa; everyone has a right* 4:13 (63:66).

Table 6.2 reflects rights which a number of respondents indicated that they are entitled to according to their right to freedom of expression. The following words of a respondent echo some of the expectations:

Like early vandalism or abuse – mental, physical and emotional - and blackmail is not allowed, but often still happens. To me I think the school suppresses us to [sic] much and should motivate learners to express themselves, because now they're too scared to say anything 5:44 (210:215).

- ***The right to education***

One of the open-ended questions required learners to explain what they would be allowed to do at school in terms of their right to freedom of expression, while the next question asked what they would not be allowed to do at school under their right to freedom of expression. It could be that this question misled some respondents into thinking that these questions were about the right to education, but even if that is the case, it may be an indication that they do not understand the right to freedom of

Table 6.2 Other rights respondents perceived in terms of the right to freedom of expression

Right	Section in the Constitution	Quotation
Equality	9	<i>It means I have the right to say or do what I feel, whether right or wrong. I have the right to be considered whether in a minority or majority 4:15(70:71).</i>
Human dignity	10	<i>I am allowed to be taught and not allowed to be corporally punished [sic] for unnecessary silly mistakes 2:52 (191:193).</i>
Freedom and security of the person	12	<i>I think it is a good thing because if I [sic] under violence or discrimination I [sic] under good right 4:35 (156:157).</i>
Freedom of religion, belief and opinion	15	<i>If we are belittled in school, because of our beliefs, we are allowed to be moved to a different class 3:42 (163:165).</i>
Freedom of association	18	<i>Make my own choices whether I attend it or not, etc. 5:29(142:143).</i>
Freedom of movement and residence	21	<i>To say anything to respect any person who is older than me or younger than me to have the right to go anywhere in the country without being ashamed 4:37(165:168).</i>
Freedom of trade, occupation and profession	22	<i>I think I'm allowed to do anything. To work we ever [sic] I like 2:33 (119:121).</i>

expression. One respondent indicated that s/he would not be allowed to do more under the right to freedom of expression than what s/he is currently allowed to do:

Not much more as what we currently can do or say! We can just have as much freedom of expression and human rights but circumstances at school will always remain the same¹⁰⁹ 1:64 (167:170).

Nine respondents indicated that they understood in regard to their right to freedom of expression that they have a right to education. Another said that s/he could expect the educator to supply quality education:

- *I am allowed to be taught, and not allowed to be corporally punished for unnecessary silly mistakes 2:52 (191:193).*
- *I think I am allowed to do anything at school under my right to freedom of expression because I will learn many things to make my future to be better than now 2:94 (236:239).*
- *As a learner I have the right to get educated so that I can satisfy my consequences [sic]. And I can study more and more so that I can reach my goals 4:57 (257:260).*

Other respondents stated that according to their right to freedom of expression they can demand a completed school, to participate in sport, have sports grounds, sports equipment and stationery:

I think my school must be complete and the teachers are teaching well and we have all stationary [sic]. We have sports grounds where we play our sports and we have all sports equipment 4:52 (231:234).

¹⁰⁹ Nie veel meer as wat ons nou kan doen of sê nie! Ons kan net soveel "vryheid tot spraak" en "menseregte" hê maar die skoolomstandighede sal maar altyd dieselfde bly.

This quotation echoes the pattern in the previous quotations, viz. that some respondents have a vague and general understanding about human rights, but no understanding of the differentiation of the rights. The right to freedom of expression also gives them the right to decide when to attend school or to study at school until late or go to the library whenever they want to: *I think I'm allowed to go to the library whenever I like. If I feel like I don't wanna [sic] come to class today, they don't have to force me 2:56 (208:210). One indicated: I am supposed to be honest in school work and have good morals in regarding [sic] to my teacher 2:41 (144:145).*

The findings show that not all learners understand their right to freedom of expression. As a matter of fact, they have only a vague knowledge of rights and confuse the rights without differentiating among those in the Bill of Rights; hence they cannot be expected to understand a specific right in the Bill of Rights.

The selected quotations reinforce the fact that respondents have a vague general knowledge of human rights but do not understand the specifics of the right to freedom of expression. Therefore one could hypothesise that some learners do not understand the different rights or what they entail.

6.3 CONCLUSION

The data interpreted in this chapter indicates that learners do not have a very broad and deep understanding of their right to freedom of expression. Of the respondents 80% know that they are allowed to speak their minds verbally. A few of the 80% understand that the right to freedom of expression entails more than verbal expression. My first assumption, namely that some learners know that the right to freedom of expression encompasses the spoken word, has been proved by the findings in this chapter. My second assumption, i.e. that some learners know that the right to freedom of expression encompasses the written word, was disproved. Almost all the respondents know that they can speak their mind under the right to freedom of expression. There were, however, a few learners who indicated that they know they are allowed to read and write what they want to under the protection of their right to freedom of expression.

My third assumption, viz. that some learners do not understand that they have a right to symbolic and artistic expression according to the right to freedom of expression, has been proved by the findings. Only a few learners mentioned that they understand that symbolic and artistic expression is part of their right to freedom of expression. Interestingly and unexpectedly, however, this was indicated by more respondents than those who knew that they can read and write what they want to according to the right to freedom of expression.

My premise that learners have limited knowledge of their right to freedom of expression was substantiated during the first, exploratory phase. The data indicated clearly that most learners have a limited knowledge of the right to freedom of expression and they do not have an understanding of the

spectrum included under this right. Only a few know that the right encompasses more than only the right to speak. The findings from phase 3 will be used to crystallise these findings and to scrutinise them for resonance with the findings from phases 1 and 2 (see § 8.1).

A large number of respondents indicated that they can use the right to freedom of expression without fearing the consequences:

- *Without other people making offensive remarks about my opinion*¹¹⁰ 1:22 (50:52).
- *Everything you want to do without any fear. Is our right to enjoy freedom through our life. No one should "unfree" [sic] through our freedom. Is our right to express anything because of our freedom* 2:22 (68:72).

The quotations above reflect a pattern that surfaced during the investigation of the spectrum of the understanding of the right to freedom of expression and is a realisation of a tendency among some learners to believe that the right to freedom of expression is absolute. Stakeholders do not know how to deal with these newly found human rights, e.g. learners seem to think that they have absolute rights and that they can demand these rights without assessing the situation or considering other stakeholders: *You have a right to say anything you want at anyplace and at any time you want* 4:20 (90:92).

On the other hand, some learners still believe that they cannot exercise their rights because they still believe that they should respect authority and do not dare to differ:

I am not allowed to tell how I feel about my school uniform or my hair, they are the ones who decide for me what to wear and what to do. They make rules for me 2:89 (354:357).

This leads toward the premise that some grade 11 learners in the Gauteng Province of South Africa do not know how to exercise their right to freedom of expression. They either think this right is absolute and abuse it, or they are not aware of the implications of the fact that they are allowed to speak out:

Everything you want to do without any fear. Is our right to enjoy freedom through our life. No one should "unfree" [sic] through our freedom. Is our right so express anything because of our freedom 2:22 (68:72).

These two perceptions form the basis of the two assumptions of my second premise (see § 2.5) which will be explored in the following chapter. Figure 6.2 provides an overview and route map of the investigation in regard to the data and premises in the various chapters.

The findings indicate that most learners know that they can speak their mind under their right to freedom of expression. Unfortunately, for most of them it is limited to this understanding. Only a few respondents know that the right to freedom of expression encompasses much more than verbal expression.

¹¹⁰ Sonder dat ander mense vieslike op- of aanmerkings daaroor sal maak.

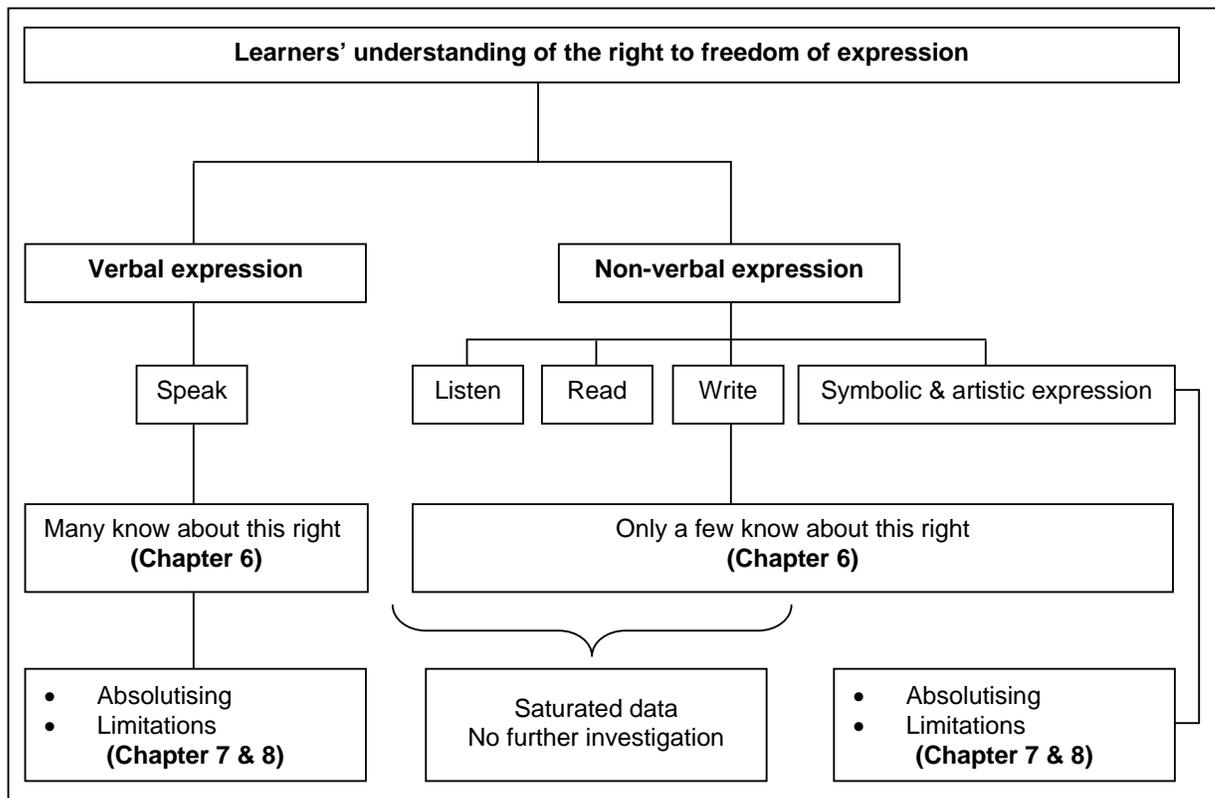


Figure 6.2 Overview of the data analysis on the right to freedom of expression

On glimpsing the horizon of my destination of understanding, I realise that I do not yet know much about the landscape and that many experiences lie ahead before I reach my destination. I shall therefore proceed to the next chapter to explore and interpret the data on my second premise, i.e. that some learners do not know how to exercise their right to freedom of expression.

CHAPTER SEVEN

DATA ANALYSIS: Becoming acquainted with the environment

7.1 INTRODUCTION

In the previous chapter I investigated my first premise. The findings prove that learners do not have adequate knowledge of the right to freedom of expression in terms of the spectrum of expressions included in this right. Most of the learners know that they can speak their mind, but only a few know that the right to freedom of expression includes more than speech.

In this chapter I shall investigate the data in regard to my second premise.

7.2 PREMISE 2: SOME LEARNERS DO NOT KNOW HOW TO EXERCISE THEIR RIGHT TO FREEDOM OF EXPRESSION

My second premise is that some learners do not know how to exercise their right to freedom of expression. The assumptions that underpin this premise are that some learners:

- tend to absolutise the right to freedom of expression; and
- do not know how to limit the right to freedom of expression.

Data regarding this question was found in the answers to the first three questions (see addendum I) of phase 1 in the questionnaire, as well as the focus group interviews of the second phase (see addendum S)

The questions were:

- What do you think you are allowed to do under the protection of your right to freedom of expression?
- What do you think you are allowed to do at school under the protection of your right to freedom of expression?
- What do you think you are not allowed to do at school under your right to freedom of expression?

It was determined in the previous chapter that most respondents know that they can speak their minds in terms of the right to freedom of expression. Only a few know that reading or writing is part of their right to freedom of expression or that it includes symbolic or artistic expression. As the latter was a wide field to explore, I decided to explore only the symbolic and creative expression in phase 2 during the focus group interviews. This decision was further motivated and inspired by *Antonie* ("Antonie", 2002) that deals with symbolic expression in schools. Furthermore, this is the area that causes the most critical incidents and problems in practice. One often hears of incidents at school, because learners and school administrators are uncertain of how to handle this issue correctly. The recent incident in which Sunali Pillay, a 15 year old schoolgirl, obtained an interim court order to prevent the

Durban Girls' High School from conducting a disciplinary hearing that could have resulted in her suspension or even expulsion for wearing a nose-ring (Broughton, 2005), serves as an example.

My assumption was that most learners would know that they can read and write their mind under the right to freedom of expression. This assumption was rejected in the previous chapter; although it still proved my premise that some learners have limited knowledge of their right to freedom of expression. As my assumption was that most learners would not know that they have a right to symbolic or creative expression, I opted to focus only on symbolic and creative expression during the focus group interviews (see figure 6.2).

I assumed that most learners would not have a clear understanding of their right to symbolic or artistic expression. When interpreting the data, however, I realised that the analysis of my findings echoed what I had already discovered during the first, exploratory phase. In other words, although the findings from the questionnaires indicated that most learners do not know that they have a right to symbolic and artistic expression, phase 2 indicated that when they are confronted with the right to symbolic and artistic expression, they realise that it is included under the right to freedom of expression and they dealt with the focus group interviews in the same way as with the questions in phase 1. In testing my second premise, I consequently used the data from both phase 1 and phase 2, which clearly correlated and crystallised the same findings (see § 8.1).

In order to analyse the data systematically, I categorised it into two patterns deduced from the data. Coincidentally these two sections correlate with the two assumptions. The notions of absolutising and the limitation of the right to freedom of expression are discussed next.

7.3 ABSOLUTISING THE RIGHT TO FREEDOM OF EXPRESSION

Some respondents stated that they understand the supremacy of the Constitution, e.g. *The Constitution is much more important than school rules*¹¹¹ 1:287 (302:303). This is in agreement with the literature which indicates that the Constitution is the supreme legislation in South Africa and that no other law, policy or rule can contradict the Constitution. The moment any other law contradicts the Constitution, it has no legal value and will not be binding in a court of law¹¹² (Bray, 2000a; Limbach, 2001; Van Vollenhoven, 2003).

The understanding of the supremacy of the Constitution, however, has resulted in an attempt by learners to absolutise the right to freedom of expression. Many of the respondents have the perception that the right to freedom of expression is an absolute right. Knowing that all the fundamental human rights are guaranteed in the Constitution, because they are entrenched in the Bill of Rights (Bray, 2000a), some learners seem to think that these rights can never be limited. In this respect they feel

¹¹¹ Die Grondwet is baie belangriker as ons skoolreëls.
¹¹² Section 8 of the Constitution.

that they can say what they want to whenever they want to, at any time and at any place, as the right to freedom of expression is an entrenched right in the Bill of Rights:

- *You have the right to say what you want when you want. And nothing or no one can stop or prevent you* 5:2 (16:19).
- *Being able to voice your opinion about events and individuals. Free and behave in any way freely, without fearing any consequences* 5:13 (65:67).
- *You have a right to say anything you want at any place and at any time you want* 4:20 (90:92).

Respondents indicated that the right to freedom of expression allows them to advertise, form their own opinion, be taken seriously, and that their opinions are always acceptable:

- *It also means that if I feel strongly about a situation (right or wrong) I am allowed to voice my opinion on that subject and be taken seriously* 3:15 (42:45).
- *No one may tell me that my opinion is incorrect* 3:3 (20:21).

They are under the impression that, regardless of the mode of expression, the right to freedom of expression is always absolute: *It means that you can say anything you want to in words, mouth, dance, art [sic]* 3:22 (71:72). Respondents feel that they have the absolute right to express themselves in any way they want to, e.g. through their hairstyles: *To do hairstyle that I want in my hair e.g. braiding, 'scruling'* 2:81 (301:303). The above-mentioned responses indicate a large extent of absolutising. Learners want to speak out if they disagree with someone or something, yet these respondents feel that no one may disagree with their point of view.

During the focus group interviews the same patterns discovered during the analysis of the questionnaires were visible. There is a definite tendency for some learners to think that the right to freedom of expression is absolute. Therefore one respondent's reaction to the scenario (see addendum S) sketched for them, in which Jonathan was suspended for wearing an earring to school, was:

*I would have fought, because I firmly believe that you do not come to school to look tidy for the rest of the people. I do not come to school to impress other people - I attend school to learn. This is the only reason why I am at school*¹¹³ 1:2 (18:22).

When the discussion later turned to the limitation of rights, the same respondent said:

*This again is like religion. You either believe or you don't believe at all. You either have your right 100% or you do not have it at all. I don't think that they can only give you a small portion of it [your right]*¹¹⁴ 1:218 (1191:1194).

One must remember that the entrenchment of the rights in the Constitution does not guarantee that one's rights will not be violated. No right is absolute and all rights can be limited (Bray, 2000a); (see § 3.2.7.1).

¹¹³ Ek sou gefight het, want ek glo vas dat jy kom nie skool toe om netjies te lyk vir die res van die mense nie. Ek kom nie skool toe om ander mense te impress nie – ek kom skool toe om te leer. Dis die enigste rede hoekom ek hier is.

¹¹⁴ Dis weer soos met geloof. Of jy glo of jy glo glad nie. Dis óf jy het voluit jou reg of jy het nie 'n reg nie. Ek dink nie hulle kan vir jou 'n klein deeltjie daarvan gee nie.

Respondents also indicated that they can speak their mind on different issues. Some respondents mentioned a variety of aspects to discuss under the right to freedom of expression. One respondent feels that s/he can speak his/her mind on contentious issues:

... if you want to speak about a subject that raises tempers, e.g. abortion, then speak. If you feel for/against the subject, speak your mind. You are allowed to say it. No one is allowed to tell you what you can and can't believe. If you believe that way that is your right 3 281 (101:106).

Another respondent indicated issues relating to South Africa: *It implies that I have the right to give my opinion on any issue in South Africa*¹¹⁵ 1:27 (66:67) and even the way the school is run: *You are allowed to give your opinion on a certain topic in class or give your opinion or ideas to the way the school is being run* 3:48 (186:188). Seventeen respondents indicated that they can speak about issues concerning themselves:

- *You have the right to give your opinion about matters concerning you. When something offends you, you may speak out against it*¹¹⁶ 1:17 (40:41).
- *You have the right to speak your mind in different areas e.g. politics, economics etc. You can speak your mind*¹¹⁷ 1:16 (39:40).
- *You may speak your opinion about decisions about which you are not happy*¹¹⁸ 1:61 (159:160).
- *To agree to disagree to certain things such as in winter when we write June exams I have the right to ask the principal if we could wear our school tracksuits or to give my opinion on things regarding myself and fellow peers. On things that I feel are correct or incorrect* 3:39 (148:153).
- *I think I am allowed to say what is bothering me and what I don't like about a certain thing* 4:44 (191:192).
- *Oppose teachers, fellow students, the governing body, the principal, etc. about anything that you do not agree with or found offensive or obscene in any way which influenced you directly or indirectly* 5:37 (174:178).

A variety of issues were mentioned that learners believe are subsumed under their right to freedom of expression, for instance to speak about their beliefs, emotions and morals: *... to me [respondent] it is an open opinion about what your ideas and morals are!* 5:19 (40:41).

Learners also feel that they have the right to agree or disagree on matters and that they can speak, even if what they say is false: *It does not matter whether right or wrong, it is your opinion* 1:26 (64:65). They are allowed to speak out about their dislikes. The right to freedom of expression also allows them to talk about their rights and even to remind the educator about their right: *You must be able to tell your teacher that you have the right to do this or that and the teacher must respect your rights* 2:73 (267:269). This right also gives them the authority to tell if someone is breaking rules or the law: *... if a same one [sic] has done something wrong you must tell your teacher or principal or one of the LRC*¹¹⁹ 2:61 (218:220).

¹¹⁵ Dit beteken dat ek die reg het om my mening en siening oor alle sake in Suid-Afrika te lug.
¹¹⁶ Jy het die reg om jou opinie te gee oor sake wat jou raak en jou pla. As iets jou persoon aanvat kan jy daarvoor praat.
¹¹⁷ Jy het die reg om jou mening te lig [sic] op verskeie gebiede, bv. politiek, ekonomie, ens. (You can speak your mind).
¹¹⁸ Jy mag jou mening uitspreek oor besluite wat geneem word waaroor jy nie gelukkig voel nie.
¹¹⁹ Learners' Representative Council.

Learners, however, do not only think that they can say anything, but also that they can talk to anybody under their right to freedom of expression. The right to freedom of expression also means that the learner can speak to any person, even to the educator, if they have a problem: *To go to any teacher [to] talk to [them] if I have any problem at home* 2:58 (212:213). Learners understand that they can speak their mind at any time: *To have a say whenever I want to ...* 2:44 (158:157). Respondents indicated that they can speak their mind anywhere, and specifically in court, at school and in the classroom:

- *I think you are allowed to express your opinion, especially in the court*¹²⁰ 1:45 (114:115).
- *You are allowed to express your opinions freely in class and school and speak freely* 3:33 (90).

Learners feel that the right to freedom of expression is absolute and therefore they can speak in any manner and that no one can tell them that their opinion is wrong and that their opinion will make a difference. Of the 690 quotations 17 indicate that they can speak their mind without fearing negative consequences: *It is my right to express my own opinion without being prosecuted*¹²¹ 1:14 (36:37).

Respondents indicated that the right to freedom of expression allows them to express their sexual orientation, express themselves physically or in any way they want to in order to be heard: *Expressing my religion, my sexual orientation and expressing the way I want to be heard* 2:49. They also indicated that they can use their right to freedom of expression to have their own way and that it provides that they need not be influenced by anybody or anything, and that they do not need to conform to any one else's ideas:

- *To express your opinion and to say how you feel without being influenced by other people*¹²² 1:20 (47:48).
- *I don't feel I have to conform to any given way* 3:13 (38:39).

A clear pattern is visible in the data. Many respondents seem to absolutise the right to freedom of expression, while very few are aware of the fact that the right to freedom of expression allows them to express their religion and beliefs. Of those who do, the majority appear to absolutise the right: *... pray wherever and whenever ...* 5:17 (88).

It is clear from the literature that the right to freedom of expression tends toward the absolute, as it is important for the development of a democracy (Beatty, 1995; Clayton & Tomlinson, 2001; De Waal *et al*, 1998; Dugard, 1978; Gordon, 1984; Türk & Joinet, 1999) (see § 4.2). This tendency is also clear in the minds of some learners. Although there is a tendency internationally to view the right to freedom of expression as a core right in a democracy and even though it tends toward the absolute, it is clearly not absolute.

¹²⁰ Ek dink jy mag jou siening stel, veral in 'n hof.

¹²¹ Dis my reg om my EIE mening bekend te maak sonder dat ek vervolg word.

¹²² Om jou mening te lug en te sê wat jy voel, sonder om beïnvloed te word deur ander mense.

To summarise, learners know that they have a right to communicate (or to speak) according to their right to freedom of expression. There is a tendency among them to regard this right as important and as guaranteed (entrenched) in the Bill of Rights. As a result, some respondents seem to absolutise this right in terms of content (what they express), addressee (to whom they express a view), time (when they express), place (where they express) and manner (how they express). The right to freedom of expression can be limited, as can any other right. As there has been only one South African school-related case to test the limitation to the right to freedom of expression in schools, the principles determined in US case law are useful guides to possible limitations in South Africa.

I shall now focus on what I have deduced from the data in phase 1 in terms of the assumption that some learners seem to absolutise the right to freedom of expression, before turning to what the data of phase 2 says on the same topic. This will be facilitated by several network displays generated by Atlas.ti™.

7.3.1 Verbal expression

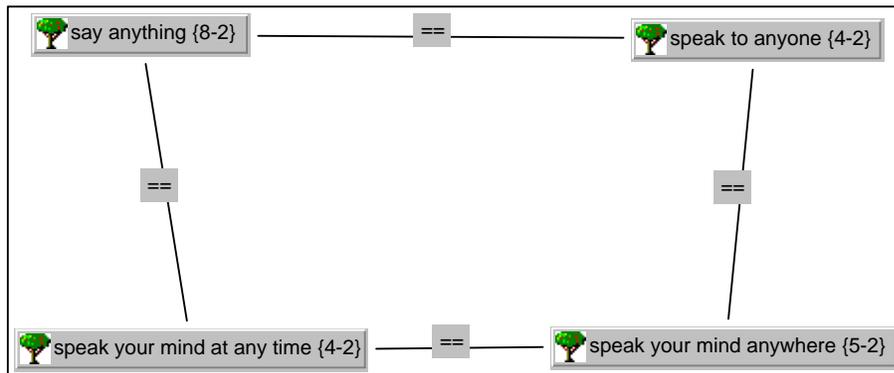


Figure 7.1 Depicting the absolutising of the family of verbal expression¹²³

From figure 7.1 one can deduce that some learners think that they may say anything to anybody at any time and at any place. The clear pattern that has evolved from the analysis of this data is that some learners believe that the right to freedom of verbal expression is absolute and may never be limited, as it is guaranteed under the Constitution. These four codes are associated with one another as they indicate what is said to whom, and when and where it is said.

7.3.2 Non-verbal expression

In regard to non-verbal expression, one can deduce that some learners know that they may express themselves via the media: *You may for instance write to a newspaper or magazine to give your opinion on an issue*¹²⁴ 1:39 (101:102). Part of this code is the code to “speak your mind on posters”, as this is a way of speaking your mind in the media: *You can voice your expression in school in many*

¹²³ The legend to read the symbols in the Atlas.ti™ generated network displays is explained in figure 2.3 at § 2.15.2

¹²⁴ Jy mag byvoorbeeld vir 'n koerant of tydskrif skryf en jou mening oor 'n saak lug.

ways. *Through letters, posters ...* 5:33 (155:156). The code “to be listened to” is part of the code “to speak your mind in the media” as you are “heard” through the media. Apropos this code, the

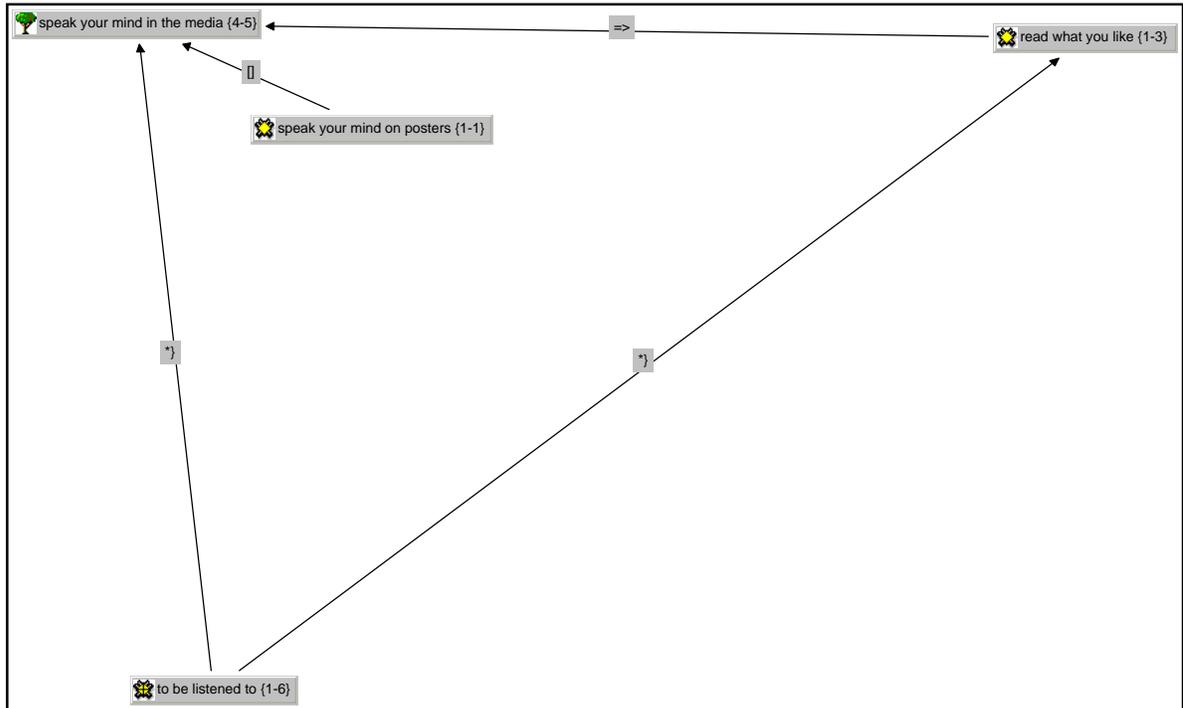


Figure 7.2 Depicting the absolutising of the family of non-verbal expression

respondents indicated that they have to be listened to: *That everyone has the right to speak his mind and that it would be listened to*¹²⁵ 1:21 (49:50). The code “read what you like” has a causal connection to the code “speak your mind in the media” as you can only read if something is written and the right to freedom of expression also allows everyone to read anything: *... I can read what I like ...* 3:101 (36) and learners have the choice of reading what they want to read. This also tends to the absolute as they do not indicate any limitation. The pattern of absolutising the right to freedom of expression is also configured by way of non-verbal expression.

7.3.3 Appearance

The fact that some learners also tend to absolutise symbolic expression can be deduced from the data generated by Atlas.ti™ in the network display (figure 7.3). Some learners think that they may appear in public as they wish to in order to freely represent what they stand for (believe in):

To me freedom of expression means being able to say, wear and do whatever you feel interprets you as a person. Its [sic] all about feeling free to be who you are and represent what you stand for as an individual 5:8 (35:39).

This implies that they can wear anything at any time: *Wearing what I want to wear at my own time* 2:90 (35:39). They may even choose their own hairstyle and clothes in order to communicate

¹²⁵ Dat elkeen die reg het om sy siening te stel en dat daarna geluister sal word.

(express) who they are: *I can wear my hair how I want to, I can wear the type of clothes that I want to wear ...* 3:81 (34:35).

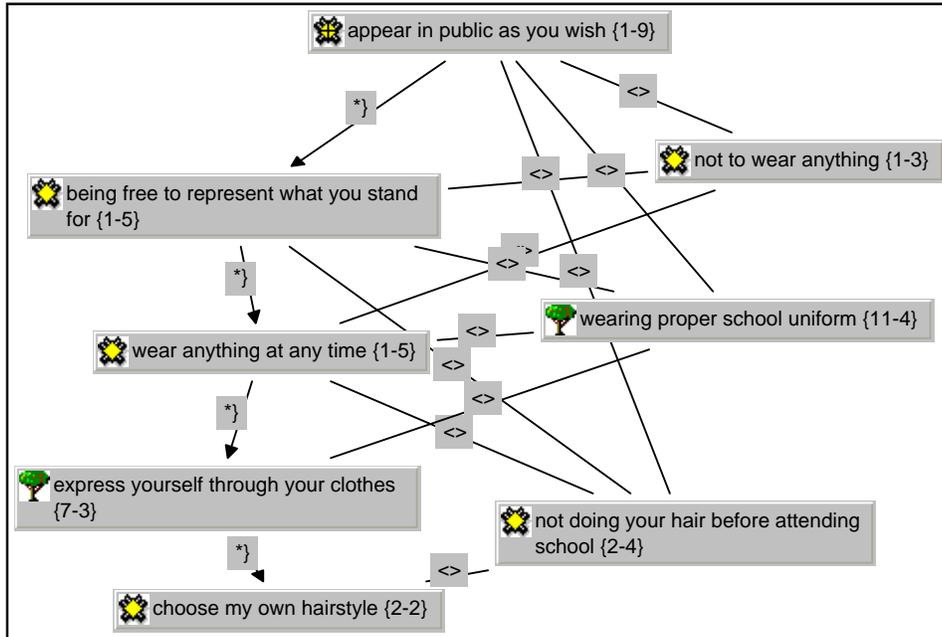


Figure 7.3 Appearance: absolutising the right to freedom of the family of symbolic expression

7.3.4 Acting (doing)

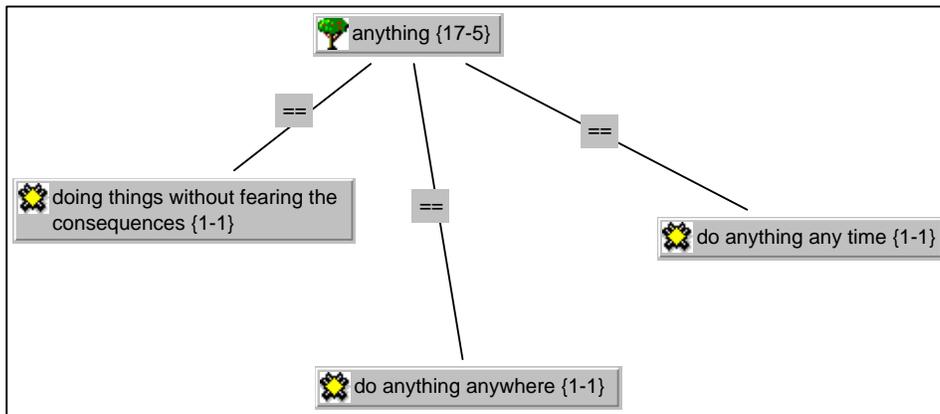


Figure 7.4 Depicting the absolutising of the family of symbolic expression by means of the category of doing

A number of codes indicate clearly that learners think that they can do anything whatsoever under the right to freedom of expression:

- *Anything you want [to do]. You are allowed to express yourself in any way ...*¹²⁶ 1:46 (117:118).
- *You have a right to do anything you really wanna [sic] do* 2:4 (24:25).
- *... I do everything that I want under the protection of [the] right ...* 2:32 (115:116).
- *Under my protection of right I can do what I want* 2:39 (135).
- *Having the right to do whatever you want ...* 4:16 (72).

Some respondents explored this issue by stating that they can do anything without fearing the consequences:

Freedom of expression means being able to express yourself about things that occur in life. Its [sic] like being free without any oppression from other people. You can do things without anyone saying no to those thing [sic] 4:4 (24:28).

Some respondents also indicated that they can use their freedom of expression at any place and at any time: *Every person have [sic] a right to do everything, everywhere and anytime* 4:8 (42:44). The codes also echo the pattern that some learners think that the right to freedom of expression is an absolute right.

7.3.5 Art

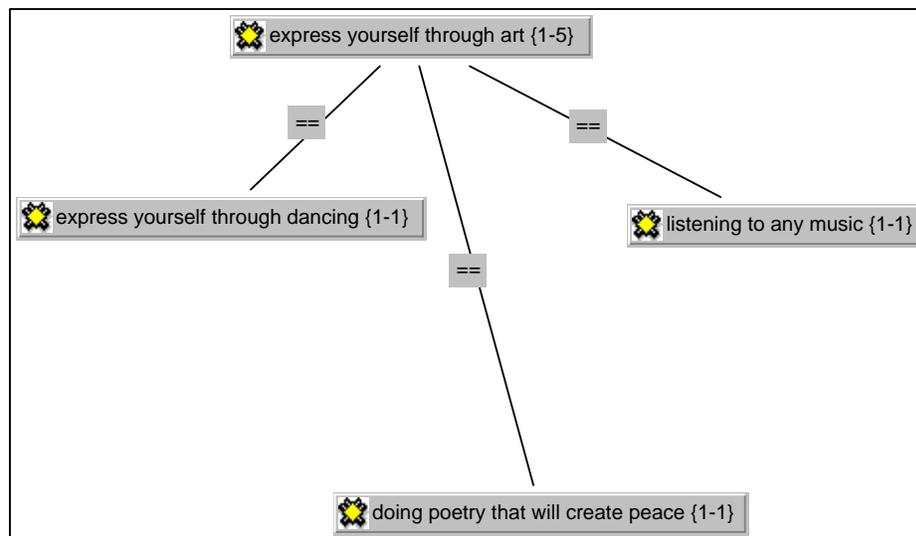


Figure 7.5 Depicting the absolutising of the family of symbolic expression by means of the category of art

Only a few learners are aware of the fact that they can express themselves through their art:

It means that I can express myself in any way that I want and not get in trouble. Like get arrested or thrown out of school. I can express myself in different ways like clothing, art and even my culture 4:10 (48:52).

A number indicated that they can express themselves through poetry and dance and by listening to their choice of music:

¹²⁶ Net wat jy wil. Jy mag jou op enige manier uitdruk.

- *It means that you can say anything you want to in words, mouth, dance, art [sic] 3:22 (71:72).*
- *I am allowed to do free speeches or poetry ... 2:54 (201).*
- *... I can listen to any music ... 3:39 (35:36).*

The use of art echoes the tendency to absolutise the right to freedom of expression.

7.3.6 Religion

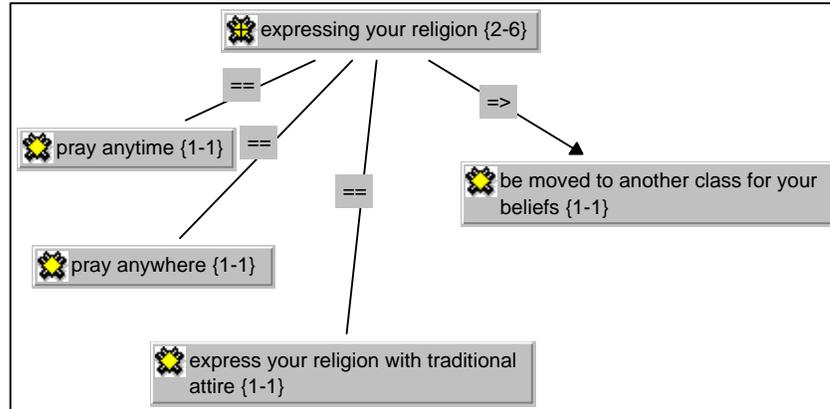


Figure 7.6 Depicting the absolutising of the family of symbolic expression by means of the category of religious expression

The pattern of absolutising the right to freedom of religious expression can be seen in figure 7.6. Although only a few learners indicated the awareness that religious expression is encompassed in the right to freedom of expression: *That you have the right to express who you are and your religion/culture ... 5:5 (28:29)*, there is also a tendency to absolutise this right by indicating that under the right to freedom of expression they are allowed to pray anywhere and at any time: *Dress as I like, pray wherever and whenever ... 5:17 (88)*. The right to express their religion is also associated with their right to express their religion through traditional attire: *You can state your viewpoint on certain things. Maybe even fashionably, e.g. if you [sic] a Muslim woman you'll express parts of your religion through your traditional attire 5:24 (115:118)*. This tendency in the community is clear from, among others, the *Antonie* case ("Antonie", 2002) (see § 5.4.1) and critical incidents such as the Sunali Pillay incident (Broughton, 2005; Rademeyer, 2005) (see § 7.2).

7.3.7 Culture

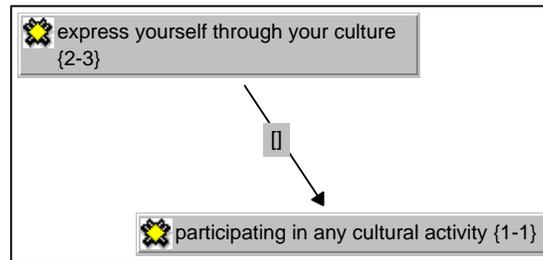


Figure 7.7 Depicting the absolutising of the family of symbolic expression by means of the category of cultural expression

Although almost no respondents are aware of the fact that the right to freedom of expression includes the right to express their culture, the three respondents who mention it, also tend to absolutise the right since they mention that it allows them to participate in any cultural activity:

- *It means that I can express myself in any way that I want and not get in trouble. Like get arrested or thrown out of school. I can express myself in different ways like clothing, art and even my culture* 4:10 (48:52).
- *That you have the right to express who you are and your religion/culture...* 5:5 (28:29).
- *I am allowed to take part in any activity, sport or culture ...* 3:41 (159:160).

The pattern of absolutising the right to freedom of expression, also by means of cultural expression, can be deduced from the following quotation: *I am allowed to take part in any activity, sport or culture and may choose any subjects. This is a form of freedom of expression as individuality is developed* 3:41 (159:162).

I shall now look at a network display generated by Atlas.ti™ to discuss what can be deduced from the focus group interviews in regard to absolutising.

7.3.8 Symbolic and artistic expression

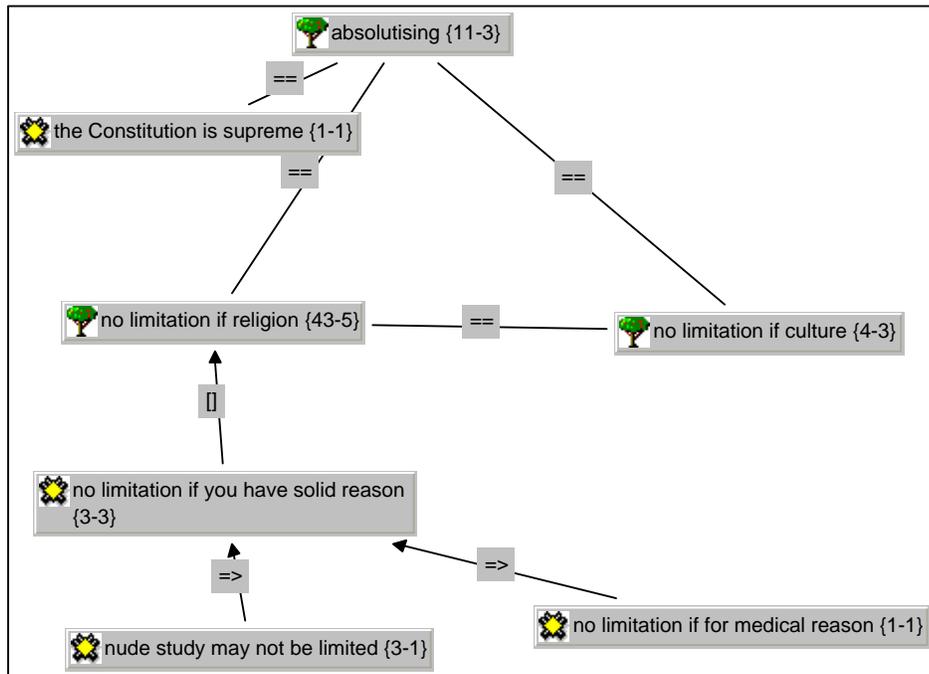


Figure 7.8 Depicting the absolutising of the family of symbolic and artistic expression

This network display generated from the focus group interviews echoes the same pattern discerned in phase 1, i.e. that some learners seem to absolutise the right to freedom of expression:

- *The thing is: I don't think you can prohibit the right like your right and give a little bit of your right. This again is like belief. You either believe or you don't believe at all. You either have your right 100% or you don't have it at all. I don't think that they can give you only a small portion of your right*¹²⁷ 1:218 (1190:1194).
- *Yes, it is. If this is my point that I want to express, who then has the right to take it from me, because I have the right to express my opinion as I wish to*¹²⁸ 1:2879 (160:162).
- *It says a lot to me. You can wear what you want and do with your hair as you want*¹²⁹ 1:313 (1024:1025).

It seems that some learners seem to absolutise this right because of the supremacy of the Constitution: *The Constitution is more important than our school Code of Conduct*¹³⁰ 53 (302:303). This respondent seems to understand the relationship between the Constitution and the school's code of conduct correctly, because no other law or subordinate law can state something that contradicts the Constitution. It seems that because of this, respondents seem to absolutise the right instead of

¹²⁷ Die ding is: Ek dink nie jy kan die reg soos jou reg verbied nie en bietjie van jou reg gee nie. Dis weer soos met geloof, of jy glo of jy glo glad nie. Dis of jy het voluit jou reg of jy het nie 'n reg nie. Ek dink nie hulle kan vir jou 'n klein deeltjie daarvan gee nie.

¹²⁸ Ja, dit is. As dit my punt is wat ek wil oordra, wie het dan die reg om dit van my weg te vat, want ek het die reg om my opinie te lug soos ek wil.

¹²⁹ Baie sê dit vir my. Jy mag aantrek soos jy wil en met jou hare doen wat jy wil.

¹³⁰ Die Grondwet is mos baie belangriker as ons skoolreëls.

balancing it correctly with other rights when exercising it. In the same vein, one respondent feels that a nude study will never be wrong as it is part of the absolute right to freedom of expression:

I do not think you should be criticised at all for drawing a nude picture because I remember in Grade 9 in OBE, we got a picture of De Le Kwa and it's actually got an open breast there. So if they can show you nudity within your school curriculum, you have to be able to hand in a nude picture 3:220 (1089:1094).

The above-mentioned code is viewed as the cause of the code of “no limitation if you have a solid reason”. This indicates that if you need to draw a nude picture for art, you have a solid reason for doing it and if you have a solid reason; your right cannot be limited. Another solid reason given by some respondents for not limiting their right to freedom of expression is for a homosexual person to wear an earring to school: *Yes that would be good enough because we don't, we don't oppress or oppress [sic] the gays 4:164 (222:223)*. Having a solid reason for not limiting the right to freedom of expression is viewed as being part of the code “no limitation if religion”. Many respondents feel that their religion is a solid reason for not limiting their right to freedom of expression. There is an overwhelming consensus (43 codes) that the right to expression of religion is untouchable, sacred and may not be limited:

- *I don't think that should be. I think the school should respect your cultures and images and things like that. So they should find space within the code of conduct for things like your religion and culture 5:202 (214:218).*
- *Again, the dreadlocks are fine, because I don't think it [sic] would bother anyone. The first week it [sic] might bother them then they will be accustomed to it [sic]¹³¹ 1:179 (1000:1002).*
- *She is going her own way and she does not bother the rest of us or our religion. She doesn't comment against our beliefs. I think this is the same as the previous earring scenario. Then you have the right to do it. I think the hat is taking it a bit too far ...¹³² 1:311 (986:990).*
- *If it's got [sic] some symbolic meaning to it. It is all right. But to wear a stud or sleeper for a guy it does not really represent anything. It is just there you know... 3:27 (209:212).*
- *But this thing is that people believe in your religion that you have to show other people that you are religion [sic]. With the freedom of expression you are showing kind if it's true that you can wear an earring it's true what you are trying to say that an earring and that is the same thing, but there is a difference. Because one is expressing your religion and believe and the other one is also a believe [sic] but it's not the proper place to express it. In your religion you express throughout your whole life and just to wearing [sic] an earring is a fashion statement kind of thing. It's like a phase or fashion statement. And that kind of statement isn't the school and the place for that. Religion is throughout your whole life and these kinds of statements are not at school. Like other religions Christians wear crosses to show that they are religious. Jewish people wear their hats on top [sic] and it's go on like that [sic]. Those places should be everywhere in your life and this is just fashion or expression there is place for that like when you go out to shops and things like that or paint your hair red or whatever you want to do 5:206 (249:269).*

The respondents indicated that religious expression is absolute and may not be limited. The code “no limitation if religion” is associated with the code “no limitation if culture” as one very often expresses one's religion in one's traditional, cultural way:

¹³¹ Weer, die dreadlocks is fine, want ek dink nie dit gaan enigiemand so baie pla nie. Die eerste week gaan dit die mense pla, dan is hulle gewoond daaraan.

¹³² Sy gaan haar eie gang en sy los die res van ons en ons geloof. Sy gaan nie teen in wat ons glo nie. Ek dink dan net dit is dieselfde as die oorbelstorie van die vorige een. Dan het jy die reg om dit te doen. Ek dink die hoed is bietjie ver, want ...

I think that if you can incorporate the same way that Muslim people wear scarves and Jewish people wear hats and that. Christian people don't really wear anything except for crosses, little signs so this is our way of saying it so I think Christian people should be allowed to wear something small like that, not something loud and extravagant like Muslim people are allowed to wear the thing on top of their head, but I think it's certain colours and that all or something like that. I know that you can't in a way like go too far goes extravagant that really looks. The same with allowing the traditions and cultures out there that should be allowed 5:218 (491:504).

It seems that the assumption that learners know that they can speak their mind under their right to freedom of expression has been corroborated (see § 6.3). Learners, however, do not necessarily understand how to exercise the right correctly. A second phenomenon evident from the data is that many respondents seem to think that the right to freedom of expression is an absolute right and may, in terms of its entrenchment in the Bill of Rights, never be limited. The literature and case law prove this to be a misconception. International law, foreign law, case law and the South African Constitution point out that the right to freedom of expression can be limited.¹³³ The respondents do not understand that the right to freedom of expression can be limited and balanced by other rights and believe that once they have a guaranteed right, it can be absolutised without any responsibilities being attached to it.

The *Edwards v. South Carolina* 372 U.S. 229 (1963) case ("Edwards", 1963) determined that an unpopular viewpoint may be expressed at any place in a peaceful manner. The criterion that limits the right to freedom of expression is thus the manner or way in which the opinion is expressed. Furthermore, the principle has been determined that freedom of expression may be limited if it could lead to unrest or result in material and substantial interference with the school's routine. See the following cases in § 5.2: *Terminiello* ("Terminiello", 1949), *Garner* ("Garner", 1961), *Cox v. Louisiana* 379 U.S. 559 (1965) ("Cox", 1965), *Burnside* ("Burnside", 1966), *Blackwell* ("Blackwell", 1966), *Brown* ("Brown v. Louisiana", 1966), *Tinker* ("Tinker", 1969), *Guzick* ("Drebus", 1970), *Taylor v. State of Louisiana* 419 U.S. 522 (1975) ("Taylor", 1975), *Fraser* ("Fraser", 1986) and *Hazelwood* ("Hazelwood", 1988). Learners' right to freedom of expression can, in terms of USA case law, be limited in terms of place, time, content and manner. I shall now interpret the data in regard to the second assumption which addresses the limitation of the right to freedom of expression.

7.4 LIMITING THE RIGHT TO FREEDOM OF EXPRESSION

Despite the above-mentioned data, a surprisingly large number of respondents indicated that there are qualifiers in regard to exercising their right to freedom of expression. The focus will now be on what I can glean from the data about balancing the right to freedom of expression. In this section the respondents' comments on balancing the right to freedom of expression in general will be discussed. These qualifiers are not necessarily attached to a specific mode of freedom of expression, like communicating, acting, etc. Figure 7.9 depicts a flow chart of respondents' view on limitation of the right to freedom of expression and will serve a framework for the discussion of the data.

¹³³ Section 16(2) and 36 of the Constitution.

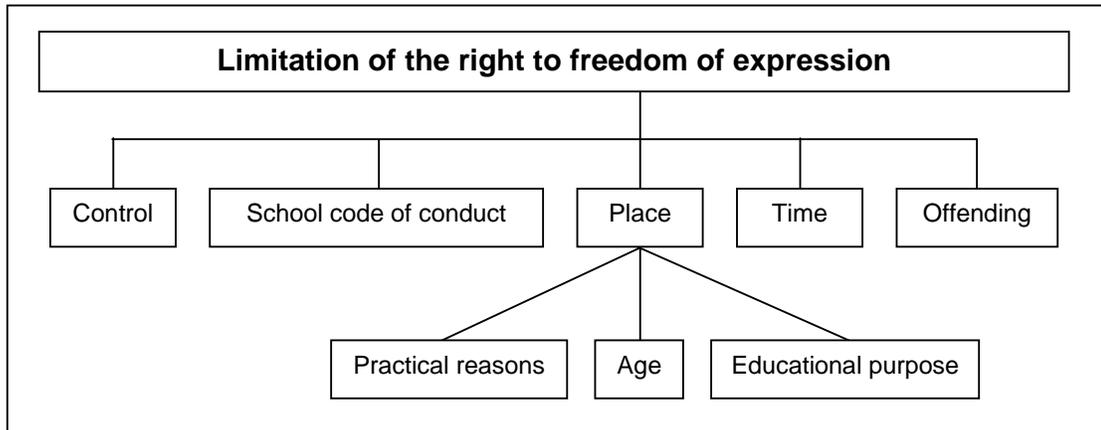


Figure 7.9 Limitations to the right to freedom of expression as identified by the respondents in the focus group interviews

Of the respondents, 17 indicated that one should respect the rights of other people while exercising one's right to freedom of expression. The respondents state specifically that one is required to respect educators, other learners and their points of view:

- *I'm not allowed to dismiss another person's (pupil's) view without taking it into consideration and giving valid facts. I'm not allowed to swear, make noise, disrespect, etc. 2:87 (346:349).*
- *I think I'm not allowed to criticise other kids or make fun of them and I'm not allowed to disrespect my teachers 2:80 (298:300).*
- *You are not allowed to talk to the teacher the way you like and tell them that you have the right to say no. That is not allowed 2:91 (359:361).*
- *To talk to teacher the way we like and say we have freedom of expression 4:94 (384:385).*
- *I cannot always have what I want to have like [sic] for an example a good teacher. I can also not have abandoning [sic] other children's freedom of expression 5:42 (204:207).*
- *I am allowed to not abuse my freedom to my thoughts and opinions. I'm allowed to respect and treat everyone's opinion 4:62 (275:277).*
- *I am allowed to do free speeches or poetry having in mind it will bring peace, not actually hurt others. I am allowed to bring peace among others 2:54 (201:204).*

Only one respondent balanced the right to freedom of religious expression by stating that one can express one's religion only if one does not slander someone, or while respecting the rights of others:

I think that I am allowed to stand up for what I believe in and no-one is allowed to tell me that I can't as long as I am not infringing on other people's rights for e.g. if I believe strongly in Christianity, I can voice that as long as I don't slander 3:29 (107:111).

Of the respondents, 11 indicated that one of the biggest qualifiers governing the right to appear at school as one wants to, is the school's dress code. This right does not allow one to choose what to wear nor does it allow one not to wear the prescribed school uniform:

- *Wearing items of clothing that do not correspond with the school code of conduct 3:61(245:246).*
- *Cuss [sic] at teachers and peers. Put on different uniform or accessories to be artistic 5:43(208:209).*

In other words, one is not allowed to wear anything of choice to school, nor can one wear just any hairstyle when attending school:

I am not allowed to tell how I feel about my school uniform or my hair, they [sic] are the ones who decide for me what to wear and what to do. They make rules for me 2:89 (354:357).

Some respondents indicated that they can choose their own hairstyles while others said that they may not, under this right, wear whichever hairstyle they prefer to school while wearing school uniform. This contradiction is in line with what the data reflects about the other modes of expression. Some learners think that the right to freedom of expression can be absolutised while others know that it may be limited. From the above quotations it is evident that some learners believe that the right to freedom of expression may be limited by the school rules.

Furthermore, they indicated that when exercising their right to freedom of expression they need to behave and use the right in a responsible way. While exercising this right they still need to obey the law and school rules as well as their educators:

- *As long as I don't touch a person in such a way that I break other laws¹³⁴ 1:88 (220:221).*
- *I am allowed to not abuse my freedom of thought and opinion 4:62 (275:277).*
- *Something drastically wrong (burn a bathroom to be heard, strike) 5:39 (194:195).*
- *There are rules at school that we have to abide by. Once we (you) break those rules, you are over bounding [sic] 5:38 (189:193).*

Respondents also indicated that while exercising their right to freedom of expression, they are not allowed to humiliate or slander, use hate speech or offend. They are also not allowed to influence someone negatively:

- *I am also not allowed to abuse anyone through words and use the excuse that I am allowed to perform the act because it's my right to freedom of expression 3:63 (250:253).*
- *To be vulgar and rude to others such as my peers and teachers 3:70 (218:219).*
- *I am not allowed to call another learner names 4:90 (378:378).*
- *Cause damage to property or other people by expressing my views 3:54 (222:224).*
- *You are not supposed to do hate speech towards other cultures or races¹³⁵ 1:80 (202:203).*
- *Offend or impact anybody negatively in any way with your own actions 5:48 (230:231).*

This is in line with section 16(2) of the Constitution in which the right to freedom of expression is inherently limited (see § 3.4.2.2). The above quotations seem to indicate that respondents are aware of the fact that the right to freedom of expression is indeed not absolute, but can be limited in terms of its inherent limitation in section 16 (2) of the Constitution.

Respondents further stated that they can exercise their right to freedom of expression as long as they do not disrupt the class, make noise or damage property:

- *Interfering with classwork [sic] 3:59 (244:244).*
- *Cause damage to property or other people by expressing my views 3:53 (215:217).*

¹³⁴ Solank ek net nie 'n persoon op so 'n wyse sal raak dat ek ander wette oortree nie.
¹³⁵ Jy mag jou nie aan haatspraak teenoor ander kulture of rasse skuldig maak nie.

The data coding process was enlightening. I anticipated that learners would not know that their right to freedom of expression can be limited. Although a fairly large number of respondents are under the impression that the right may not be limited, it was pleasantly surprising to find that some learners do indeed understand that the right to freedom of expression is not absolute and may be limited under certain circumstances.

These respondents also seem to absolutise this right and understand that they are legally allowed to do anything if they wish to convey a message. A respondent indicated that the right to expression is also limited in this regard and indicated that s/he can do anything provided s/he does not break the law:

- *You are allowed to open, view and express your opinion. You are allowed to act and voice your opinion as long as it's justified, reasonable and in a fair manner, and in a responsible manner* 5:14 (77:80).
- *As long as I don't touch a person in such a way that I break other laws*¹³⁶ 1:88 (220:221).

During the focus group interviews most of the respondents indicated that the right to freedom of expression can be limited. The respondents' understanding of the limitation to the right to freedom of symbolic or artistic expression resulted in a fascinating pattern. While a fair number indicated that the right is absolute (see § 7.3), an overwhelming number echoed the existence of limitations of this right. One respondent said about the boy who wore an earring to school: *He is abusing the responsibility of the fact that he can express himself as an individual and I do not think that ...* 3:177 (152:153).

I shall now focus on the limitations to the right to freedom of expression as expressed in the data and displayed in figure 7.10 that was generated by Atlas.ti™. As all the codes indicated in figure 7.10 are limitations to the right to freedom of expression, I have indicated that they are all interrelated, since they are all associated with one another as reasons for limiting or balancing the right to freedom of expression. I shall then discuss each code indicated as a limitation.

7.4.1 Limitation in order to control

Some learners clearly believe that the absolutising of the right to freedom of expression will result in chaos in school and society:

- *Yes, but remember now. If everyone can say what they want to do, what they want to wear as they wish to. Just think how everything will be*¹³⁷ 1:12 (62:64).
- *All the people will wear what they want and then there will be no order anymore*¹³⁸ 1:267 (70:71).
- *And there will be no discipline at school, because everybody wants to do whatever he wants, you might wear jeans, you might wear something else, there won't be discipline* 4:15 (141:142).

¹³⁶ Solank ek net nie 'n persoon op so 'n wyse sal raak dat ek ander wette oortree nie.

¹³⁷ Ja, maar onthou nou, as almal kan sê wat hulle wil doen, wat hulle wil aantrek soos wat hulle wil - dink net hoe sal alles wees.

¹³⁸ Al die mense sal aantrek soos hulle wil en dan gaan daar nie orde wees nie.

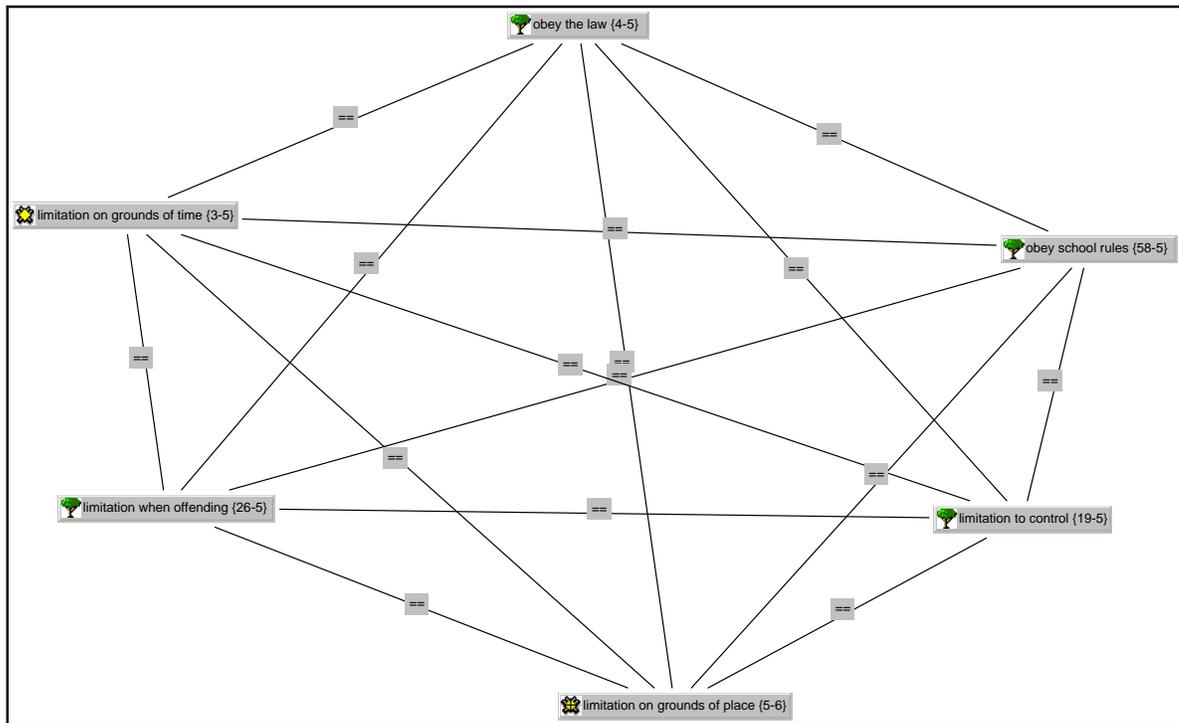


Figure 7.10 Depicting the pattern of limitations to the right to freedom of expression

- *That is the same way of saying I come to school with a gun and I shoot five people and I my particular feelings and moods because I don't like maths [sic] so I killed half the class. That's the truth. It is the same comparison. You have to take it like that as they should perhaps say I convey positive particular feelings and not negative. Change the word. It's very difficult because if you take anything you can say anything and you can turn it the same way you want it to go. Because you can just say a simple sentence and had it said oh now you are saying that you hate me. Just from a simple sentence. Anything like that you can change 5:121 (965:977).*

As the main purpose of the law is to create order and harmony in a society, original statutory law or any subordinate law¹³⁹ may be used to limit any fundamental right. This means that the law is intended to create order; and if human rights are absolutised, chaos will reign. This principle has also been established in USA case law, viz. that the right to freedom of expression may be limited if it could lead to substantial disruption at school ("Blackwell", 1966; "Burnside", 1966; "Drebus", 1970; "Tinker", 1969) Schools need an operational code of conduct for learners to ensure that control, order and harmony exist in schools.

7.4.2 Limitation in terms of the school code of conduct

Learners believe that the school's code of conduct is the single most important principle or guideline that limits the right to freedom of expression. I sensed a distinct authoritarian influence in the learners' perspective here. The code assigned by far the most (58 times) during the focus group interviews was

¹³⁹ Subordinate law refers to regulations and conditions promulgated in terms of statutory law and has the same legal force as statutory law.

“to obey school rules”. In many cases the respondents argued that the right to freedom of expression is absolute in society but it can be limited by school rules:

Freedom of expression is fine at home but at certain places and certain times you've got to abide by certain rules. When you come to the school, you know that you are part of that group and from eight in the morning until two thirty in the afternoon you've got to abide by those rules and instructions and have respect 3:7 (56:62).

When asked to juxtapose the authority of the Constitution and the school rules, the respondents appeared confused. Some regard the school rules as the supreme law at school, while others know that the Constitution reigns supreme. The respondents, who know that the Constitution is supreme, tend to absolutise the right. Other respondents were confused after the focus group interview and believe that they have been tricked into obedience by school authorities:

- *The school is against hair that stands like that. It must be tied and combed; cut behind the ears for boys, but the ends keep standing out. The school has the rule and she must obey. On the other side there is the Constitutional right to expression or religion which states that she may do it, but the school rule states that you are not allowed to do it¹⁴⁰ 1:309 (958:964).*
- *There is a Constitution and the school code of conduct is based on the Constitution, but they try now in the Schools Act, school code of conduct, whatever... it contradicts the Constitution. When you are outside the school you can wear whatever you want; you may look as you want to. When you arrive here [at school] everybody must look alike otherwise it does not look correct and you will be scolded or whatever¹⁴¹ 1:271 (106:112).*
- *I really do not know. That is a difficult situation but I think again the child would be wrong because the child challenged authority and the child knew that what he/she did was wrong because it is stated, there is proof you know and the court would be on the school's side 3:191 (319:323).*

As a result of the authoritarian culture in South African schools (see § 1. 2) most of the codes of the data were applied to the limitation of school rules. It seems that respondents view school rules as superior to the Constitution. If the school has a code of conduct and learners know about it, there is no reason to disobey it. Few respondents indicated that their right to freedom of expression can be limited by other laws or by the Constitution. Some also indicated that the right to freedom of expression can be limited in terms of time and place or when offending someone.

I shall now discuss the last three limitations according to the interpretation of the coded data.

7.4.3 Limitation in terms of time

Not many learners indicated that the right to freedom of expression can be limited at specific times. In other words, these respondents understand that there are certain times at which this right can be limited and that one cannot claim it absolutely:

- *There is also a time and place for it [freedom of expression] 3:133 (880).*

¹⁴⁰ Die skool is teen hare wat so staan. Dit moet vasgemaak word en dit moet ordentlik gekam word, agter die ore gesny word vir die seuns, maar die punt bly staan, die skool het daardie reël en sy moet dit doen, maar O.K. aan die ander kant dit is haar Grondwetlike reg tot uitspraak of godsdienst dat sy dit mag doen, maar die skool se reëls sê jy mag dit nie doen nie.

¹⁴¹ Die Grondwet is daar en die skoolreëls word eintlik gebaseer op die Grondwet, maar hulle probeer dit nou in die skoolwet, skoolreëls, whatever - dit stry nou eintlik teen die Grondwet. As jy buitekant die skool is, mag jy aantrek soos jy wil, mag jy lyk soos jy wil. As jy hierso kom, moet almal presies dieselfde lyk anders lyk dit nie reg nie, en word jy uitgetrap – whatever!

- *Freedom of expression is fine at home but at certain places and certain times you've got to abide by certain rules. When you come to the school, you know that you are part of that group and from eight in the morning until two thirty in the afternoon; you've got to abide by those rules and instructions and have respect 3:7 (56:62).*
- *But they need to get punished and correct it, not necessarily correct it by picking on them in front of everyone, but correct it so that everyone knows that that was wrong. And that opinion was not that's wrong but against the law. That's right to have your own opinion, because I am sure there is a hundred of people that believe LSD is the way to go. But it was wrong what they did. It was the wrong way to express it and it's not the type or the place. So it is very difficult to say that this freedom of expression act should be in this place in this time. There are so many limitations and that. I don't think that it was correct by singing LSD and that in front of everyone cause I mean that's again imposing on people that don't like LSD and think LSD and all LSD 5:234 (1071:1086).*

These respondents are aware of the fact that the right to freedom of expression can be limited at specific times. It is interesting that all three quotations indicate this time as equal to the time at school. One can thus argue that this equals the limitation as a limitation in terms of place, in this case, the school.

The first respondent stated the limitation in terms of time succinctly. Although one has a Constitutional, protected and entrenched right, school is not the time or place for it. The second respondent has a similar view, and mentions that school rules overrule the Constitutional right. The school rule legitimates the limitation in terms of time (school time). The third respondent elaborates the same theme and says that there are several reasons why the right to freedom of expression should be limited at school, i.e. the school is not the time (or place) to express something that contradicts the educational purpose of the school. As school time is identified as the criterion for the limitation I shall survey the data regarding limitation in terms of place.

7.4.4 Limitation in terms of place

Respondents indicated that the entrenched right to freedom of expression is not absolute, but may be limited in terms of place (also see § 7.4.2) e.g.:

I am sure there is an area where you could express yourself and not break the school rules. By the way [Person D] and the poetry club and that they all express themselves and they are in the school. They express themselves every Friday afternoon or whenever they have their things and they like poetry contrary about today's [sic] society, poetry about the happenings at the school and that anyone like to come and listen to their poetry and they say like that then express themselves. And that is like nothing to do with wearing an earring or wearing dreadlocks or wearing something like that... 5:241 (1405:1416).

This respondent indicated that the right to freedom of expression can be limited at school, but that schools can create certain forums in which the right to freedom of expression can be exercised. This indicates a clear understanding of this right and the way to exercise it in a school. As the right to freedom of expression is a core right in a democracy, tending toward the absolute, there are reasons for limiting it at schools, but since schools deal with young people who need to develop to their fullest potential to function optimally as responsible citizens, schools should offer a forum for the development of this right.

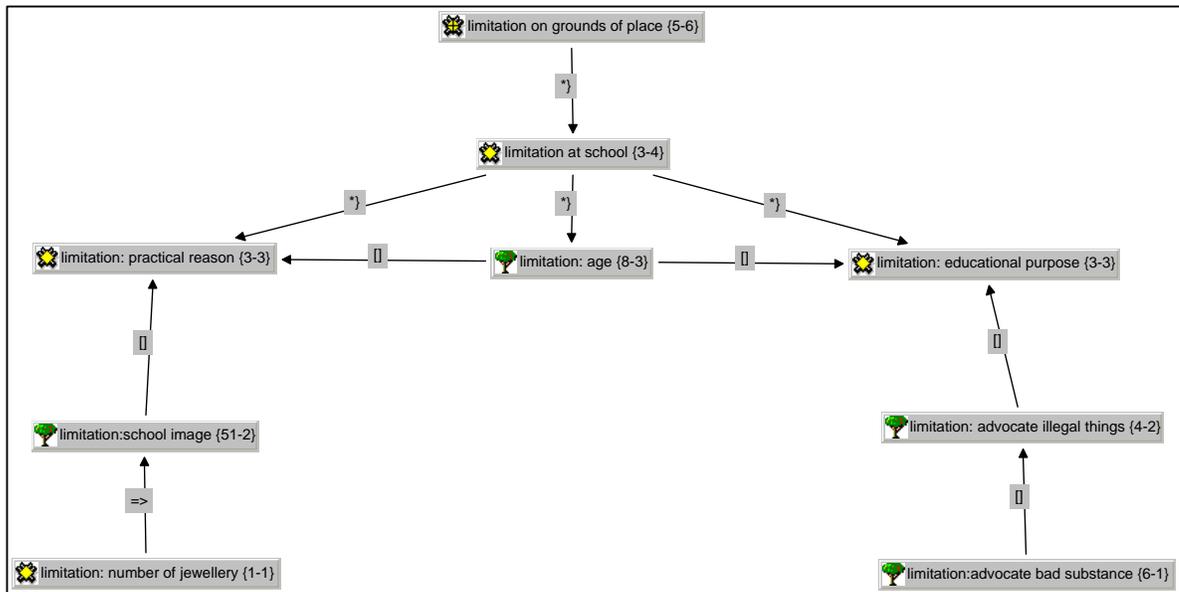


Figure 7.11 Depicting the pattern of limitations to the right to freedom of expression in terms of place

Respondents put forward three reasons for limiting the right to freedom of expression in schools, viz. practical reasons, age and educational purpose. I shall start by discussing the variable of age as I view it as the overarching variable for limitation in schools.

7.4.4.1 Age

All learners at school are minors and they lack *iudicium*¹⁴² (see § 1.5 and § 4.2.3.1) (Bondesio, Beckmann, Oosthuizen, Prinsloo, & Van Wyk, 1989) and could therefore harm themselves and those around them. Someone should look after them to ensure that this does not occur. The educator's duty of care plays an important role here as the educator needs to see to the welfare of the minor in place of the *pater familias*.¹⁴³ Since children lack *iudicium*, they have limited responsibilities and are often unable to make correct decisions. Educators need to assist them on their path to adulthood, but also need to protect them from harming themselves and those around them. Therefore the fundamental rights of learners' as minors may be limited in order to protect their own rights, as well as the rights of those around them. Age is therefore definitely a variable in limiting rights. The younger the child, the less responsibility s/he will have, and the more his/her rights may be limited. As the school is the place where a child is prepared for adult life, the school may definitely limit the child's rights. A respondent who clearly understands the concept expressed the following view: *Yes, but remember it is because we are older. I mean when I was in standard six ...*¹⁴⁴ 1:325 (428:429).

¹⁴² Discretion/ judgement.

¹⁴³ Good, prudent father of the family.

¹⁴⁴ Ja, maar onthou dit is ook omdat ons ouer is. Ek meen toe ek in standerd ses was ...

Other respondents also indicated that schools are allowed to limit the right to freedom of expression in terms of age:

- *Because if you are under 18, I mean dancing like that ... 4:124 (1028).*
- *As I say there is an age restriction some of us are under 18 we are not allowed to see like [sic] naked things. We are still young so she is promoting for us to look for naked things. We can't allow people to draw naked things 4:188 (1231:1233).*
- *He doesn't know to decide for that. But if I decide I want to wear a dress I know what comes with wearing a dress I know that girls wear dresses I know that guys are not supposed to wear dresses then I can decide because like I am sure at a certain age like 16 when you are an adult I am consider you will not I am sure 16 is a certain age for something like [Person H] said at 16, 18 and 21 and your age is that you get certain responsibilities 5:240 (1364:1373).*

The educational aim of schools is to develop minors and lead them to adulthood in order for them to fulfil their responsibilities in society as effective citizens (Clayton & Tomlinson, 2001; De Waal *et al*, 2001; Gordon, 1984) (see § 4.2.1.2 and 4.2.1.3). This educational purpose of schools may also be used as a variable to limit learners' right to freedom of expression (Zirkel, 2003).

7.4.4.2 Educational purpose

One of the school's main aims, amongst others, is to develop minors into adults who can fulfil their societal responsibilities (Clayton & Tomlinson, 2001; Gordon, 1984). Schools may therefore limit the right to freedom of expression in order to ensure the realisation of this aim. Three codes were assigned apropos the fact that the school has an educational purpose and can therefore not allow expressions that contradict this purpose:

You know not everyone has a strong personality. You get people who are big enough to say no and get up and walk, but you get people who follow and if you allow that to happen in class it is going to happen more often, more people are going to start doing it and then the people who are going to follow them are going to deal consequences [sic] and then they go back and they say but I started because there was this rap song that was in my path 3:217 (103:1041).

This respondent understands that learners are minors in a specific sociological context and that they are faced with many choices and peer pressure on their journey to adulthood. It is therefore of vital importance for the school, in striving to achieve the educational purpose, to limit inappropriate choices.

Another respondent mentioned:

It's not, I know it's against the law to do certain Satanist acts and that and that is against the law. So people should not be allowed to wear things that are against the law. I know it's doing something like doing Satanist acts like skinning cats and killing people that's all against the law so it's promoting something wrong. In a way the school tries to put up a good image wearing one of these badges in the community is promoting the wrong idea and that should be taken off 5:64 (938:959).

Although the right to freedom of symbolic expression would allow one to wear an emblem advertising one's belief, it can be limited if that belief is against the morals and values of society. Four additional codes were assigned that indicated that the right to freedom of expression can be limited if that expression advocates illegal conduct. These four codes are part of the code "educational purpose", as the educational purpose is not to advocate anything illegal (see figure 7.11). The next quotations illustrate this:

- *But you can't promote drugs because the law doesn't approve it 4:185 (1152).*

- *It goes against like the school's ethos and that LSD is against cause it using your body [sic]. It's also it's not just in the school it's a lawful thing. I mean LSD is against the law 5:235 (1101:1105).*

It is, however, not only illegal substances and acts that stand in the way of achieving the educational purpose. The school may not advocate harmful substances, even though they may not necessarily be illegal. The following two quotations were selected from six of the responses which referred to this aspect:

- *... think is because they are promoting to do drugs as they say it gives them power so I think that the school can suspend them. I think that the school can suspend them, because they are promoting something that is not good for our health 4:182 (1088:1090).*
- *It brings on a very wrong message. I don't think the Constitution allows that kind of lyric to be written 5:127 (1043:1045).*

On considering the 13 responses (see figure 7.11), it appears that some learners are aware of the fact that the right to freedom of expression can be limited at school because of its educational purpose.

I shall now discuss the third variable identified by the respondents as a legal limitation to the right to freedom of expression at schools.

7.4.4.3 Practical reasons

Bearing in mind that the school has to achieve its educational purpose and that it needs to look after the minors in its care, there are some practical measures the school needs to enforce to ensure that it runs smoothly. Three respondents mentioned this as a reason to limit the right to freedom of expression:

No. I have two things for that sorry it's impractical to wear jewellery to school just generally because if you wear jewellery to school people do like to steal it and then also again with the code of conduct it's the same as the earrings and jewellery and that but also not just the feeling of expression is that people do steal at schools 5:207 (293:299).

It is, however, debatable whether this really is an acceptable reason for limiting a constitutional right. Schools ought rather to aim toward creating an environment in which the value system that underpins society is so clear that something like stealing will not occur. Then again, one must bear in mind that learners are still minors and are still being guided toward adulthood. They lack discretion and may steal because they do not fully consider the consequences.

As part of the practical reason for limitation, one can also add the code "school image". It was assigned a mammoth 51 times. Arguments in regard to dress codes and school discipline in ensuring a better school environment in order to reach the educational purpose are the focus here.

- *In which direction is this school heading? I must take out my child. Is this school going in that direction? The parents will not be satisfied¹⁴⁵ 1:170 (950:952).*
- *We are here to look tidy. We are a school. We must have a good image to the outside¹⁴⁶ 1:265 (45:46).*

¹⁴⁵ Waarheen gaan hierdie skool nou. Nou moet ek my kind uithaal. Gaan hierdie skool nou so uitdraai? Die ouers gaan bietjie onrustig wees.

- *I think the school tries to create an image. When the school opens its gates and everyone walks out, everyone will see this is a pupil from school A or B. The school uniform indicates the school that you attend and shows that you are proud of your school ...*¹⁴⁷ 1:277 (137:142).
- *Yes, but remember we are informed daily during assembly that we are soft targets if we are untidy*¹⁴⁸ 1:316 (1088:1089).
- *Look, the school informs us all the time that everyone is individual but I don't think this is exactly what they allow us, because they want everybody to look alike. Everyone must act the same. Everyone must say and believe the same things. They nail you the moment you try to be different*¹⁴⁹ 1:318 (1096:1101).
- *Because it is normal for girls to wear earrings in their ears and it looks better. It gives a bad impression. I know a lot of people, not just adults think that if a guy wears an earring he is the gangster type. Now imagine being in a school uniform, what impression that gives about [sic] your school. That school got [sic] a lot of gangster boys. You know people stereotype. You know people could judge you. A lot of people judge a book by its cover. So he should not wear the earring. He should not. It is wrong* 3:180 (180:187).
- *If you are in civvies [sic] I think it would be fine because then no one would say you sell people are going to say that child from [school C] because they don't know your name. They are not going to say what [person A] looks like in her school uniform, they are going to call the school and I think your school uniform is pathetic and people are going to get a bad impression of the school* 3:215 (854:863).
- *There are some dyes that will be allowed at school like a blonde dye that would be approved. Here at school our uniform is maroon so they would not* 4:176 (851:852).
- *It's not just the fact that it is wrong. It's against the code of conduct. The school aims to give you uniformity in the school to give a good visual for the community so they need to get rid of the earring but you can wear [it] out of the school in your own time you can wear it not in the school. If all the boys aren't wearing earrings then you shouldn't wear it* 5:190 (16:18).

This code generated significant findings, e.g. schools are very concerned about their image. This is understandable as schools are in an open and competitive market in regard to recruiting learners. Quotation 1:170 indicates that parents will move their children to another school if they realise that the image of the current school does not match their expectations. Parents of course demand the best education and values for their children, so this reaction is understandable. In the overwhelming response regarding the importance of school image, there is a strong authoritarian influence, which is in agreement with the notion of authoritarian leadership. Minors (learners) are not supposed to question, argue or be different from the norm. This authoritarian culture is still so palpable in schools, that I suspect a degree of indoctrination in this regard. Quotation 1:316 indicates that learners are told daily that they will become soft targets if they are untidy, i.e. if they look different from the others or do not conform to the expected image.

This notion is echoed by quotation 3:180 that implies that learners who do not conform will be stereotyped and judged by their external appearance. This is effectively summarised by quotation

-
- ¹⁴⁶ Ons is hier om netjies te lyk. Ons is 'n skool. Ek meen. Ons moet 'n goeie beeld na buite toe dra.
- ¹⁴⁷ Ek dink die skool probeer 'n beeld skep. So wanneer die skoolhekke oopmaak en almal loop uit, dan sal almal kan sien dit is [skool A of B]. Die skoolklere wys van watter skool jy kom en wys jy's trots daarop ...
- ¹⁴⁸ Ja, maar onthou daar word elke dag vir ons gesê in graadopening as ons nie netjies is nie, is ons klaar 'n teiken.
- ¹⁴⁹ Kyk, die skool sê die hele tyd vir ons. Almal is individueel, maar ek dink nie dit is presies wat hulle toelaat nie, want hulle wil hê almal moet presies dieselfde lyk. Almal moet presies dieselfde optree. Almal moet presies dieselfde dinge sê, glo, ens. Sodra jy net 'n bietjie anders as die res wil wees dan nail hulle jou daarop.

1:318. The purpose of the school is to develop all individuals to their fullest potential to become responsible citizens in a democracy. Individuality should therefore be emphasised and enhanced. Although this message is preached, the example by way of enforcement through the school code of conduct, conveys the opposite message, i.e. that there must be uniformity and that uniqueness is taboo. This notion is also reflected in the fact that respondents indicated that the school rule is superior to the Constitution – thus a school rule is unquestionable and not debatable. The question arises as to whether schools are developing critical citizens to reach their fullest potential in a democratic society, or whether factors like the school image that resonates in dress codes, etc. is conveying the opposite message and working against the educational purpose.

The next code, “limitation: amount of jewellery” can also be viewed as contributing to the school image:

Sometimes the girls wearing more than two bracelets at school, they don't approve of that. If you are wearing a bracelet you should wear maybe one or two not more than two 4:166 (301:302).

The above quotation shows that that school authorities will act against the wearing of a number of bracelets in order to improve the school image. People against the wearing of large amounts of jewellery or who advocate uniformity, may rightfully argue that the wearing of too much jewellery may be a safety risk. The question is whether the right of learners to express who they are can be limited (or rather violated) if the expression of the right is not a threat to the safety of anyone at school, if it does not work against the educational purpose of the school, does not interrupt the school or does not infringe any fundamental right of any stakeholder.

I now turn to the last limitation to the right to freedom of expression as deduced from the data.

7.4.5 Limitation when offending

There were 26 responses in regard to this limitation of the right to freedom of expression:

- *If you wear a shirt that offends somebody's religion, you will not be allowed to wear it. The school will ask you to take it off¹⁵⁰ 1:55 (818:819).*
- *... as I understand the Constitution you have the right to say or do what you want, but it must not harm other people. The moment you do something like that in front of the class, you affect them, it does not matter how you think about it; you will affect them in one way or the other and I think the problem is there where you have affected them. I don't think that what you have done is the problem. The problem is that you have affected them with it ...¹⁵¹ 1:227 (1236:1246).*
- *The issue is the way that you were raised ... He thinks it is wrong. It would harm him¹⁵² 1:321 (1249:1255).*

¹⁵⁰ As iemand 'n hemp dra wat jou geloof gaan aantast, gaan jy dit nie mag dra nie. Die skool gaan vir jou vra om dit uit te trek.

¹⁵¹ Soos ek die Grondwet verstaan, het jy die reg om te sê wat jy wil of te doen wat jy wil, maar dit mag nie skadelik wees teenoor ander persone of soiets nie. En sodra jy soiets doen voor die res van die klas, dan affekteer jy hulle, maak nie saak hoe jy daarvoor dink nie, jy gaan hulle affekteer op een of ander wyse en ek dink die probleem is daar waar jy hulle geaffekteer het. Dit wat jy gedoen het, dink ek nie is die probleem nie. Die probleem is dat jy hulle geaffekteer het daardeur

¹⁵² ...
Dit gaan ook hier oor hoe jy grootgemaak is. Hy dink dit is verkeerd. Dit is skadelik teenoor hom.

- *I think yes. I think the fact that she asked made the statement that she might be a little more serious than some of the kids who just experiment. But the fact that growing your hair and actually having dreads is taking it further. So I think. O.K. - she asked. The principal denied it. Why stop there you know? If you know how you feel, what you really want, and then she said she is going to wear a cap made in the colour of her school uniform. To just make the dreads whatever. Why not allow her that freedom to expression to experiment? It is not harming anyone in her school. It is not harming anyone in her class. It is not going to do anything to her. Give her the right to express herself and if that is what she really wants why stop her from doing it? 3:199 (559:571).*
- *You see all the classrooms but I think the whole school is embarrassed [because] of what you are doing 4:119 (992:993).*
- *They will definitely say take it off. I mean it's gonna [sic] offend so many people 'cause it's Satanism and it's wrong 5:219 (511:513).*
- *In a way. I think your freedom of expression is in your mind and you can believe whatever you want to yourself because you are not gonna [sic] offend yourself but as soon as you start publishing your views and showing others out there who do not want to see it [sic], it's offending on them. That is why you should respect other people as well with responsibility not to offend other people's expressions. I am not saying look here I've got, I like say I don't know, [Person Y] doesn't like this then I keep telling him all these things that he doesn't like ... 5:238 (1293:1304).*

The respondents indicated that their right to freedom of expression can be limited the moment that they offend someone. Offending someone includes a variety of actions, e.g. one may not offend someone's religion (quotation 1:55), neither may one harm them or express anything that will affect them negatively (quotations 1:227; 5:238), or even just embarrass them (quotation 4:119). The matter to consider, however, is under which circumstances one person actually offends another. Quotation 1:321 indicates that different people will be offended by different things, and what is acceptable for one will be offensive to another, depending on the way they were raised. On the other hand, to further complicate the issue, it could be construed as offensive when someone expresses something that is against someone else's belief or values, but a person may not limit the right to freedom of expression if it does not offend or harm him/her (quotation 3:199).

It is evident from the data that some learners vaguely understand that other people's right to dignity must be protected and that everyone therefore has a responsibility to balance their rights when exercising them. The data, however, does not indicate that learners have a clear understanding of how and when to limit this right. It is necessary to consult the literature and case law in regard to this issue. Expression that is legally obscene will be limited, as it constitutes breaking the law of the country ("Roth", 1957). The problem, however, is that not all expletives, which include vulgar, indecent or offensive words, are necessarily legally obscene (see § 4.4.2.1) and they are therefore not automatically limited. The courts need to determine whether such expression should be limited or not. The principle that an unpopular expression or offending expression cannot be limited *per se* because a person disagrees with the view or if the offensive word was not meant for the person in question can be used as a guideline ("Cohen", 1971) (see § 5.2.14).

The right to freedom of expression can, however, be limited in terms of place ("Fraser", 1986; "Schenk", 1919), and one of the places where the right to freedom of expression tends to be limited to a fairly large extent, is the school. The reason for this is that learners lack *iudicium* and the school has an educational purpose. School authorities, however, must be careful not to limit the right to freedom

of expression on the grounds of the learners' lack of *iudicium*, and in the process harm the development of the individual in a democratic society by creating an authoritarian society of citizens who obey without questioning. This will hamper the development of the skill of critical thinking.

Another aspect that needs to be considered is the fact that a person's expression can offend others, as quotation 1:1227 indicates, i.e. the expression could be harmless to one person, but it has the potential to offend someone else. It is not possible for no expression to be allowed because all expressions have the potential of offending someone, since opinions differ. It is impractical to accept that anyone who disagrees with someone's expression should feel offended by such an expression. That is why the courts have decided that expression cannot be limited just because someone disagrees with the expression or because the expression is unpopular ("Brown v. Louisiana", 1966; "Cox", 1969; "Edwards", 1963; "Garner", 1961; "Taylor", 1975; "Thornhill", 1940). This is a very important twist in the argument, because if this were the case, expression, which is the core of critical thinking and democracy, would be limited. The findings indicate that learners are aware of the sensitivity pertaining to the right to freedom of expression, but they are not certain as to when it can be limited and exactly how it should be limited.

7.4.6 No limitation

Although most of the learners in the focus group interviews indicated an understanding of the necessity for some limitation to the right to freedom of expression at school, almost all of them agreed that certain issues are beyond limitation. While drawing this network display generated by Atlas.ti™ I was pleasantly surprised to notice that Atlas. ti™ had automatically generated the relationships between the different codes.

There was an overwhelming consensus (43 responses) that although the right to freedom of expression can be limited at schools for various reasons, the right to expression of religion is untouchable, sacred and may not be limited:

- *I don't think that should be. I think the school should respect your culture and images and things like that. So they should find space within the code of conduct for things like your religion and culture 5:202 (214:218).*
- *Again, the dreadlocks are fine because I don't think it would bother anyone. The first week it might bother them then they will be accustomed to it¹⁵³ 1:179 (1000:1002).*
- *She is going her own way and she does not bother the rest of us or our religion. She doesn't comment against our beliefs. I think this is the same as the previous earring scenario. Then you have the right to do it. I think the hat is taking it a bit too far ...¹⁵⁴ 1:311 (986:990).*
- *If it's [sic] got some symbolic meaning to it. It is all right. But to wear a stud or sleeper - for a guy it does not really represent anything. It is just there you know ... 3:27 (209:212).*
- *But this thing is that people believe in your religion that you have to show other people that you are religious. With the freedom of expression you are showing kind if it's true that you can wear an earring it's true what you are trying to say that an*

¹⁵³ Weer, die dreadlocks is fine, want ek dink nie dit gaan enigiemand so baie pla nie. Die eerste week gaan dit die mense pla dan is hulle gewoond daaraan.

¹⁵⁴ Sy gaan haar eie pad en sy los die res van ons en ons geloof. Sy gaan nie teen wat ons glo nie. Ek dink dan net dit is dieselfde as die oorbelstorie van die vorige een. Dan het jy die reg om dit te doen. Ek dink die hoed is bietjie ver, want ...

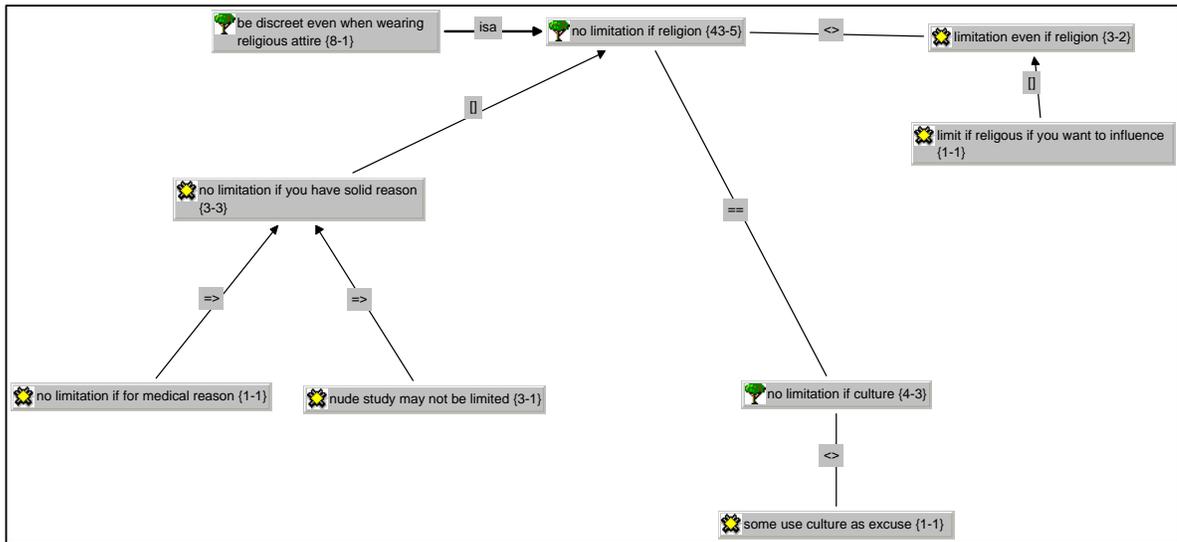


Figure 7.12 Depicting the pattern of no limitation to the right to freedom of expression

earring and that is the same thing, but there is a difference. Because one is expressing your religion [sic] and belief and the other one is also a belief, but it's not the proper place to express it. In your religion you express throughout your whole life and just to wearing [sic] an earring is a fashion statement kind of thing. It's like a phase or fashion statement. And that kind of statement isn't the school and the place for that. Religion is throughout your whole life and these kinds of statements are not at school. Like other religions Christians wear crosses to show that they are religious. Jewish people wear their hats on top and it's go on [sic] like that. Those places should be everywhere in your life and this just fashion or expression there is place for that like when you go out to shops and things like that or paint your hair red or whatever you want to do 5:206 (249:269).

Quotation 5:202 states that the respondent firmly believes that the right to freedom of expression of religion should not be limited and that schools should adapt their codes of conduct accordingly. According to the respondents religious attire might be foreign to some cultures and schools, but learners will become used to it and then it will not be contentious at all (see quotation 1:179). One respondent then links religious attire to jewellery, stating that religious attire, e.g. the Rastafarian hairstyle is acceptable, as long as the learners wearing it do not bother other learners. They believe that religious attire can be worn as long as the wearers don't try to influence others or attempt to convert others to their religion. The same respondent feels that boys can wear earrings as long as they do not bother other learners. Yet, the same respondent disapproves of the Rastafarian wearing a hat to hide the Rastafarian hairstyle (see quotation 1:311). This is contradictory, and I surmise that the hat is not acceptable because it is not part of religious attire or perhaps because it is not good for the school's image. If the first reason applies, then this respondent should find the wearing of the earring which is also not religious attire, problematic. If the latter is the case, one can argue that the wearing of earrings might also be limited because of the school's image. This is an indication of the vagueness and confusion among learners on the issue of freedom of expression. Another respondent indicated clearly that symbolic (religious) expression is acceptable, but if the expression is a matter of fashion, it

will definitely not be acceptable (see quotation 3:27). Quotation 5:206 summarises the feeling of the respondents effectively by arguing that religious attire should not be limited as it is part of a person's being, while fashion does not touch a person's existence. A number of respondents argued that even the right to freedom of religious expression can be limited:

Because your religious status is your family. It is your own private life and you should not put it out there for others to see what your status is because obviously some people will start misusing it 3:187 (280:283).

Part of this argument is echoed by a respondent who stated that the right to religious expression may be limited if someone's purpose is to influence other people:

... I would differ slightly because I think that everyone has their own right on what they believe in, but as long as the people do not imply to the other people that the one is better or worse. I think they should just keep it to themselves because if you believe in your religion and that is what you stick to, you don't need to influence others that believe in another 3:197 (417:423).

Some respondents also indicated that although the right to religious expression should not be limited, the right is not unconditional. When exercising the right to freedom of religious expression, one must still be discreet when wearing religious attire:

- *It's the same like the other things. Accept the Muslim scarves and the colours and the Christian badges, but that is not too extravagant and doesn't look out of place it looks neat and tidy. That's it 5:229 (743:747).*
- *And can't you tie your..., I know that I don't know how it works but you guys get ... and it's grown long at the back and the school doesn't want that. Can't they tie their dreadlocks up in a certain way, or something? 5:225 (712:716).*

A second reason given by a few respondents for the right not to be limited is when someone has an appropriate reason, e.g. A

- boy may wear an earring if he claims that he is gay;
- medical bracelet may not be limited; and
- nude study in the art class may not be limited.

Religion can be added to the list of solid reasons, as almost all the respondents indicated that the right to freedom of religious expression may not be limited (see quotations above).

Another reason given by respondents for not limiting the right to freedom of expression is when it is regarded as a cultural expression. This is of course associated with the right to freedom of religious expression:

I don't think that should be. I think the school should respect your culture and images and things like that. So they should find space within the code of conduct for things like your religion and culture 5:202 (214:218).

In contrast to the previous point, one respondent alerted the group to the fact that some learners will abuse the system and use culture as an excuse to express themselves, even if they do not really attach the cultural significance to such modes of expression:

Sometimes people use culture to like break the rules. If you don't like school to have rules like that, to say no, it's part of the culture, which I think it's [sic] just nonsense 'cause some cultures don't allow ... so some people use tradition as the excuse 5:203 (220:224).

The data indicates that some respondents have a sense of the fact that rights can, under specific conditions, be limited. It seems that they do it instinctively and do not apply principles.

The next category concerns the data that indicate that the respondents are uninformed about the right to freedom of expression. It needs to be spelled out that the mismatched data was collected only during phase 1 via the questionnaires. As the respondents were confronted with real-life scenarios during the focus group interviews they were already situated within a freedom of expression context.

7.4.7 Mismatched data

Qualifiers given by respondents in regard to mismatched data form the focus here, but are not linked to the right to freedom of expression. This section indicates that although these respondents do not understand the right to freedom of expression, they do understand that rights are not absolute and can be balanced. Although some respondents indicated that they do not understand the meaning of the right to freedom of expression (see § 6.2.4), it is significant that some of the respondents indicated that they know that rights in general can be limited. These findings echo the earlier pattern which indicates that rights are not absolute, but must be limited.

A number of respondents indicated what people are not supposed to do under the right to freedom of expression, although they addressed it as the right to education. They indicated that according to the right to freedom of expression at school one has the responsibility to attend school, not to be late for school and not to leave school early or play outside during school time:

- *I think we are not allowed to bunk periods and not to wear everything that we want also not to disrespect our teacher's and other students 2:92 (362:364).*
- *We are not allowed to go around during school hours 4:75 (316:317).*
- *... not allowed to come to school whenever I want to and not allowed to come to school late 4:92 (380:381).*
- *... Go home before after school without having a good reason ... 4:93 (382:383).*

One also has the responsibility to do one's schoolwork, not go to the toilet during periods and not to do homework at school:

- *I think I don't have to disrespect anyone and I have to do the work I have been given 2:85 (327:328).*
- *Not to write home/school work ... 4:93 (382:383).*

Three respondents indicated that a learner can be punished for doing wrong things, while six respondents indicated that learners are not allowed to receive corporal punishment:

- *I think if there is anything wrong I have to report it and if I have done something wrong I have to be punished 2:42 (146:148)*
- *It means a lot because nowadays we live a free life there are [sic] no longer corporal punishment in many schools 2:17 (52:54).*
- *I think I must be under my right at school, because teachers they do [sic] not allowed to abuse school children, such as to punish a child 2:55 (205:207).*
- *Beating. Not allowing children without uniform to come to school because some kids have no money at home 2:82 (312:314).*

Respondents also indicated other limitations to their right to freedom of expression, e.g. smoking, littering, gambling, using drugs or alcohol and making jokes:

- *I am not allowed to smoke or do any illegal things, like not following school rules, fooling around during school hours and not listening to my teacher when she's warning me. The most important thing that I am not allowed to do is taking [sic] drugs 4:71 (304:309).*
- *I think I shouldn't do the wrong things like smoking, taking drugs, drinking alcohol, etc. I think I should follow the school rules 4:79 (321:323).*
- *I am not allowed to smoke, gamble or misbehave at [sic] any circumstances. I am not allowed to be late or absent without any reasons 4:83 (343:345).*
- *At school I am allowed to keep my school clean, respect teachers and do school work when they gave [sic] us, and I am allowed to be punished if I do something wrong 4:46 (206:209).*

Although these respondents do not have even a vague idea of the meaning of the right to freedom of expression, they understand that rights are limited.

Respondents indicated that they have to respect the rights of others, including educators and learners:

- *I must have discipline and respect other people at the school, being faithful, being punished when I did something wrong [sic] 4:50 (223:225).*
- *I think I am allowed to respect my rights and others' rights as I want to be respected and I don't want to be a shame to my race. I want to be proud, including [of] my party [the] ANC, because with it I have rights 4:27 (122:126).*
- *At school I am allowed to keep my school clean, respect teachers and do school work when they gave [sic] us, and I am allowed to be punished if I do something wrong 4:46 (206:209).*

When exercising rights, one needs to be respectful. These respondents show no particular understanding of the meaning of the right to freedom of expression. Although respondents have a vague understanding of human rights, they do not understand the right to freedom of expression.

Some respondents say that everyone must be respected and protected:

- *Everybody has the right to be protected, even if you are grown up. A person has the right to be protected against crime, etc. 4:36 (158:160).*
- *I am not allowed to smoke, gamble or misbehave at [sic] any circumstances. I am not allowed to be late or absent without any reasons 4:83 (343:345).*

A number of respondents believe that you may not humiliate anyone, carry dangerous weapons, or discriminate:

- *We must follow the rules of school and listen to the teacher even if we know that our rights is [sic] to feel free to our school. We must not be allowed to carry a dangerous weapon through our school premises, that is true. We know we have our right, but we must follow the rules 2:68 (232:233).*
- *It is a freedom of expression because everyone has a right. This time we have no apartheid and violence because we have a right 4:14 (67:79).*

Eight respondents said that learners are not allowed to break school rules. Another six said they may not break the law and one said learners have to obey the educator:

- *We must follow the rules through our Constitution. We must not be like before 1994. We want our government to listen to us about this section 16 of the Constitution. We must behave well not be negative through [sic] our Constitution 2:45 (158:162).*
- *If we learners do as we wish, nothing is going to get right, we are going to bunk classes, go home, even if it's not yet school out and most of the learners expect teachers to be responsible for what they did in [sic] purpose 2:76 (285:289).*

Although what these respondents said is correct concerning rights in general, they did not link it at all to the right to freedom of expression, which is an indication that they do not understand the right to freedom of expression. One respondent said that they are not allowed to abuse their rights while other respondents said that people may not abuse children:

- *I am probably not allowed to abuse my rights 2:75 (284).*
- *It means anyone in our country has the rights and because some of the parents abuse their children or the guardians abuse the children 4:9(45:47).*
- *I think that we are allowed to do under the protection of our right, because life that we are living now it is not the same (comparing [sic] to the old one). Now we look at same things where, we as children facing [sic] abuse from our parents, guardians. But now it is freedom and it gave us phone numbers to child abuse [sic] 4:28(127:133).*

It is clear from the responses in this section that some learners only have a broad awareness of rights but are still not able to differentiate among the different rights entrenched in the Bill of Rights. If this is the case, one could definitely not expect these learners to have knowledge of the details entailed under the right to freedom of expression.

7.5 CONCLUSION

My second premise, that learners do not know how to exercise their right to freedom of expression, has been substantiated. Although the data in regard to the assumptions was not quite what I expected, it was a pleasant surprise to realise that most learners know that rights are not absolute and may be balanced. Although some respondents still believe that the rights are absolute, the majority know that they are limited. There is, however, a tendency among learners to know the concept of human rights and its limitations vaguely, but they are not able to differentiate between the rights specifically. Therefore they have a general understanding of human rights and their limitations under the umbrella of the right to freedom of expression, but do not really know what the right to freedom of expression *per se* implies, or how it should be specifically limited or balanced. The fact that some respondents believe that the right to freedom of expression is absolute while others know that it can be limited, corresponds with the literature and case law (especially in the USA), where the line between the right and the limitation or violation of the right is unclear. Respondents have an instinctive feeling that the right to freedom of expression may be limited, especially in schools, but are not sure how to implement such limitations. There is still a lack of basic principles to apply in limiting the right to freedom of expression.

The in-depth interview will form the focus of the next chapter. The aim of the in-depth interview is to determine whether a learner who actually sued her school for violating her right to freedom of expression has a better understanding of this right than other learners. I shall also use the data from phase 3 to crystallise the data from phase 1 and phase 2.

CHAPTER EIGHT

DATA ANALYSIS: Crystallising the events of the journey

8.1 INTRODUCTION

In the previous two chapters I analysed and interpreted the data to test my two premises. In chapter six, I interpreted the findings of the exploratory or first phase in relation to my first premise. The findings in regard to my premise that some learners have limited knowledge of their right to freedom of expression, was found to be valid. Almost all the respondents are aware that they can speak their mind under the right to freedom of expression, but only a few know that the right to freedom of expression entails a wide spectrum of modes of expression. In chapter seven I investigated my second premise, i.e. that some learners do not know how to exercise their right to freedom of expression. Once again, the assumptions were not fully substantiated, but the interpreted findings indicate that some learners do not know how to exercise their right to freedom of expression.

In this chapter I interpret the data from phase 3. As my premises have already been addressed by the findings from the first two phases, my intention is to use the data from phase 3 (an in-depth interview), to crystallise the data from the previous two chapters in order to enhance the validity of the data and findings. It is similar to reflecting on and appreciating the journey after arriving at the destination, and deciding whether the journey was worth the effort. It also includes reflecting on important (in)sights possibly missed along the way.

The *Antonie* case ("Antonie", 2002) was the single most important reason I chose to write on this topic, as it was the first South African school-related case that addressed freedom of expression. I conducted an in-depth interview with the plaintiff in order to determine whether a learner who actually sued the school governing body for infringing her right, has a clear understanding of what the right entails. In addition, I also wanted to determine whether her understanding of the right correlates with the understanding of other learners (see § 5.4.1 for background on this case). I shall interpret the data according to the three categories that arose during the data-coding phase. Firstly, I shall consider the importance of filing a court case. Secondly I shall investigate whether the data crystallises the notions of absolutising and limitation as deduced from the first two phases.

Before continuing, I need to define my understanding of the term "crystallisation". When crystallising one uses multi-dimensionality and angles of approach as a process of validation (Richardson, 2000; Tobin & Begley, 2004). Crystallisation recognises that any given approach to study the social world has many facets (Denzin & Lincoln, 2000; Janesick, 2000). Borkan (2000) refers to this notion as "immersion/crystallization". He points out that crystallisation is a process "emerging after concerned reflection with intuitive crystallizations, until reportable interpretations are reached" (Borkan, 2000, p. 180). It is in other words, an intuitive realisation of patterns evolving through the entire research process. The pattern starts to evolve after the literature review. One recognises it again when

collecting data and it emerges once more when the data is analysed. Furthermore, the data interpreted by using different data collection instruments indicates the same pattern. In other words, the pattern crystallised throughout all the phases of the research validates the research process. I simultaneously acknowledge the fact that there is not a single truth and that I am investigating people's perceptions. The fact that all the respondents verified the raw data and that the three phases of data collection in which three data collection instruments were used resulted in the same findings (patterns), was my main method used to crystallise the data. The data from phase 3 was therefore used to confirm the patterns previously identified.

8.2 THE IMPORTANCE OF FILING A LAW SUIT

When I asked the plaintiff how she experienced the importance of taking the issue to court, she answered that she felt so strongly about the case and the right to freedom of religious expression that she believed that she would have the courage to follow through. She indicated that the culture of not differing from, speaking out, or questioning authority is ingrained in South African society (see § 1.5 and § 3.2.7):

Yes. I just felt either our parents contacted the officer saying [sic]. They asked that I redo it because their children would not be able to handle that type of publicity and that type of reaction from the school. So our parents felt that we needed to express them but the children would not allow them to interfere in their school 1:4 (58:63).

Many learners shared her sentiments, but were not prepared to follow the same legal route. First they contacted her to offer support and later to congratulate and support her:

But most people were very supportive. I had people at Row's school calling me, saying "well done for doing it", you know 1:19 (330:332).

The fact that many felt the same, but were hesitant to act on it echoes the fact that South African culture is still to some extent influenced by authoritarianism. South African learners and the broader South African community will still rather be controlled by the authorities than cause disputes by asserting themselves or challenging authority, since they fear the consequences of such actions. (see § 1.2.1).

The plaintiff also felt at the time, that some people were intent on belittling her right. They acted as if she was exaggerating the issue, and in the process they ignored or violated her right:

- *Nobody really took notice of the whole thing. Through the case it was not really important to anybody 1:11 (27:29).*
- *I felt maybe they thought it was just a phase but they had no right of thinking it was just a phase 1:12 (18:20).*

People singled her out because she had the audacity to take the matter to court. Some educators even violated her fundamental rights because she went to court:

- *There were a lot of people who did not agree with what I said. Teachers put me out of their classes because of what I was doing. So it was quite something for some people that made comments and remarks. You know ... 1:5 (67:70).*
- *Yes. A girl my brother was seeing at the same school. She was in matric¹⁵⁵ and then she actually said that I was taking away the limelight from the matriculants.¹⁵⁶ And I did not. It*

¹⁵⁵ Final year of secondary school.

¹⁵⁶ Learner in final year of secondary school.

was not meant to be like that you know. It's the school. They didn't ... It's not been me [sic] that blew it out of proportion. The school just had to see what I wanted and what my rights were. That's all and I said yes go on with it. That would have been it 1:7 (82:89).

The school exaggerated the importance of a minor issue, but was ignorant regarding many more important issues:

- *But if most of the people do these things, it is not to the extent as what [sic] schools make it out to be 1:30 (534:535).*
- *This was probably a big extent to them, the dreadlocks and the head coverings but this is my right 1:31 (529:540).*

She indicated that schools tend to distort issues. To them, for instance, the wearing of dreadlocks is a big issue. When considering the literature (Alston, 2002; Bray, 2000a; Sachs, 1992), one would expect school authorities to be informed and to be able to balance rights by applying the appropriate principles and values that guide the process. Yet, in applying the principles determined by case law to limit the right to freedom of expression, it becomes difficult to understand the reason the school went to such extremes: the wearing of the dreadlocks did not substantially disrupt the school, nor did it oppose the educational purpose of the school, and it did not violate any stakeholders' rights. Also, the issue was not addressed according to the value system that underpins the South African democracy¹⁵⁷ and which expects tolerance toward other cultures and religions. This phenomenon also resonates with the notion that people are entrenched in their own habits. They are not accustomed to taking the views of others into account. People also lack tolerance for different opinions that differ from their own. It seems that school authorities are reluctant to change their habits and to implement their management style according to the values that underpin the new democracy. The issue has been emphasised to such an extent, that when I asked the plaintiff whether she, in hindsight, would have gone to court again, she felt that she would have followed the same route:

No. I would not change a thing. Really I would not. It made me see that some people often are very ignorant. I cannot use the word ignorant. Just some people are. They do not realise so much more. Yes blindfolded 1:18 (315:318).

In retrospect, as I realised the importance of this issue to the plaintiff, it became of paramount importance to analyse the third set of data in terms of absolutising the right to freedom of expression.

8.3 ABSOLUTISING THE RIGHT TO FREEDOM OF EXPRESSION

It was clear that the plaintiff understood the concept that rights are not absolute and may be limited but, in her opinion, the right to freedom of religious expression is absolute. This is in agreement with the views elicited from the majority of respondents during the first two phases of the research. The code assigned most often during the analysis of the plaintiff's interview was: "no limitation if religion":

- *I do not know how far freedom of expression goes, but for us it is about religion and the way we do it and our way of life and how we express yourself [sic] so it falls under religion. I do not know if it falls under religion 1:23 (416:419).*
- *And that is why it is so close to freedom of expression. Freedom of expression ... I think that it is on its own. There could probably be a difference in opinion, but because it was my religion I stood with that 1:24 (552:554).*
- *Because there is only a certain extent that they can use it [sic] and that is their religious freedom and the school cannot deny them that 1:35 (693:695).*

¹⁵⁷ Section 1 and 7 of the Constitution.

- *Negotiate this and not that you know, but they are allowed - the people, to wear something stating their religion or their personal religion and their feelings 1:32 (552:554).*
- *That is the difference, because it is religious and the others are not. You can wear a badge if you want to then, you know. That is not religious, you get it from the expression of freedom. So there is definitely a barrier there 1:33 (574:577).*

The first three quotations (1:23; 1:24 and 1:35) spell out clearly that if the right to freedom of expression is linked to religion, the right is absolute and may not be limited. When I asked her about the wearing of jewellery to school, she stated in quotation 1:32 that it may be negotiated, but again, if it is a form of religious expression, it should be allowed. This is echoed in quotation 1:33 where she states that there is a difference between expression and religion, indicating that the right to freedom of religion and freedom of expression are linked and that the right to freedom of expression may be limited, but not if it is a form of religious expression.

Another point the plaintiff made, that other respondents did not make, relates to the literature, i.e. schools (people) cannot limit a person's right only because their opinions differ or they disagree with that person's point of view ("Brown v. Louisiana", 1966; "Cox", 1969; "Edwards", 1963; "Garner", 1961; "Taylor", 1975; "Thornhill", 1940) (see Table 5.1):

The reasons what they said about it [sic] and how they went about doing it definitely show they had no grounds to stand on. They just did not want it. If they had something more to say about it or something more argumentative about it ... Not saying "this is what she did and it was wrong". There had to be a reason why they said it was wrong because it was not in the schoolbook that what I did was wrong 1:41 (816:823).

Another quotation to consider concerns the fact that the issue was not addressed according to the value of tolerance that underpins the Constitution. The school suspended her for "serious misconduct". Even if she had acted against the code of conduct (and that is debatable (see § 5.4.1)) she would not be guilty of serious misconduct and suspension (as punishment) would definitely not be commensurate with the offence. The value of tolerance was not considered in dealing with the matter:

So that was it. They placed it under that and I could not understand how can you [sic] place me under that. I did not do any of those things, but that was the only category they could find to place me under 1:11 (171:174).

8.4 LIMITING THE RIGHT TO FREEDOM OF EXPRESSION

That is the difference, because it is religious, and the others are not. You can wear a badge if you want to then, you know. That is not religious, you get it from the expression "freedom". So there is definitely a barrier there 1:33 (574:577).

In this quotation, the plaintiff implies that there certainly are barriers or limitations. Although she differentiates between religion and expression, she refers to freedom of expression by means of freedom of religious expression and states clearly that she understands that rights are not absolute and can be limited:

- *Yes, but then anybody can also come and say I have this and that right. So somewhere we needed to draw that line 1:39 (793:795).*
- *I definitely think they do have a boundary because there are such a lot more things that people do want to say and want to do, but they do not because the boundaries are there. I think people do see why the boundaries are there. You know. If somebody just explains and lets them know why many other people feel the same, but not the majority 1:44 (870:876).*

One could argue that this is in line with what the other respondents mentioned as a limitation in terms of control (see § 7.4.1). If everyone exercised their human rights as absolute, it would result in chaos. Therefore certain inherent limitations as well as a limitation clause¹⁵⁸ apply, to ensure order and harmony in society. The plaintiff's data will now be interpreted in terms of limitation according to figure 8.1, a network display generated by Atlas.ti™.

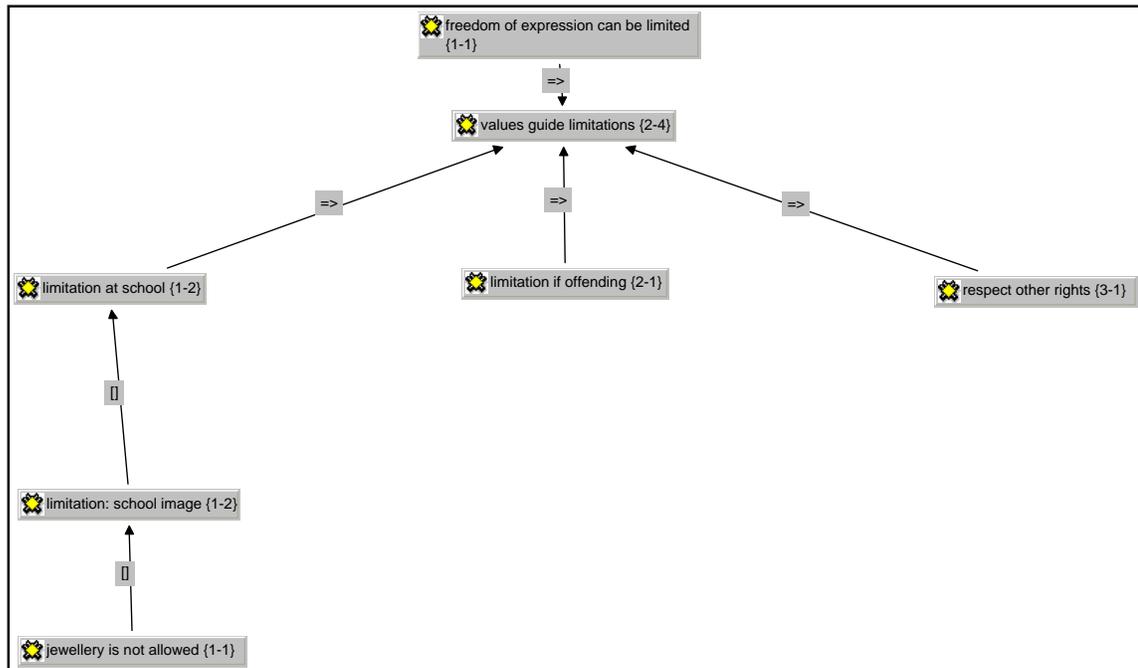


Figure 8.1 Plaintiff's criteria used to limit the right to freedom of expression¹⁵⁹

The plaintiff acknowledged the fact that rights are not absolute and that the right to freedom of expression can be limited:

That is the difference, because it is religious and the others are not. You can wear a badge you want to then, you know. That is not religious, you get it from the expression "freedom". So there is definitely a barrier there 1:33 (574:577).

She also realised that there should be specific criteria to limit this right; otherwise it would result in discrimination. When I asked her how courts could limit constitutionally entrenched human rights, she indicated that they use values as criteria and she subsequently reflected on the values that underpin the Constitution,¹⁶⁰ as can be seen in the following quotations:

- *That is where values also come into play 1:40 (799).*
- *No, that is where values and boundaries come into play 1:43 (845:846).*

In South Africa every verdict, judgement, disciplinary action or decision, should be guided by these values. The plaintiff, in other words, understands that the right to freedom of expression can be limited by applying the values that underpin the Constitution in order to ensure a harmonious society. In the

¹⁵⁸ Section 36 of the Constitution.

¹⁵⁹ The legend to read the symbols in the Atlas.ti™ generated network displays is explained in figure 2.3 at § 2.15.2

¹⁶⁰ Section 1 and 7 of the Constitution.

quotation above she states three categories in which the right to freedom of expression can be limited, indicating the value as the cause of the limitation. The right to freedom of expression can be limited firstly at school, secondly if it offends someone, and thirdly, if it is disrespectful of other people or their rights (see figure 8.1).

8.4.1 Limitation at school

The nudity is the same thing as you bring nude magazines to school or to do nude painting [sic]. It is the same basis. It is a personal thing. No not at a school. I cannot say why not at school you know. Maybe if it is a private art class or culture or things like that, but not at school, because that is the word for it. I think you need to draw a line somewhere 1:38 (771:777).

In this quotation the plaintiff indicates that she is aware of the fact that the right to freedom of expression can be limited at school. This is in line with the literature and what the other respondents said (see § 7.4.4). The right to freedom of expression can be limited in terms of place, e.g. the school ("Fraser", 1986; "Edwards", 1963; "Schenk", 1919). Interestingly, however, she states that she knows that the right to freedom of expression can be limited at school, but she is unable to explain why. This further emphasises the authoritarian indoctrination in South African schools and society. The plaintiff knows instinctively that the right to freedom of expression may be limited at school, yet she appears to lack the knowledge or understanding as to why that should be the case. In the quotation she offers two reasons in relation to the limitation at schools of the right to freedom. She notes, as some of the other respondents have, that the right to freedom of expression can be limited at school in regard to the respect and protection of the school's image. To my mind, this is a further indication of the influence of authoritarian indoctrination in schools. The question arises as to whether the emphasis on the school's image has not been exaggerated, since the image of the school does not ensure that the purpose and aim of the school will be attained. The school's image of uniformity was emphasised during the interview:

Yes, so the school can say O.K. you can wear a small badge and maybe decide together with the school which one would be suitable or something like that, and then everybody can wear that specific one 1:29 (525:528).

She indicated that the image of the school is important to her (as did other respondents), by stating that jewellery is not allowed at school: *But I think it is also because of jewellery and things like that. That is why the schools do say no 1:26 (494:495).* By disallowing jewellery because of their image and uniformity, schools limit the right to freedom of expression.

8.4.2 Limitation when offending

In the following quotation the plaintiff indicates, as did other respondents (see § 7.4.5) that the right to freedom of expression can be limited if a person offends someone in the process of exercising their right:

- *Some schools, I doubt if most schools would allow that, but personally I do not think so. Maybe privately he would be able to do that but other people also do see [sic] that nude painting and some people may feel offended 1:36 (722:725).*
- *No, for me personally I think you would not do that. Go speak to the person. Do not announce it like that. That is also where it comes to borders. You must know right from wrong and so personally, I would go up to the person and say what I feel about him and*

what he did wrong. You cannot say that person is bad and curse him, also not a teacher in the class. You cannot do something like that 1:45 (884:890).

The above quotation also refers to a person's right to dignity, which leads to limitation in terms of other rights.

8.4.3 Limitation in terms of other rights

The plaintiff also stated that a person should not, in the process of exercising their right to freedom of expression, violate or infringe any right of another person:

- *For me, the teacher would. I think he could take it further and say anything to that learner and go to the school governing body. Everybody needs also at the end of the day to respect each other. Accept each other's values and morals and don't degrade each other. It definitely plays a big role 1:46 (894:898).*
- *That is where the boundary is. Dignity is where the boundary is. Most schools say - personal values. You would know yourself you are doing wrong and treat people like you would like to be treated 1:47 (912:915).*
- *Freedom of religion is a big factor still in the community and in the world. People should know what they believe in. Be strong in what they believe in [sic] and act on that but also, they must do it with the values in what [sic] they believe in and go forward like that, and not infringe on other things as well 1:48 (932:937).*

One should respect other people's rights; therefore other rights may be used to limit or balance the right to freedom of expression. One may not violate other people's rights in the process of exercising one's own right.

8.5 MAKING SENSE OF UNDERSTANDING

It is interesting to note that although I expected the plaintiff to consider her rights more carefully than the other respondents from the previous two phases, the same pattern emerged during the in-depth interview with her. Although she was not confronted with the full spectrum of the right to freedom of expression, she also argued that the right to freedom of religious expression is absolute. She knows, however, that rights are not absolute and can be limited. Yet, as with the other respondents, she knows instinctively when the rights should be limited, and is not aware of which principles to apply or how to apply them when limiting the right to freedom of expression:

- *Where do you draw the line with the badge issue like you said? I do not know. I never saw that bringing the school down or the look image of the school down, or anything like that 1:27 (499:502).*
- *I really do not know what would happen with something like that 1:51 (756:757).*

This is also evident from her reply to a question regarding the wearing of punk hairstyles to school:

I do not know how far freedom of expression goes, but for us it is about religion and the way we do it and our way of life and how we express yourself [sic] so it falls under religion. I do not know if it falls under religion 1:23 (416:419).

Furthermore, she was unable to differentiate between rights, and mentioned that for her, the case was about her battle to assert her own right to freedom of religion and she had not even considered the right to freedom of expression: *That is why I did not think of it as two separate things 1:50 (301).*

8.6 CONCLUSION

This chapter is a reflection on the value of the experiences on the journey toward understanding. The data from the in-depth interview was crystallised with the data from the questionnaire and the focus group interviews and, despite minor differences, the findings echoed the same patterns. Respondents were found to be aware that the right to freedom of expression can be limited, but were unsure of how the limitations should be applied. The final chapter will contain a discussion of the findings and conclude with a number of recommendations.

Chapter Nine

CONCLUSIONS: Reflecting on the journey toward understanding

9.1 INTRODUCTION

The academic puzzle that drove my research was: What is learners' understanding of their right to freedom of expression? The main issue that interested me in this topic among many critical incidents at schools was the *Antonie* case ("Antonie", 2002) where the girl was suspended for wearing dreadlocks to school. Knowing that everyone has a right to freedom of expression, I wondered how far this right could stretch its authority and at what point and under which circumstances it could be limited, especially in schools. I wondered whether learners really understand the intentions of legislators and policy makers.

My working premises were that some learners:

- (1) have limited knowledge of their right to freedom of expression; and
- (2) do not know how to exercise their right to freedom of expression.

Under my first premise I assumed that most learners would:

- (1a) know that the right to freedom of expression entails the spoken word;
- (1b) know that the right to freedom of expression entails the written word; and
- (1c) not know that the right to freedom of expression entails symbolic or creative expression.

Under my second premise I assumed that most learners would:

- (2a) tend to absolutise the right to freedom of expression; and
- (2b) not know how to limit the right to freedom of expression (see § 2.5).

I subsequently embarked on a journey toward understanding learners' perceptions of their right to freedom of expression.

9.2 OVERVIEW OF MY JOURNEY TOWARD UNDERSTANDING

After being intrigued by substantially critical incidents at schools, where learners claimed that their right to freedom of expression had been violated ("Antonie", 2002; Ismael, 1999; Van Vollenhoven & Glenn, 2004), I considered the variables that could influence the implementation of the right to freedom of expression. This intriguing enigma compelled me to study the literature in an attempt to clarify my thinking. I was overwhelmed by all the information I found.

Firstly, I learnt from the literature that freedom of expression is regarded as the core of a democracy ("Handyside", 1976; Marcus, 1994; McQuoid-Mason, O'Brien, Greene, & Mason, 1993; Sachs, 1992; Wood, 2001). Human rights cannot prevail where the right to freedom of expression is violated. Secondly, I realised that all human rights are so important that they have been entrenched in bills of

rights in the constitutions of many nations (Bray, 2000b; Limbach, 2001; Van Vollenhoven, 2003), and in particular in chapter 2 of the South African Constitution. Knowing that human rights are guaranteed in the South African Bill of Rights, and that the right to freedom of expression is seen as the core right in a democracy, one would tend to believe that this right is absolute. The literature, however, indicates that human rights are not absolute and that they can be limited by means of other rights (Bray, 2000b; Malherbe, 2004). The value system that underpins a specific bill of rights is the norm in terms of which this limitation is exercised (De Waal *et al*, 2001). Chaos could result if human rights are absolutised, as people will act without considering the consequences of their deeds. Since the primary purpose of the law is to create order and harmony in society (Van Vollenhoven, 2003), the law should serve as a guideline on the implementation of these entrenched human rights. As the right to freedom of expression is viewed as a core right in a democracy, it tends toward the absolute. Even this core right cannot, however, be absolute, and can be limited under certain circumstances. The line between a limitation and a violation of this right is not patently clear. Authorities can easily "limit" this right, but in the process of limiting, actually violate it, thereby undermining the principles of a democracy or distorting the educational purpose.

Furthermore, this right is often associated with other rights, like the right to freedom of religion, belief and opinion; the right to assemble, demonstrate, picket, petition and associate. This means that a violation of any of the mentioned rights might constitute a violation of the right to freedom of expression.

I was surprised by the frequency of critical incidents in relation to this topic at schools, e.g. the cases involving Yusuf Bata (Pretorius, 1998), Danielle Antonie ("Antonie", 2002), Layla Cassim (Ismael, 1999) and Sunali Pillay (Broughton, 2005). I realised that learners probably do not understand the meaning of the right to freedom of expression and wondered whether learners interpret it correctly or whether school authorities have a misconception in this regard.

I decided to embark on a hybrid case study for which I would collect data in three phases in an attempt to try to understand learners' understanding of their right to freedom of expression (see § 2.6. and § 2.7). I used questionnaires during phase 1 to determine how widely learners regard the spectrum of actions protected by their right to freedom of expression. I realised on observing the data from phase 1 that learners do not know that the right to freedom of expression encompasses symbolic and artistic expression. In addition, many critical incidents that occurred in schools in regard to freedom of expression involved symbolic or artistic expression. In phase 2, I made use of focus group interviews during which I confronted the respondents with scenarios concerning symbolic or artistic expression. Phase 3 comprised an in-depth interview with the plaintiff in the *Antonie* case ("Antonie", 2002). I believed that a learner who followed through in suing her school would have a better understanding than other learners of what the right to freedom of expression encompasses. I selected a qualitative research methodology which I motivated in chapter 2.

The rationale for the study was constructed in chapter one (see § 1.4). The single incident that triggered my interest was the *Antonie* case ("Antonie", 2002). I discussed the variety of factors that could influence the implementation and understanding of the right to freedom of expression and began by explaining the historical development of the South African nation with its different cultures and the role, among others, of Calvinism and its traditions (see § 1.2). Although my intention was not to focus on cultural, historical or religious aspects of society, which influenced the authoritarian character of South African society, they are of importance to my study. This led to the formulation of the research question as to what learners understand under their right to freedom of expression. The question motivated me to embark on a journey toward understanding the perceptions of learners regarding the right to freedom of expression.

In chapter 2 I described the research strategies, participants, schools and sampling processes. A total of 89 respondents from five different schools completed the questionnaires (phase 1). During this exploratory phase, I intended firstly, to answer my first premise and secondly, to plot the way for the next phase. As I realised during phase 1 that learners do not know that they may express themselves symbolically or artistically under the right to freedom of expression, and because this is the area involving the most critical incidents in regard to freedom of expression, I decided to concentrate on symbolic and artistic expression during the focus group interviews in phase 2. With the data from both phases I could test my second premise. In phase 3 I conducted an in-depth interview with the plaintiff in the *Antonie* case ("Antonie", 2002) to crystallise the data from the first two phases.

I needed assistance to manage the volume of the data. To this end I utilised a CAQDAS programme, called Atlas.ti™. It proved to be an invaluable data-managing tool, enabling me to integrate ten primary data sets into three hermeneutic units (addenda A, B and C), to work with every quotation and response and to separate my two premises. In addition, I could work holistically in endeavouring to answer the research question. This enabled me to get a comprehensive overview of the strengths and weaknesses in my approach. The number of codes was overwhelming. After coding the data of phase 1, I recoded it to narrow the 690 quotations down to 245 codes for the first hermeneutic unit (addendum A). The second hermeneutic unit (addendum B) comprised 241 quotations and 52 codes while the third (addendum C) comprised 51 quotations and 25 codes. The data-managing process helped me categorise the data from the codes into categories, which were then clustered into families. Through this process certain patterns crystallised to assist me in answering the research question.

In chapters 6, 7 and 8, I presented the research findings as revealed by an inductive analysis of the data. After coding the raw data, the codes were clustered into categories. These categories represent the different modes of expression which were again clustered into three families, viz. verbal expression, non-verbal expression and symbolic or artistic expression. The interpreted data evolved into two main patterns, indicating that some learners seem to absolutise their right to freedom of expression, while those who know that the right to freedom of expression can be limited are unsure of

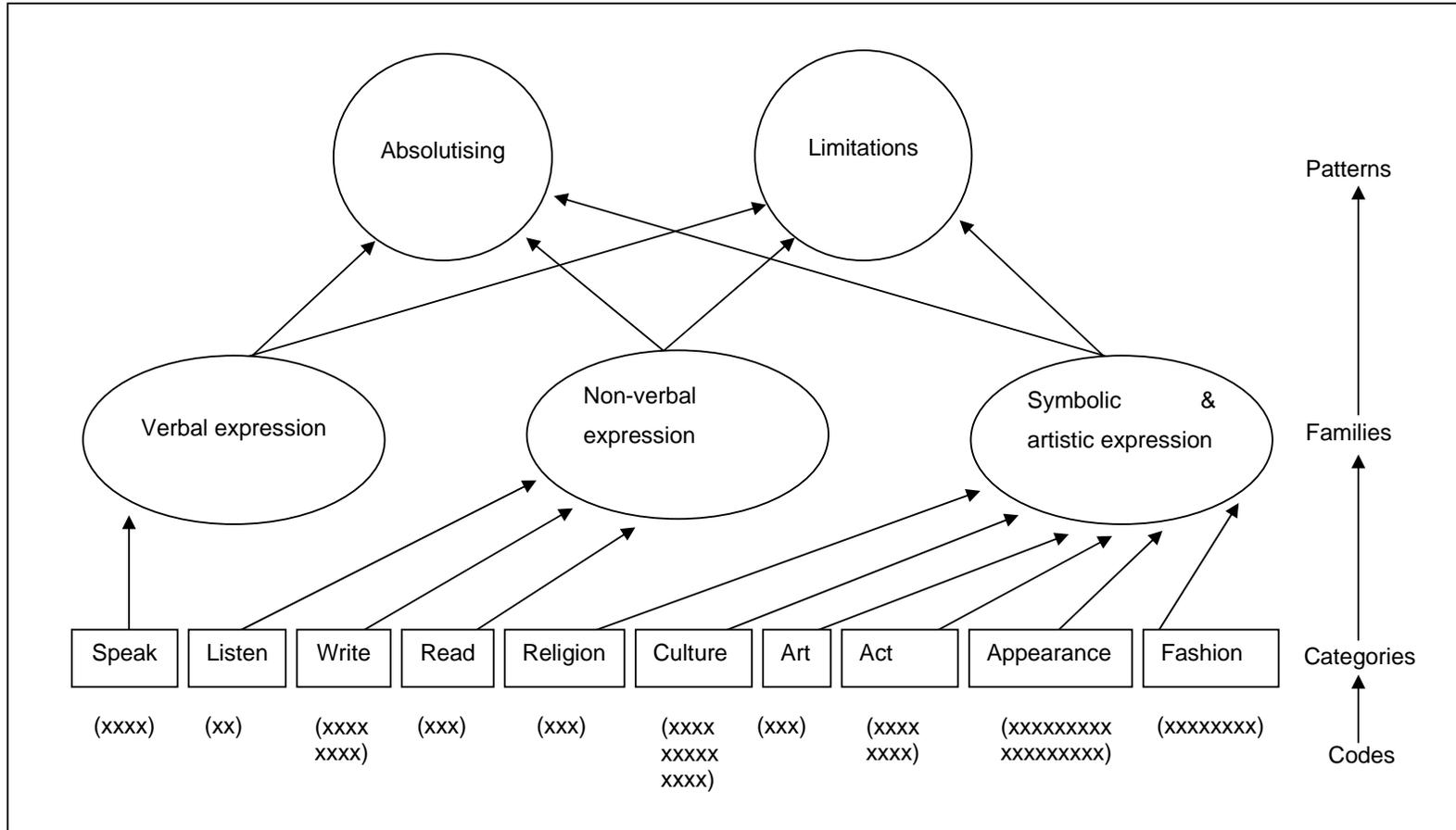


Figure 9.1: Depicting the categories, families and patterns as evolved from the data interpreted

how and when to implement the right and do not know how it can be legally limited. Figure 9.1 provides an overview of the process that was followed.

I conclude hereafter, with the key findings which reflect the fact that learners do not have a clear understanding of the implementation of their right to freedom of expression.

9.3 RELIABILITY AND VALIDITY

As my epistemological stance is that there is no single truth, but that truth is constructed in real life and that people interpret their own truths, the validity too, is vested in the interpretation of real-life situations. The question to be answered is whether I researched what I thought I was researching. The validity of the research is proved by the crystallisation of the data from the three phases, which represent the respondents' understanding of the data and their way of interpreting it. I used the respondents' understanding as a basis for constructing my own understanding.

My epistemological philosophy is underpinned by a post-modern approach, as I do not believe in an objective world. People give meaning as they interpret real life, thus giving their own truth to their understanding of the world (Denzin & Lincoln, 2002). Believing that individuals construct their own understanding from the reality around them, I made a point of summarising what the respondents said during both the focus group interviews and the in-depth interview. In this way I checked my interpretation of their understanding with the respondents to ensure objectivity and reliability. Furthermore, I verified the raw transcribed data by showing it to the respondents. As validity became problematic in the paradigm in which I was working, I used crystallisation among the three phases of data and data collection instruments to validate the data and findings. I gathered data from multiple voices during the three phases of data collection. The fact that the same patterns developed in the three phases is the main validation aspect of crystallisation in my study.

The trustworthiness of the research was ensured by measures such as the participation of ten critical friends in prioritising the scenarios (addendum R), availability of all the data sources in the addenda, and the cross referencing of findings. This enhanced objectivity in the sense that if I had selected the scenarios myself, an element of subjectivity could have resulted. The objectivity was further ensured by the fact that a subject specialist chose the five schools in the purposive sample.

Concurrent validity was achieved with the crystallisation of the rich and depth data received in the three phases.

9.4 MAIN FINDINGS

I have categorised the findings according to my two premises and will therefore first discuss the findings regarding the spectrum of the right to freedom of expression before I focus on the findings concerning learners' knowledge about exercising the right to freedom of expression.

9.4.1 Understanding the spectrum of the right to freedom of expression

The first hermeneutic unit (addendum A), along with phase 1, indicated that some learners are not aware of the spectrum of the right to freedom of expression, although most learners are aware of the fact that they can speak their minds under the right. Only a few realised that the right to freedom of expression includes non-verbal, as well as symbolic and artistic expression. My assumption that most learners would know that the right to freedom of expression encompasses the spoken word, was substantiated since 80% of the respondents indicated that they know they can speak their minds.

The second assumption, that most learners understand that they can write their opinion under the right to freedom of expression, was not substantiated. The third assumption, namely that most learners do not know that the right to freedom of expression includes symbolic and artistic expression, was substantiated.

Although the second assumption was not substantiated, it actually served to substantiate my first premise, viz. that some learners have limited knowledge of their right to freedom of expression. Of the respondents 80% know that they can speak their mind under the right to freedom of expression. Yet, only a few know that the right to freedom of expression includes non-verbal, as well as symbolic and artistic expression.

9.4.2 Learners do not know how to exercise the right to freedom of expression

In terms of my second premise I found that some learners do not know how to exercise the right to freedom of expression. This premise was substantiated by means of the first two hermeneutic units (addenda A and B) and the data from the first two phases. It also crystallised with data from the third hermeneutic unit (addendum C) from phase 3.

9.4.2.1 Absolutising the right to freedom of expression

Many reasons can be given in order to explain why some learners seem to absolutise the right to freedom of expression. It appears that the lack of respect for human rights in South Africa before 1994, coupled with the fact that South Africa is still a young democracy, has led to a tendency among some learners to absolutise their newly found rights. Knowing that the rights are entrenched and fully guaranteed in the Bill of Rights of the Constitution (Limbach, 2001), learners absolutise the right to freedom of expression. They fear no consequences, irrespective of what they express, where and when they express themselves, or whom they address and in what manner they express themselves. This is similar to rebellious teenagers who rebel against the strict rules in their parents' houses. When they "break loose", they have no knowledge of how to balance their newly found freedom, often emerging from a very strict Calvinistic, traditional or Muslim background where authority was not questioned, or from a political system which denied human rights. They seem to lose track of the concomitant responsibilities and the fact that other people's rights also need to be respected.

9.4.2.2 Learners are unable to differentiate between rights

Some learners seemed unable to differentiate between the different rights in the Bill of Rights, i.e. learners are aware of the fact that they have fundamental and constitutionally protected human rights, but do not understand them and find them vague (see table 6.2).

9.4.2.3 Absolutising religious expression

There is a tendency among most respondents, also those that know that the right to freedom of expression can be limited, to believe that the right to freedom of religious expression is absolute and can under no circumstances be limited. There can be different reasons for this perception. Firstly, one can expect the Muslim to believe that the right to freedom of religious expression is absolute, as this is in line with the Shari'ah law which they view as higher as the Constitution (see § 3.2.5) (Moosa, 1998). When considering the values that underpin the Constitution one realises that there is a notion in the new democratic South Africa characterised by a multi-cultural society to be tolerant of other cultures. People have become so aware of the fact they should not discriminate and should tolerate and live in harmony, that they will for instance, rather absolutise the right to freedom of religious expression than balance it with other rights. In this regard, Judge Sachs indicates that learners cannot claim, for instance, to wear religious attire to school because of their right to freedom of religious expression. He also states that "... the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law" ("Christian Education South Africa v. Minister of Education", 2000, p. 779). The same argument is contained in the Draft National Guidelines on School Uniform. The way that religious expression is worded in the Guideline indicates the notion that religious expression is indeed absolute:

Protect pupils' Religious Expression

- d. A school uniform policy must accommodate pupils whose religious beliefs are substantially burdened by a uniform requirement.
- e. When wearing particular attire, such as yarmulkes and headscarves during the school day is part of pupils' religious practice; under the Constitution schools generally may not prohibit the wearing of such items (RSA, 2005, p. 8).

As the absolutising of the right to freedom of religious expression was already contested in *Christian Education South Africa v. Minister of Education* ("Christian Education South Africa v. Minister of Education", 2000), the signals authorities send out in this regard are confusing and might sooner or later lead to yet another court case. The assumption that some learners seem to absolutise the right to freedom of expression is substantiated by the data.

9.4.2.4 Limiting the right to freedom of expression

Some learners do know that the right to freedom of expression is not absolute and can be limited. This is encouraging, but on perusing the data more closely, I realised that, although some learners are aware of the fact that rights can be limited, the area of limitation is extremely vague to them. They do not give it much thought and act instinctively, or are indoctrinated by authoritarian society.

Some learners highlighted the following criteria for limiting the right to freedom of expression:

- in order to have order and control;

- by the school code of conduct;
- in terms of place;
- in terms of time;
- in terms of age;
- by the educational purpose;
- for practical reasons;
- when someone offends; and
- in terms of other rights.

Although the above-mentioned are stipulated as criteria which could limit the right to freedom of expression, the implementation of the limitation remains vague. The respondents do not understand the legal principles that can assist them to implement the limitations. It seems that they are inclined to limit every incident on its own merit, using the school code of conduct and the school's image as the two main criteria to limit the right to freedom of expression.

The second assumption under my second premise, viz. that some learners do not know how to limit the right to freedom of expression, was substantiated. The fact that some learners still seem to absolutise the right to freedom of expression and are unaware of how to limit it, substantiated my second premise.

9.4.2.5 Authoritarianism in schools

The authoritarian philosophy still, to a large extent, influences the school structure and educational system in South Africa. Since the school code of conduct is still the "supreme law" at schools, learners are still, in general, largely ignorant of their right to freedom of expression. Those who are aware of it are uncertain of the manner in which to apply it.

9.5 IMPLICATIONS OF FINDINGS

I shall now discuss the implications of the findings in terms of my two premises, viz. that learners are not aware of the full spectrum included under the right to freedom of expression and do not know how to exercise the right to freedom of expression. The implications of the findings will support the learners' theoretical understanding of the right to freedom of expression.

9.5.1 Spectrum of the right to freedom of expression

The finding that learners are not aware of the whole spectrum included under the right to freedom of expression implies that learners will be unable to exercise and use this right to its maximum extent to develop to their full potential as individuals. Since the right to freedom of expression is a core right in a democracy ("Handyside", 1976; Marcus, 1994; McQuoid-Mason, O'Brien, Greene, & Mason, 1993; Sachs, 1992; Tribe, 1988; Wood, 2001), this could create a distorted society with an impaired democracy in which citizens cannot adequately participate. Therefore learners should develop the skill of implementing the right to freedom of expression practically at school in order to be able to fulfil their

place as citizens in society, and to enhance democracy. The findings are clear; viz. learners are confused about the right to freedom of expression and unsure of how and when it should be implemented. The question arises as to what the future holds for the next generation regarding the success of democracy, if the leaders of tomorrow are not trained to be responsible citizens.

9.5.2 Exercising the right to freedom of expression

The implications of the findings will be discussed in terms of the absolutising of the right to freedom of expression and then in terms of limitations of the right to freedom of expression.

9.5.2.1 Absolutising the right to freedom of expression

The fact that some learners seem to absolutise the right to freedom of expression is an indication that schools do not teach them about the basic implementation of human rights. This implies that the authorities do not fulfil the educational purpose as required in a democracy and this could result in the abuse of the rights of others by people who exercise (absolutise) their rights. Citizens are not taught to respect other's rights and are ignorant of the responsibilities in regard to specific rights. This tendency is not in agreement with the values of human dignity, equality and freedom that underpin the South African democracy, because the absolutisation of rights debases the value system.

9.5.2.2 Limiting the right to freedom of expression

Some respondents are aware of the fact that because human rights can be limited, the right to freedom of expression can also be limited. I shall now discuss the implications of these findings in terms of criteria that limit the right to freedom of expression.

- **Limitation to control**

Some learners' understanding that the right to freedom of expression can be limited in order to control, indicates an understanding of the basic purpose of the law, viz. to establish order and harmony in a society. The absolutisation of rights could lead to chaos as people could then claim to have a right to do anything without fearing the consequences. The concern is that the school's code of conduct or image would be the reason for the limitation. The literature indicates that rights should be limited, because the Constitution is supreme, i.e. nothing should contradict the Constitution. Hence, based on an open and democratic society, rights should be limited to ensure respect for the human rights of all citizens. The tendency among learners to exaggerate the limitation of the right to freedom of expression in order to control indicates the level of indoctrination as a result of the school system, i.e. to defer to school rules rather than to the Constitution.

- **Limitation by means of the school code of conduct**

Many respondents indicated that the right to freedom of expression can be limited by means of the school code of conduct. The code "to obey school rules" was assigned the most (58 times). There is a strong tendency among the respondents to absolutise the school code of conduct. The moment a

fundamental human right is not exercised in agreement with the school code of conduct it may be limited:

*The school is against hair that stands in all directions. It must be tied and combed, cut behind the ears for boys, but the point remains: the school has the rule and she needs to obey. On the other side, she has a right to expression or religion but the school rule does not allow it*¹⁶¹
1:309 (958:964).

This implies that respondents seem to absolutise the school code of conduct rather than the rights in the Bill of Rights. They argue that they have the right to freedom of expression everywhere, but not at school. This indicates that authoritarian indoctrination is still a major influence in the South African school system. Although South Africa has one of the most advanced constitutions in the world, learners have not yet learned to question authority.

This notion echoes the importance of the code, "image of the school" which was assigned 51 times. Learners appear to be so indoctrinated to conform for the sake of the image of the school that they dare not differ from the norm in any respect. The implication of the indoctrination is that learners do not develop the skill of critical thinking, a prerequisite for a democracy. Schools ostensibly teach learners to be individualistic, but in practice they punish them if they do not conform. This will result in a society that does not question authority. Such a society will not reflect the values of democracy.

- ***Limitation in terms of time and place***

Respondents indicated that although they have a fundamental, protected human right to freedom of expression, the right can be limited at certain times and in certain places, i.e. during school time and at school. This is reflected in the literature that indicates that the right to freedom of expression can be limited in terms of time, place, manner and content ("Fraser", 1986; Marcus, 1994; Suttner, 1990). The implication of this yet again, is absolutisation. Although the right to freedom of expression can be limited in terms of manner, because one must not violate the right to dignity of a person, or in terms of school or during school time, as the school has an educational purpose to achieve, this right cannot be limited only because it is unpopular. People may question it, and in the process enhance the principles of democracy. Schools can easily misuse their educational purpose to violate the right to freedom of expression because they dislike the expression, and in the process distort the development of the individual and democracy.

- ***Limitation in terms of age***

Some learners understand that age is a variable that can limit the right to freedom of expression and this implies an understanding of the maturity of the minor, which develops as the learner grows older. This means that the older the children, the more responsibilities they have, the more they can exercise their right to freedom of expression, and the less the right to expression may be limited. A further implication, which is a purpose of the school system, is to teach the principles of good citizenship, i.e.

¹⁶¹ Die skool is teen hare wat so staan. Dit moet vasgemaak word en dit moet ordentlik gekam word, agter die ore gesny word vir die seuns, maar die punt is, die skool het daardie reël en sy moet dit doen, maar O.K. aan die ander kant dit is haar grondwetlike reg tot uitspraak of godsdiens dat sy dit mag doen, maar die skool se reëls sê jy mag dit nie doen nie.

the right to freedom of expression, so that the mature citizen will be able to take full responsibility in exercising this right in a democracy. Because of its educational purpose and the fact that learners are minors, the right to freedom of expression can be more easily limited at school than at any other place. School authorities, however, should be careful of violating this right and consequently not achieving the educational purpose of enhancing a democracy.

- ***Limitation in terms of the educational purpose***

The fact that respondents seem to absolutise the school code of conduct can be explained in terms of the school's educational purpose. There are amongst others, two functions of education that are significant in this regard. The first is the socialisation function. This function views education as a tool for cultural transfer from certain groups to the individual in order for the individual to function adequately in the social groups in society. The second function is the qualification function, which refers to the acquisition of skills and knowledge, which are prerequisites for access to the employment market (Akkermans, 1994). The school's main purpose is to develop minors into adults who can fulfil their place and take up their responsibilities in society (Clayton & Tomlinson, 2001; Gordon, 1984). Therefore the implementation of the right to freedom of expression in schools is complicated. As schools deal with minors, who lack *iudicium* (judgement), and need to achieve the educational purpose, behaviour that is not limited outside the school may indeed be limited at school to ensure the realisation of the educational purpose. The responsibility is vested in the school authorities. Since the school has an educational purpose, it is easy for school authorities to limit the right to freedom of expression at schools. Yet, if the right is limited too easily, for instance when expressing an unpopular view, it will work against the fulfilment of the requirements of a democracy.

- ***Limitation when offending***

The learners who know that the right to freedom of expression may be limited, agree that it can be limited when someone is offended. Once again, this point of view echoes the notion of authoritarianism, because as the literature indicates, an expression implies *per se* the possibility that someone might be offended. People's opinions differ and they could be offended by one another's expression. Therefore, only something that is legally obscene is limited under the right to freedom of expression. Expression invites dispute and has the potential to offend someone ("Lehman", 1974). While learners are minors and while schools have an educational purpose, the right to freedom of expression is more open to limitation inside, rather than outside, the school grounds. The data indicates that learners are not really aware of the fine balance and how to implement such limitations and appear to rather do it instinctively, based on their indoctrination by the authoritarian school code of conduct and the image of the school rather than applying legal principles.

- ***Limitation by means of other rights***

Some learners understand that the right to freedom of expression should be balanced against the rights of other people. This is reflected in the literature and indicates an understanding that some learners seem to understand how limitations of rights work in practice.

9.5.3 Respondents' theoretical understanding

The theoretical understanding of the respondents seems vague, e.g. in regard to the implications of the supremacy of the Constitution. Those who understand the supremacy of the Constitution seem to absolutise the right to freedom of expression. There is not a clear understanding of the interrelationship between the Constitution and subordinate legislation, e.g. the school code of conduct. As minors in a specific school system, they seem to have been indoctrinated into believing that the school's code of conduct is the supreme law at school. They acknowledge the principle that every place requires an own set of rules in order to ensure harmony and order, e.g. school rules and house rules. They however, fail to see the interrelationship between such rules and the Constitution. Practice and example may have indoctrinated them to the extent that they do not even argue or try to exercise their right to freedom of expression when they disagree with rules.

Consequently the future of a healthy democracy is in danger. School authorities manipulate learners to the extent that every expression that differs from the norm is seen as a violation that is not tolerated. Learners are taught that they have to respect one another and must conform to the acceptable norm to fit in with the image of the school. This is illustrated by the controversy about religious expression.

Since many learners tend to absolutise the school code of conduct, religious expression is not allowed at all. Others, who realise that tolerance is one of the values that underpin the Constitution and democracy, argue that the right to freedom of religious expression should not be limited (this code was assigned 43 times). These learners seem to absolutise the right to freedom of religious expression, but have to defer to the school's image of uniformity. It is exactly this imbalance regarding the right to freedom of religious expression that leads to critical incidents or even lawsuits. Other learners again, realise that institutions are allowed to have own images and cultures and that rights could be contrary to these. Their solution is to be subtle in exercising the right to freedom of religious expression.

Learners balance the right instinctively and are influenced by the wide spectrum of knowledge about the supremacy of the Constitution, the Calvinist background, the authoritarian culture, the importance of the school code of conduct in order to control and the school's image, and the lack of legal principles to apply. Even though the right to freedom of expression has an inherent limitation as guide, hardly anyone refers to it or indicates that they are aware of it. This has resulted in everyone exercising the right to freedom of expression in their own way, according to their own interpretation of the Bill of rights, resulting in critical incidents and even court cases.

An educational system that is too prescriptive and rigid does not have space for different views or opinions as only the prescribed ways are the norm. Such a normative educational process suppresses the inquisitive mind and does not enhance critical thinking, which is a prerequisite for a dynamic democracy. Traditions, e.g. school dress codes and school image that do not really contribute to the educational purpose of schools should be abolished as they form part of the hidden curriculum of an

authoritarian culture which does not enhance the dynamic development of a democracy in which human rights prevail.

9.6 SIGNIFICANCE OF THE STUDY

While knowing that the implementation of freedom of expression will pose challenges to school managers in balancing everyone's rights, I focused on what learners understand under their right to freedom of expression, as this may alert authorities to learners' expectations and perceptions of the right. Since the rights entail such a wide spectrum of nuances, I focused on learners' understanding of their right to freedom of symbolic and artistic expression, which includes their understanding of their grooming, dress, jewellery and artistic creativity.

This research could assist authorities to realise how learners understand the right to freedom of expression, which could guide them in the development of policies to ensure that the right is respected and balanced correctly.

With reference to the interpretive significance of the findings, my study has expanded the body of knowledge by documenting a hybrid case study from a province in a developing, ten year-old democracy. After ten years in the "new" democracy, learners are aware of human rights, but still need to learn to differentiate between the rights and to balance the rights with one another, using the values that underpin the Constitution. The notion that the right to freedom of expression is the core right in a democracy is not acknowledged in the implementation of this right in South African schools. The authorities need to address this threat to democracy.

Another significant phenomenon is the realisation that learners perceive the school code of conduct as the supreme law at schools. I believe that this perception originates from the authoritarian character still unexpectedly rife in schools. As indicated in § 1.2.1 South African society is characterised by an authoritarian style which originated in different spheres, e.g. the Calvinistic Eurocentric influences, the traditional patriarchal system and the Muslim religion with its Shari'ah law. This notion of an authoritarian culture hampers the development of a vibrant and dynamic democracy and needs to be addressed by government, school authorities and educational planners.

9.7 LIMITATIONS OF THE STUDY

Although I planned my journey toward understanding meticulously and considered many variables, I experienced some hurdles during the journey. This forced me to change the original journey plan during the process of the research.

One of the limitations of my study was the number of respondents. I anticipated using the respondents of five register classes (one at each of the sampled schools) for the questionnaires in phase 1. This would have provided 100 to 150 respondents. On my arrival at the schools, I found that a number of learners' consent forms had not been submitted. Interestingly, they each time assured me that they

wanted to participate in the research and that the absence of the consent form would not deter them. I explained the legal consequences and continued only with the respondents whose consent forms had been collected. This left me with 89 respondents for the questionnaires in phase 1. As the research was qualitative, this did not seem problematic in regard to the findings.

At one of the schools I realised that the class did not understand what I was talking about when I introduced myself and explained the confidentiality of the research. I then realised that I was with the wrong class. On realising then that only five respondents in the other class had returned their consent forms, I explained the research to the new class and asked them whether they wanted to participate. I returned the next day to supply them with the consent forms and returned two weeks later to conduct the questionnaire.

During phase 2 punctures, figuratively speaking, took up a substantial amount of my time. I conducted the focus group interviews at the five schools and on listening to the tape recordings to transcribe the data, realised that the sound quality of three of the five interviews was too weak to use. I had to return to the schools to re-do the interviews. The original interviews were done in August 2004. As schools do not allow fieldwork during the first and last terms of the year, I could return only in April and May 2005 for the interviews. I could not use the same learners as before as this would invalidate the findings, besides, those learners were in grade 12 by that time. I had to arrange consent forms for new respondents from the grade 11 group. Yet another puncture occurred - one of the interviews was accidentally deleted. This left me with four focus group interviews to transcribe and interpret. Furthermore, although I had planned to have five respondents in every focus group interview, some learners were absent on the day. I had five respondents in one focus group and four in each of the other three. The number of respondents for the phase 2 was 17.

Another problem that surfaced was that after I had coded the questionnaires, my computer needed to be upgraded. In the process I lost all the encoded data in Atlas.ti™. I had to start all over again. I managed to gain more insight into the data as I was forced to work with the raw data again.

Despite the mishaps, I received rich data. I definitely would have experienced further problems in managing all the data, but fortunately Atlas.ti™ assisted me with the management process. I initially coded in great detail, but redid it to reduce the number of codes to 245. Using Atlas.ti™ I categorised the codes into categories and the categories into families. From the families I deduced the patterns. Seeing that I had chosen an interpretivist paradigm, I attached meaning to the data on the basis of relationships within the families. It is, however, possible that another researcher would have seen different relations and focused on them. I structured my findings from my understanding of the respondents' creation of the reality as they experienced it.

9.8 RECOMMENDATIONS

When conducting qualitative research, the intention is not to generalise or find solutions to global problems. I therefore have no intention of generalising, but rather contextualising, i.e. in regard to the South African public school system concerning the right to freedom of expression (Adler, 1996).

9.8.1 Theoretical recommendations

The aim of outcomes-based education is to prepare learners to be critical and skilled citizens who can fulfil duties in a democracy. This aim, however, cannot be realised in an authoritarian system. The making of decisions according to the values that underpin the Constitution must enhance the culture of democracy, i.e. the skill of decision-making should be developed at schools in terms of the values that underpin the Constitution. This is only possible if the right to freedom of expression is understood and respected by all the stakeholders at schools (see § 9.8.2).

9.8.2 Recommendations for practice

During my exploration of the avenues toward a better understanding and application on school level of the right to freedom of expression, I identified the following issues, which, unless addressed, could result in serious complications.

- The school curriculum should be responsible for teaching and enhancing the culture of human rights in schools and society. Awareness should be created from an early age, not only concerning the right to freedom of expression, but regarding all constitutional human rights. Therefore human rights should be taught at schools as a compulsory subject in order for learners to know what human rights entail, as well as understand the corresponding duties and responsibilities and how to balance these rights in practice.
- The right to freedom of expression should be taught as a core right in a democracy, teaching learners not only to respect one another, but also to be critical citizens. This will contribute to a vibrant and dynamic democracy.
- Learners should master the art of speaking out, debating their rights in a classroom situation and should be equipped to defend their rights, not only against their peers, but also their superiors, without acting disrespectfully. Practical assignments involving the exercising of human rights are highly recommended, as this is a skill that needs to be developed. If this skill is not developed, the shackles of authoritarianism will remain and democracy will stagnate and lose among others, its right to freedom of expression.
- Compulsory school uniform should be abolished in public schools as it symbolises authoritarian and Calvinistic indoctrination which distorts the development of democracy. Preserving the school image has become an important aim of schools and diminishes the realisation of the educational purpose, i.e. to guide learners to become adults who can fulfil their duties as citizens according to democratic principles.
- Like the Constitutional Court, a human rights court for schools (similar to equality courts) should be introduced to investigate the abuse of rights in schools. The nature of the school

environment is so unique and precious to our society that it requires a more lenient approach on the level of the learner.

- The Department of Education should give school authorities clear and specific guidelines in balancing the right to freedom of expression. The right to freedom of expression can be limited at schools if it:
 - disrupts the school or educational process;
 - poses a danger;
 - slanders or infringes someone's right to human dignity;
 - violates other rights of others; and
 - is not in line with the educational mission of the school.

The belief that learners should not speak out in certain school situations is outdated. The above recommendations pave the way to a practical and constitutionalised interpretation of the *audi et alteram partem*¹⁶² legal principle, which will ensure that human rights are mutually respected.

9.8.3 Future research

One of the purposes of qualitative research is to generate hypotheses for future research (Yin, 1984). From my study, two patterns developed from the beginning of the data analysis to the end. These patterns generated two hypotheses to be tested by means of future quantitative research. The two hypotheses generated are:

- learners absolutise the right to freedom of expression; and
- learners do not know how to exercise the right to freedom of expression.

When dealing with qualitative research, one of the biggest challenges is to focus and not be distracted by the interesting research possibilities that arise during the investigation. This research has proved that learners do not have sufficient knowledge of their right to freedom of expression and that they do not know how to exercise the right properly. I propose the following questions for future research on this topic:

Topic 1: The teaching of human rights in schools

- How is the teaching of human rights in schools structured to support the value system underpinning the Constitution?
- What are the influences of cultural, religious and historical backgrounds on the teaching and establishing of a culture of human rights in schools?
- How can human rights principles be established in schools?
- How can human rights be taught to ensure that every specific right, including what it entails and how it should be implemented in practice, is understood?

¹⁶² The other side must be heard.

Topic 2: The right to freedom of expression at schools

- How can the right to freedom of expression at schools be balanced with the school's educational mission without posing a threat to the development of democracy?
- How does one balance the right to freedom of expression with the educational purpose of the school?
- How does one balance the right to freedom of expression with the school's image?
- To what extent does the educational purpose of the school pose a threat to the development of the right to freedom of expression and *vice versa*?
- To what extent does school image pose a threat to freedom of expression at schools and to the development of democracy?
- What is the influence of Calvinism on developing the right to freedom of expression?
- What is the influence of authoritarianism on developing the right to freedom of expression?
- What is the influence of Shari'ah law on the development of the right to freedom of expression in schools?
- What do educators' understand under their right to freedom of expression?
- To what extent is the right to freedom of expression viewed as a core right in South African schools?
- What is the understanding of learners in private schools of their right to freedom of expression?
- What is the understanding of students in the higher education sector of their right to freedom of expression?

Topic 3: The right to freedom of religion

- How is the right to freedom of religion balanced with other rights in schools?
- To what extent is the right to freedom of religion viewed as a core right in schools?
- What is the interrelationship between the right to freedom of religion and the supremacy of the Constitution?
- To what extent is there a relationship between the right to freedom of religion and the right to freedom of expression in schools?

Topic 4: Values

- How should the culture of values that underpin democracy be enhanced in schools?
- How do values influence the teaching of human rights in schools?
- How do values influence the implementation of human rights in schools?
- What is the influence of Calvinism on the development of the value system that underpins the South African democracy?

After completing the research I am certain that there are still many unanswered questions and there is a need for further research in order to enhance the development of the South African democracy, especially concerning the place of the right to freedom of expression in this regard. It would be

wonderful if government could sponsor these critical research topics. I, for one, would be enthusiastic to embark with other scholars and post-graduate students on these research topics.

9.9 EPILOGUE

In this chapter, I have presented my interpretation of learners' understanding of their right to freedom of expression. Although not all my assumptions were substantiated, my two premises were substantiated. Some learners are not aware of the spectrum implied by the right to freedom of expression, which is perceived in the literature as the core right in a democracy, and they do not know how to exercise the right. The most alarming aspect of these findings is the fact that eleven years into democracy, learners are still not aware what the right entails or how to balance it in a school situation. This does not augur well for the future of the democracy. One can further argue that the school system has failed in its educational purpose of developing minors into adults who can fulfil their duties as citizens in a democracy successfully.

I have concluded my research with a number of recommendations, indicating a field that still requires research, as it is clear that young citizens do not have sufficient knowledge of human rights and democracy. A respondent described this perception succinctly during the focus group interview: “ ... *one knows one's basic rights, but you [sic] don't know all of them in detail ...*”¹⁶³ 1:315 (1059:1061).

The onus of achieving a harmonious society rests heavily on the authorities, who need to exhort the issue of human rights, and particularly the right to freedom of expression amongst learners, to ensure the survival of democracy. My vision is to revisit this research area in five years' time; hopefully to interview a fully informed learner who has learnt to balance freedom of expression and other rights in democracy. A knowledgeable learner will develop into a responsible citizen and protagonist who will rather respect the human rights of fellow citizens than care for the horses in the streets. If this is the case, Madame Campbell's words will no longer apply to the latitude of protection the courts provide in regard to freedom of expression in South Africa (see § 1.1).

She would then possibly say: “I don't care what the horses do, so long as the people can express themselves”.

¹⁶³ Jy ken jou basiese regte, maar jy ken ook nie almal in detail nie.

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ADDENDUM D: QUESTIONNAIRE FOR PILOT STUDY

VRAELYS

FASE 1:

1 Volgens artikel 16 van die Grondwet van die Republiek van Suid-Afrika, het almal 'n reg tot **vryheid van uitdrukking**.

1.1 Wat beteken **vryheid van uitdrukking** vir jou?

1.2 Wat dink jy mag jy alles doen onder die beskerming van jou reg tot **vryheid van uitdrukking**?

1.3 Wat dink jy sal jy toegelaat word om te doen (of nie te doen nie) by die skool onder jou reg tot **vryheid van uitdrukking**?

Addendum E: Posing Questions for the Focus-group Interview (Phase 2)

Phase 2: Posing Questions

Scenario 1:

Jonathan is a grade ten pupil at Achievement High School. He was suspended from school because he wears a golden sleeper in his left ear. The Code of Conduct for learners specifically mentions that girls are allowed to wear a golden stud or sleeper in their ears. Jonathan is suing the school for infringing his right to freedom of expression.

Posing questions:

- 1 Do you think Jonathan will have a strong case in the court?
Discuss.

Scenario 2:

Bianca is a grade eleven learner at New Life Secondary School. She embraced the principles of the Rastafarian religion. She, in line with this religion, grew her hair in dreadlocks and covered her hair with a cap. Although she knew that this was not the way to wear hair to school, she asked permission from the principal to do this. Believing her right to freedom of religion and expression was infringed; she attended school wearing a navy cap because this matched the prescribed school colours. The navy cap covered her dreadlocks. Bianca was suspended for five days for serious misconduct because she disobeyed the Code of Conduct for learners and disrupted the school. The Code of Conduct stipulates that hair should be neat and tidy. It did not specifically mention the growing of dreadlocks or the wearing of headgear.

- 1 According to section 4.5.1 of the schedule, issued by the ministry of Education, which deals with guidelines for consideration of SGBs in adopting a code of conduct for learners:

“Freedom of expression is more than freedom of speech. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles”

Would the schedule support Bianca’ argument in court that her right to freedom of expression was violated by the school?

- 2 Do you think the school violated Bianca’s right to freedom of expression?
- 3 Do you think the school can legally limit Bianca’s right to freedom of expression? Give reasons for your answer.

Scenario 3:

Riverside High School's ethos is based on Christian principles. They have a very strong Christian religion association where learners can freely participate in prayer and worship ceremonies during break time. The members of this association wear a badge on their uniform to witness to fellow learners.

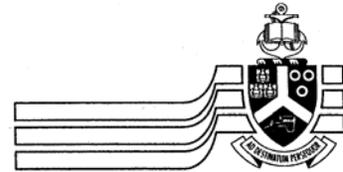
Rebotile, a grade eight learner, was suspended from school for wearing a badge on her uniform to promote Satanism. She sues the school claiming that her right to freedom of expression was violated.

- 1 Do you think the school may allow the wearing of only badges for the Christian organisation?
- 2 Do you think Rebotile has a strong case in the court?
- 3 What do you think would be the best precaution that the school can take in order to prevent being sued for cases like this?

Addendum F: Posing Questions for the In-depth Interview (Phase 3)

In depth interview with the plaintiff in Antonie v Governing Body Settlers High School, and others

- 1 In looking back at the court case, do you think it was worthwhile going through the whole ordeal?
- 2 Although you primarily felt that your right to freedom of religion was violated, was your right to freedom of expression also violated?
- 3 Why do you think that your right to freedom of expression should be protected?
- 4 Was your right to freedom or expression / religion not in contrast with the ethos of the school?
- 5 Do you think it would be fair to limit learners' right to freedom of expression?



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Fakulteit Opvoedkunde
Skool vir Opvoedkundige Studies
Departement Onderwysbestuur en Beleidstudie

Addendum: G Parents' Consent Form

Geagte Ouer

Ek is 'n voltydse dosent in die Fakulteit van Opvoedkunde se Departement van Onderwysbestuur en Beleidstudie by die Universiteit van Pretoria.

My vak is Onderwysreg. Ek is tans besig met my doktorale studies. Die titel van my skripsie is: ***“Learners’ understanding of their right to freedom of Expression.”***

Vir fase 1 van my data-insameling moet 'n gr 11-klas van 5 geïdentifiseerde skole, vraelyste invul.

Vir fase 2, gaan ek met 8, gr 11 leerders per skool 'n fokusgroeponderhoud voer en vir fase 3 sal ek met 1 of 2 leerders per skool 'n persoonlike onderhoud voer.

Die doel van die studie is eerstens om my studies te voltooi maar ook om vir beleidmakers aan te dui wat skoliere onder hulle grondwet beskermde mensereg van vryheid van spraak verstaan. Die inligting mag beleidmakers help om proaktiewe beleid in plek te stel om sodoende te verseker dat leerders se reg tot vryheid van spraak nie in skole geskend word nie.

Die skole en name van respondente is vertroulik en sal nêrens in my tesis vermeld word nie.

Geliewe asseblief die toestemmingsbrief te voltooi, sodat u kind aan die projek mag deelneem.

Willie van Vollenhoven
Departement Onderwysbestuur en
Beleidstudie

Toestemmingsbrief vir data-insameling

Hiermee gee ek,, IDouer/voog
van toestemming dat hy/sy aan die projek mag
deelneem.

	Ja	Nee
In Fase 1		
Fase 2		
Fase 3		

Geteken te op hierdie dag van
..... 2004.

.....
Handtekening van ouer/voog



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Faculty of Education
School of Educational Studies
Department of Educational Management
and Policy Studies

Addendum G: Parents' Consent Form

26 April 2004

Dear Parent

RESEARCH PROJECT

I am a fulltime lecturer in the Faculty of Education in the Department of School Management and Policy Studies at the University of Pretoria. My field of study is Education Law. Currently, I am busy with my doctoral studies. The title for my thesis is: *Learners' understanding of their right to freedom of expression*.

My data will be collected from five identified secondary schools and will be done in three phases.

- In phase 1, a whole Grade 11 register class will complete a questionnaire
- In phase 2, I will conduct a focus-group interview with eight of the learners, and
- In phase 3, I will conduct a personal interview with two of the learners.

The aim of the study is firstly to complete my PhD but secondly to indicate to policy makers and legislators what learners in schools understand currently under this constitutional protected right. This will help legislators to be pro-active in writing policies in order to ensure that learners' right to freedom of expression will not be violated at schools and also to indicate to school authorities how this right can legally be balanced in a schools situation without the threat of a court case against them.

The names of the schools and the respondents will be totally confidential and respondents will participate anonymous.

Please complete the consent form and return it to the school.

Kind regards

Willie van Vollenhoven
082 872 3782

CONSENT FOR DATA COLLECTION

I,, ID parent of
..... in Grade 11 hereby give
my consent that he/she may participate in the research project.

	Yes	No
Phase 1		
Phase 2		
Phase 3		

Signed at on this day of
..... 2004.

.....
SIGNATURE OF PARENT

Addendum H: Interpretation of Quantitative data (Question 1.5 from Phase 1)

Phase 1: Section 2

This section of Phase 1 consists out of eleven questions where respondents only had to answer yes or no. After asking in section1 what they understand under the right to freedom of expression, without supplying to them the different types of expression, the aim of this section is to confront them with the whole spectrum of things that fall under the right to freedom of expression and to determine if they think they will be allowed to do or not to do certain things under the protection of the right to freedom of expression at school. I will look at the statistics of these questions one by one in a quantitative manner before interpreting them with section1.

Question1

A learner may **say** what he/she wants to say at school:

Yes: 46 No: 42

51,7% of the respondents indicated that you may say what you want under your right to freedom of expression at school while 47,2% disagree. This gives an indication that some learners tend to think that the right to freedom of expression is absolute, although almost half of the learners disagreed, which indicates that they know that the right to speak can be limited. The deduction from this data is that learners do know that they can speak their mind verbally under the right to freedom of expression. About half of the respondents think that this right is absolute, while the other half knows that the right can be limited. This responds totally with the data from Phase 1 section 1

Question2

A learner may **write** what he/she wants to write at school:

Yes: 40; No: 47

44,9% of the respondents indicated that they may write anything at school, while 52,8% respondents disagreed. Here the run up is also very close as with the previous question. Interesting, though is the fact that almost 45% say that they may write anything, while more than half knew that the right to write anything is limited. One should have expected that there would be a good relation between question 1 and 2. Although the percentages

do not vary that much, it is fascinating that more learners seem to think that the right to write anything would rather be limited than the right to speak your mind.

Question 3

A learner may **wear** any **headgear** to school:

Yes: 9; No: 80

10,1% of the respondents indicated that you are allowed to wear headgear to school while 89,9% disagreed. The respondents are clear about the fact that the wearing of headgear to school will definitely be limited. This data also responds with Phase 1 section1, as only one respondent indicated in Phase 1 section1 that you may wear religious attire under your right to freedom of expression. It is only 10% who believe that religious attire will be protected at school under your right to freedom of expression. The majority (90%), however, state that your right to freedom of expression does not allow you to wear religious attire at school.

Question 4

A learner may **wear** any **jewellery** to school:

Yes: 7; No: 82.

7,9% of the respondents indicated that they may wear any jewellery to school while 92,1% disagreed. As far as jewellery concern, the learners indicated that this right will be limited at school. This data is very equal to the previous point of religious attire. Respondents indicated that religious attire and jewellery will not be accepted under the right to freedom of expression. 2% more respondents will, however, rather limit the right to wear jewellery than limiting the wearing of religious attire. This is already an indication that learners might think that the right to freedom of expression will rather not be limited if it is connected to religion.

Question 5

A learner may wear any **hairstyle** to school:

Yes: 24; No: 64

27% of the respondents indicated that they may wear any hairstyle to school, while 71,9% disagreed. Although almost three quarters of the respondents indicated that the right to wear any hairstyle would also be limited at school, it is not as overwhelming as with the wearing of headgear and jewellery.

Question 6:

A learner may have **tattoos** anywhere he/she wants to at school:

Yes: 13; No: 75

14,6% respondents agreed that learners may have tattoos anywhere at school, while 84,3% disagreed. By far also the most learners indicated that the right to have tattoos at school will also be limited. Interesting is the fact that although more learners think that this right would rather be limited as the right to wear any hairstyle, less learners tend to think that the right to wear a tattoo would be limited than the right to wear headgear or jewellery.

Question 7:

A learner may **wear any clothes** at school:

Yes: 6; No: 82

6,7% respondents agreed that you may wear anything to school, while 92,1% disagreed. Learners basically agree that the right to wear anything at school will be limited.

Question 8:

A learner may have any **slogan** on his/her **satchel**:

Yes: 30; No: 58

33,7% of the respondents agreed that you may have any slogans on your satchel, while 65,2% disagreed. Although not all agreed on this one, there is a tendency to think that your right to write any slogan on a satchel will also be limited. Interesting is the fact that a third do not think that this right will be limited.

Question 9:

A learner may have any **slogan** on his **clothes** at school:

Yes: 25; No: 64

28,1% of respondents indicated that you may have any slogans on your clothes at school, while 72% disagreed. Although this question (as expected) corresponds with the previous one, one note that a few more respondents think that the right to write a slogan on your clothes will rather be limited than writing slogans on your satchel. The reason for this could be that they feel that the satchel is their personal belonging where although their school uniform is also, it is prescribed to them.

Question 10:

A learner may **disseminate any information** at school:

Yes: 38; No: 51

42,7% of the respondents indicated that they may disseminate any information at school, while 57,3% disagreed. Here, again the run-up was very close, but it seems that although learners are not too sure they seem to think that one will not be allowed to disseminate any information at school. A substantial amount of respondents, however, believe that they may disseminate any information at school without being limited.

Question 11:

A learner may receive any information he/she wants to receive at school:

Yes: 70; No: 19

78,7% of the respondents indicated that they are allowed to receive any information that they want to receive at school, while 21,3 % disagreed. Very fascinating here is that almost 80% agreed that you may receive any information at school and only 20% think that the right to receive any information will be limited at school. One would have expected this to correspond with the previous question but it seems that learners think that they may not disseminate any information at school, yet they may receive any information at school.

ADDENDUM I: QUESTIONNAIRE

PHASE 1:

1 According to section 16 of the Constitution of the Republic of South Africa, everyone has a right to **freedom of expression**.

1.1 What does **freedom of expression** mean to you?

1.2 What do you think you are allowed to do under the protection of your right to **freedom of expression**?

1.3 What do you think are you allowed to do at school under your right to **freedom of expression**?

1.4 What do you think you are not allowed to do at school under your right to **freedom of expression**?

1.5 Do you think that you are legally allowed to do the following under your right to **freedom of expression**?

A learner can:

		YES	NO
1	say what he/she wants to at school		
2	write what he/she wants to at school		
3	wear any head gear to school		
4	wear any jewellery to school		
5	wear any hairstyle to school		
6	have tattoos anywhere he/she wants at school		
7	wear any clothes to school		
8	have any slogan on his/her satchel		
9	have any slogan on his/her clothes		
10	disseminates any information he/she wants to		
11	receive any information he/she wants to		

Addendum J: Official Research Application GAUTENG DEPARTMENT OF EDUCATION



RESEARCH REQUEST FORM

REQUEST TO CONDUCT RESEARCH IN INSTITUTIONS AND/OR OFFICES OF THE GAUTENG DEPARTMENT OF EDUCATION

1. PARTICULARS OF THE RESEARCHER

1.1	Details of the Researcher	
<i>Surname and Initials:</i>	Van Vollenhoven	
<i>First Name/s:</i>	Willem Johannes	
<i>Title (Prof / Dr / Mr / Mrs / Ms):</i>	Mr	
<i>Student Number (if relevant):</i>	79 1994 8 (personnel no: 2520443)	
<i>ID Number:</i>	601117 5050 008	
<i>Gender (Male/Female):</i>	Male	

1.2	Private Contact Details	
<i>Home Address</i>	<i>Postal Address (if different)</i>	
849 Church Street	PO Box 11096	
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Pretoria	Pretoria	

For Official Use

Ref. No.

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<i>Fax: (012) 420 3581</i>	
<i>E-mail:wvollen@postino.up.ac.za</i>	

2. PURPOSE & DETAILS OF THE PROPOSED RESEARCH

2.1	Purpose of the Research (Place cross where appropriate)	
	<i>Undergraduate Study - Self</i>	
	<i>Postgraduate Study - Self</i>	X
	<i>Post-Doctoral Study</i>	
	<i>Private Company/Agency – Commissioned by Provincial and/or National Government Department/s</i>	
	<i>Private Research by Independent Researcher</i>	
	<i>Non-Governmental Organisation</i>	
	<i>National Department of Education Commissioned Study</i>	
	<i>Commissions and Committees</i>	
	<i>Independent Research Agency</i>	
	<i>Statutory Research Agency</i>	
	<i>Independent Study by Higher Education Institution</i>	

2.2	If Post-Graduate Study – Please indicate by placing a “X” in the appropriate column		
	<i>Honours</i>	<i>Masters</i>	<i>Doctorate</i>
			X

2.3	Full title of Thesis / Dissertation / Research Project
	Learners’ understanding of their right to Freedom of Expression in South Africa

2.4	Value of the Research to Education (Attach Research Proposal)
	This will emphasize the importance to get policies pro-actively in place so that learners would know in advance how there right to freedom of Expression can be limited. See the proposal at no 8.

2.5	Student and Postgraduate Enrolment Particulars (if applicable)
<i>Name of institution where enrolled:</i>	University of Pretoria
<i>Degree / Qualification:</i>	PhD
<i>Faculty:</i>	Education
<i>Department:</i>	Education Management and policy studies
<i>Name of Supervisor / Promoter:</i>	Prof J Beckmann

2.6	Employer (where applicable)
<i>Name of Organisation/School:</i>	University of Pretoria
<i>Position in Organisation:</i>	lecturer
<i>Head of Organisation:</i>	Prof Pistorius
<i>Street Address:</i>	Lynnwood Road
	Pretoria
<i>Postal Code:</i>	0002
<i>Telephone Number (Code + Ext):</i>	(012) 420 2902
<i>Fax Number:</i>	(012) 420 3581
<i>E-mail:</i>	jbeckman@hakuna.up.ac.za

2.7	PERSAL Number (where applicable)
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3. PROPOSED RESEARCH METHOD/S

(Please indicate by placing a cross in the appropriate block whether the following modes would be adopted)

3.1 Questionnaire/s (If Yes, supply copies of each to be used)

YES	X	NO	
-----	---	----	--

3.2 Interview/s (If Yes, provide copies of each schedule)

YES	X	NO	
-----	---	----	--

3.3 Use of official documents

YES		NO	X
<i>If Yes, please specify the document/s:</i>			

3.4 Workshop/s / Group Discussions. (If Yes, Supply details)

YES		NO	X

3.5 Standardised Tests (e.g. Psychometric Tests)

YES		NO	X
<i>If Yes, please specify the test/s to be used and provide a copy/ies</i>			

4. RESEARCH PROCESSES

4.1 *Types of Institutions.* (Please indicate by placing a cross alongside all types of institutions to be researched).

INSTITUTIONS	Mark with "X" here
<i>Primary Schools</i>	
<i>Secondary Schools</i>	X
<i>Technical Schools</i>	
<i>ABET Centres</i>	
<i>ECD Sites</i>	
<i>LSEN Schools</i>	
<i>Further Education & Training Institutions</i>	
<i>Other</i>	

4.2 *Number of institution/s involved in the study.* (Kindly place a sum and the total in the spaces provided).

Type of Institution	Total
<i>Primary Schools</i>	
<i>Secondary Schools</i>	5
<i>Technical Schools</i>	
<i>ABET Centres</i>	
<i>ECD Sites</i>	
<i>LSEN Schools</i>	
<i>Further Education & Training Institutions</i>	
<i>Other</i>	
GRAND TOTAL	5

- 4.3 **Name/s of institutions to be researched.** (Please complete on a separate sheet and append if space is deemed insufficient).

Name/s of Institution/s
<i>Hoerskool Eldoraigne</i>
<i>Pro Arte</i>
<i>Lyttelton Manor Secondary School</i>
<i>Pelindaba Secondary School</i>
<i>Gatang Secondary School</i>

- 4.4 **District/s where the study is to be conducted.** (Please mark with an “X”).

District	
<i>Johannesburg East</i>	
<i>Johannesburg South</i>	
<i>Johannesburg West</i>	
<i>Johannesburg North</i>	
<i>Gauteng North</i>	
<i>Gauteng West</i>	
<i>Tshwane North</i>	
<i>Tshwane South</i>	X
<i>Ekhuruleni East</i>	

District	
<i>Ekhuruleni West</i>	
<i>Sedibeng East</i>	
<i>Sedibeng West</i>	

If Head Office/s (Please indicate Directorate/s)
Not applicable

NOTE:

If you have not as yet identified your sample/s, a list of the names and addresses of all the institutions and districts under the jurisdiction of the GDE is available from the department at a small fee.

4.5 *Number of learners to be involved per school. (Please indicate the number by gender).*

Grade	1		2		3		4		5		6	
<i>Gender</i>	B	G	B	G	B	G	B	G	B	G	B	G
<i>Number</i>												

Grade	7		8		9		10		11		12	
<i>Gender</i>	B	G	B	G	B	G	B	G	B	G	B	G
<i>Number</i>									20	20		

4.6 **Number of educators/officials involved in the study.** (Please indicate the number in the relevant column).

Type of staff	Educators	HODs	Deputy Principals	Principal	Lecturers	Office Based Officials
Number	0	0	0	0	0	0

4.7 **Are the participants to be involved in groups or individually?** Please mark with an “X”.

Participation	
Groups (Phase 1 and 2)	X
Individually (Phase 3)	X

4.8 **Average period of time each participant will be involved in the test or any other research activity** (Please indicate time in minutes)

Participant/s	Activity	Time
learners	Phase 1: Questionnaires	30
learners	Phase 2: Focus group interview	90
learners	Phase 3: Interviews	30

4.9 **Time of day that you propose to conduct your research.** Please mark with an “X”.

School Hours	During Break	After School Hours
		X

4.10 **School term/s during which the research would be undertaken.** Please mark with an “X”.

First Term	Second Term	Third Term
	X	X

DECLARATION BY THE RESEARCHER

- 1. I declare that all statements made by myself in this application are true and accurate.**
- 2. I have read and fully understand all the conditions associated with the granting of approval to conduct research within the GDE, as outlined in the GDE Research Briefing Document, and undertake to abide by them.**
- 3. Should I fail to adhere to any of the approval conditions set out by the GDE, I would be in breach of the agreement reached with the organisation, and all privileges associated with the granting of approval to conduct research, would fall away.**

Signature:

Date:

DECLARATION BY SUPERVISOR / PROMOTER / LECTURER	
<i>I declare that: -</i>	
<ol style="list-style-type: none"> 1. <i>The applicant is enrolled at the institution / employed by the organisation to which the undersigned is attached.</i> 2. <i>The overall research processes meet the criteria of:</i> <ul style="list-style-type: none"> • <i>Educational Accountability</i> • <i>Proper Research Design</i> • <i>Sensitivity towards Participants</i> • <i>Correct Content and Terminology</i> • <i>Acceptable Grammar</i> • <i>Absence of Non-essential / Superfluous items</i> 	
Surname:	Beckmann
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Institution / Organisation:	University of Pretoria
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Signature:	
Date:	

N.B. This form (and all other relevant documentation where available) may be completed and forwarded electronically to Ebrahim Farista (ebrahimf@gpg.gov.za) or Nomvula Ubisi (nomvulau@gpg.gov.za). The last 2 pages of this document must however contain the original signatures of both the researcher and his/her supervisor or promoter. These pages may therefore be faxed or hand delivered. Please mark fax - For Attention: Ebrahim Farista at 011 355 0512 (fax) or hand deliver (in closed envelope) to Ebrahim Farista (Room 911) or Nomvula Ubisi (Room 910), 111 Commissioner Street, Johannesburg.

Addendum K: Research Proposal

PhD RESEARCH PROPOSAL

**LEARNERS' UNDERSTANDING OF THEIR RIGHT TO
FREEDOM OF EXPRESSION IN SOUTH AFRICA**

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RESEARCH PROPOSAL

1 TITLE

Learners' understanding of their right to freedom of expression in South Africa.

2 BACKGROUND

It is not uncommon to see headings in newspapers indicating that learners' right to freedom of expression is violated, for example:

"HRC finds that schoolgirls' right to freedom of expression was violated" (Ismael, *The Sunday Independent*, 19 September 1999:1), when she, Layla Cassim, a Muslim teenager, was suspended for pinning her essay on the Palestinian issue on the school notice board.

It is however not only learners' right to freedom of expression that is violated, but they are also abused when speaking out.

"Pupil endured abuse for right to speak her mind" (*Sunday World*, 26 September 1999:6). Layla's peers blew spitballs at her during the middle of a class while she was concentrating on her work. One can argue that learners' right to freedom of expression is violated by school authorities because the "present teachers were victims of an education system that did not recognise freedom of speech" (*Sowetan*, 4 June 2002:6).

In a new school system of democracy in a country where human rights should be protected because they are explicitly entrenched in the Constitution, the right to freedom of expression can be viewed as one of the core rights to solve social problems. Therefore, Patrick Lekota, chairperson of the National Board of Provinces, stated in 1997 that "*dialogue should already start at schools level*" (*Die Volksblad*, 23 July 1997:2). He added that a peaceful society does not mean everyone to always agree on everything.

The solution lies in communication and not only exercising one's fundamental human rights like freedom of expression but also in respecting the rights of others.

It is however, imperative to understand exactly what a specific human right entails in order to exercise it. Incidents like these mentioned in the newspapers, indicate that learners are not *au fait* with what their right to freedom of expression entails and how this right should be exercised. It, is therefore, necessary to conduct research to determine exactly what learners understand under their right to freedom of expression.

South Africans are not used to exercising their right to freedom of expression

In investigating any fundamental human right in the young democratic Republic of South Africa¹ it is necessary to give a short overview of the anthology and nature of the South African society.

After the Republic of South Africa was founded in 1961, a white minority governed it. The majority of black South Africans did not have any voting rights. In fact, this government was known for its policy of Apartheid and the fundamental human rights of the citizens were neither protected nor respected, but were violated, in many ways.

A small coterie of white South Africans were in power during the apartheid era. In order to understand the significance of the white South Africans, especially the white Afrikaans speaking South Africans, one needs to focus on their culture and historical background. The white man arrived in Cape of Good Hope with Jan van Riebeeck on 6 April 1652. He was sent to the southern point of Africa by the Dutch East India Company (DEIC) to establish and run a refreshment halfway base for ships on their way between Europe and India or the East (Davenport, 1987:22, Omer-Cooper, 1987:18, Van Jaarsveld 1982:39). The single reason why the DEIC sent Van Riebeeck to the Cape of Good Hope was to supply sailors with fresh water, vegetables and meat to reduce the casualties and losses

¹ The Republic of South Africa had its first democratic elections on 27 April 1994. Prior to this election, when the Apartheid regime was in power, the majority of citizens were denied their fundamental rights such as political rights and were therefore refused to vote in any elections for any legislative body.

from scurvy. Although Parsons (1994:57) maintains that the reason for the Cape settlement was an effort to control trade between the Atlantic and Indian Oceans, it can be argued that the settlement of white Europeans on the southern point of Africa never had it as purpose to establish a colony.

However, the DEIC committed itself to a policy of establishing a colony when some of the Company's servants were allowed the freedom to establish private farms. During the seventeenth and eighteenth century, the Netherlands sent Dutch, German, and French to the Cape to establish themselves at the Cape (Davenport, 1987:22; Omer-Cooper, 1987:19 and Van Jaarsveld, 1982:41). Many volunteers arrived in Cape of Good Hope to join in the development of this new country that of course was offering them several opportunities. Most of these volunteers grasped this opportunity to gain freedom of religion. Although most Germans belonged to the German Lutheran church, the Dutch and the French refugees had a Calvinistic background. Most sources state that more Germans arrived in the Cape than Dutch people (Davenport, 1987:22; Omer-Cooper, 1987:19, and Van Jaarsveld, 1982:41) while others state that the Dutch people were the most (Parsons, 1994:57). They all agree with the fact that all the settlers adopted Dutch as their language and became members of the Dutch Reformed church. This diverse European settler population was thus coaxed into cultural uniformity, as Davenport (1987:23) states: "The Afrikaner people, an amalgamation of nationalities came gradually into being during the century after Hendrik Bibault described himself as an 'Afrikaander' in 1707." These white Europeans were from the Christian Protestant religion. While Europe was overwhelmingly Roman Catholic and the Protestants were violated, they were looking for better opportunities where they could exercise their freedom of religion - in fact the French refugees fled their country to be free to practise their Protestant religion.

In order to understand the underlying influence of Calvinism, it is vital to refer briefly to its philosophy. Calvinists stress their belief in God the Almighty. According to Meeter (1960:63) the life view of Calvinists is summarized in the Bible text, "Of Him, and through Him, and to Him are all things." Steele and Thomas (1967:16-17) summarize the

Calvinistic philosophy in five points which are important for this study to get an overall view of the base of this philosophy.

- **Total inability or total depravity**

The sinner is bound by his/her evil nature. Salvation through faith is a gift from God and not something that you can contribute to.

- **Predestination**

God chose certain individuals for salvation before the foundation of the world. The sinner can actually do nothing to change his/her faith. "Thus God's choice of the sinner, not the sinner's choice of Christ, is the ultimate cause of salvation (1967:16).

- **Particular redemption**

Christ's redeeming work and His crucifixion and resurrection were intended to save only those sinners chosen before the foundation of the earth.

- **The efficacious call of the spirit**

Although there is an outward general call to salvation, the Holy Spirit extends a special inward call to the elect that brings them to salvation inevitably.

- **Perseverance of the saints**

The chosen are kept in faith by God and thus persevere to the end.

To summarise, one can say that predestination, redemption and regeneration are the work of God by His grace only. In other words, God determines who will be recipients of the gift of salvation. Since one's faith and salvation are thus totally in the hands of the

Lord, Calvinism stresses morality. Although one cannot change faith, one must strive to a life of high morality because of one's thankfulness for being chosen or perhaps for if by any change one would have been one of those chosen. This life of high morality actually then gives authority to the church over all Christians. Discipline connects the members of the church. This discipline also forms the ligaments of the church. No one was exempted from the discipline of the church. Calvinism sees authority as something given to its bearers by God. Anybody who questions or opposes any lawful power resists the ordinance of God.

Meeter quotes (1960:cover) Rev. Peter van Tuinen on the front cover of his book on Calvinism to emphasize the impact of this philosophy on the totality of men:

The Calvinist believes that when God saves men, He saves the whole man. The whole man must, therefore, be devoted to God's cause. Not only when he is at church, but when he is transacting business, or engaging in political or social activities of any sort. No sphere of his life may be excluded. Life as a whole must be God-directed. Politics, social and industrial relations, education, science and art must all be God-centred. No domain of life in which high morals are not essential! God must control the whole life. Not only individual but social ethics as well is stressed.

Calvinism can thus be viewed as an all-comprehensive system of thought or world- and life view. God is sovereign and therefore the Calvinist sees God behind all phenomena and in everything that occurs. Therefore, the Calvinist seems not to use its right to freedom of expression, since they are not allowed to question authority per se. The Calvinist in fact has no right to claim but rather privileges given to them by the Lord's mercy.

The Christian is told in the New Testament not to mix with the heathen but rather to convert them to Christianity. After their conversion to Christianity, they would be viewed as part of the group. The Europeans who had gone to America, Africa and the East found atheists with darker skins. These Europeans who had the financial backup of their governments, lived a higher socio-economic standard than the native inhabitants. Most

Europeans also had a better formal education than the native inhabitants. All these factors (and more) led to the fact that as time passed, the Europeans (whites) thought of themselves as being better creatures, and being more privileged than the native (sic).

Originally the only difference between people in Cape of Good Hope was whether you were a Christian or a heathen. Christians were all accepted in the church (whether you were European or a native) and an European was allowed to marry a native once the native became a Christian. However, the differentiation between Christian and heathen and between having a higher socio-economic lifestyle led to legislation as far back as 1678 that sex between a Christian male and heathen female was not allowed. Four years later this was changed to the wording that miscegenation should be opposed (Van Rensburg, 1982:45). It is ironic that these white Europeans who moved to a new country to exercise their freedom of Christianity devolved the policy of Apartheid in need of surviving and to save their positions from the majority by violating their human rights. It is, however important to point out that they were really looking for and giving motivation for their philosophy in the depth and principles of the Bible and their religion. As this differentiation between people escalated, the more people's fundamental rights were violated. As the white Christian believed that the authority of the church or anyone higher up in the hierarchy is unquestionable they believe that their actions were also beyond questioning by those lower down in the hierarchy. This led to the scenario that whites, so indoctrinated by their Calvinist background, never questioned their authority; thus did not exercise a variety of rights including their right to freedom of expression. Whether one was a Christian did not have any relevancy anymore.

At the same time, all non-white² citizens in the Republic of South Africa had no equal rights compared to whites and their fundamental rights were violated, they were also not

² "Non-whites" in the South African society were basically differentiated into three separate groups based on race or the colour of one's skin. It refers to blacks (the original inhabitants [natives] of this continent), coloureds (the ethnic group who developed as a "mixed race" when the Europeans who arrived from Europe mixed with the natives at Cape of Good Hope), and Indians (referring to the people who arrived in South Africa from India).

given the right to freedom of expression.³ Although non-whites were offended and surely despondent with the situation, they learned not to speak out. This would only devolve into worsening the situation, or getting thrown into jail or banned from the country and their beloved.

At this point, it is also important to briefly discuss the social and cultural background of the black South Africans because they are the majority of inhabitants in South Africa and their cultural background influences the way they deal with their fundamental rights, especially their right to freedom of expression. Although the black South African population can be divided into different ethnic groups with their own culture and customs, Ramagoshi pointed out in an interview that the culture and customs of all these groups are basically the same with smaller variations in the way it is applied. It is also not the intention of this research to focus on the differentiation of ethnicity.

The traditional culture of the black South African is also one of respect and obedience towards authority and the elder. Hoernlé (1946:14) noted that there was an “ordered group-life, with reciprocal rights and duties, privileges and obligations, of members, determining behaviour-patterns for each individual member towards other members, and moulding the feelings, thoughts, and conduct of members according to these patterns, so that it is only in and through them that the individual can achieve his personal self-realisation and participate in the satisfaction offered by the life of his community”. So for instance, the father in the Zulu culture is seen as the patriarch. Certain parts of the hut and homestead were considered his and women (Hunter,1961:36) but specifically children were not allowed there (Raum, 1973:86). Similarly Ramagoshi points out that the Xhosa hut was separated into a section for males and one for women. Also the speech and gesture of women and children are limited in this culture. When children are with their parents in the same hut, they are only allowed to speak when they are addressed. When adults discuss serious affairs children have to leave the hut. The child is not allowed to argue or pass remarks when given an order by its parents. A son should

³ Those who tried to speak out and “fought” for their human rights, were banned and had to live in exile or spend their life in jail for terrorism as our former and first president of the Democratic Republic of South Africa, Nelson Mandela.

only talk to his father by using a “go-between” (Finlayson, 1982:18; Kriel, 1991:27). Girls should lower their eyes at any person of authority. A married woman will also express her respect for her husband by speech avoidances. She is also forced to avoid syllables occurring in her husband's family's names (Finlayson, 1982:18). Kriel (1991:27) notes that after the bride's family has received the labola,⁴ she is bound to her husband and his family for life.

That this “tradition” still has a deep influence on the modern generation is clear when looking at the research that Van der Vliet conducted in 1982 concerning Xhosa marriages. The men, although modern, still believed that they had the traditional authority. Some respondents stated: “Xhosa tradition is that the man is always the boss. His word is final, that's the custom. The Xhosa do not like a henpecked man. He's seen as stupid.” “I am the boss. At times, I let my wife have a say, but at times I stand up and show her that I am a Xhosa man. I have found with my wife, and with Xhosa woman in general, if you let her do things her way she doesn't care about you.” And “ The women do not like the husband to be boss, especially the educated ones, but in the long run it has to be like that. The husband has the final word.” Under the Xhosa there definitely was a strong patriarchal trend traditionally, which, according to Van der Vliet (1982: 223) still exists in modern marriages. Sebakwane (1993:84) points out that South African black societies are traditionally characterised by a patriarchal culture. This still has an influence in modern society. Unlike most western countries some rural secondary schools, in South Africa and other Southern Africa countries, have far more male educators than female (Davies, 1990:62; Sebakwane, 1993:85).

In the eyes of these different ethnic groups, not only the women but also the child has traditionally basically no rights. A child would be regarded an adult after successfully attended initiation school. Before graduation at the initiation school, the boy is not allowed to take decisions. It is basically the king with his councillors who decide when there would be an initiation school. Only after successful graduation from the initiation

⁴ Marriage goods which are provided by the groom and his family to the bride's family as gesture of goodwill.

school, he is allowed to get married, but even in this serious decision he does not have much of a say. Only after the king has chosen his new bride to be from the initiation group, the rest of the graduates can make their choices. This choice should only be from the group of graduates or if you have been promised to marry a younger person who has not yet been to initiation school, the young lad has to wait till such time occurs. Even after making one's choice; the choice should be discussed with one's uncle who would negotiate with the parents of the young lady.

It is evident that before the successful completion of initiation school, a child has basically no rights or say at all and even had to accept the bride chosen or negotiated for him by others. He is not allowed to speak out against it. This strict authoritarian hierarchy and the violation of one's right to freedom of expression is evident in the fact that children were not allowed to eat with adults, nor were women allowed to eat with men.

Respect for authority can also be seen in the fact that a kraal-head must not be addressed before he has greeted the visitor. Nobody is allowed to address his/her seniors without their express permission. It is regarded disrespectful to answer back when reprimanded by a senior or to participate in a conversation between members of an older generation.

Only men were allowed in the kgotla (palace) where "court cases" were decided. Women and children had no say in public and no right to freedom of expression.

Alston (2002: 378) finds that the implementation of the right to freedom of expression in South Africa is affected by culture, group identity and dependence. The background and history of the political as well as social cultural development in South Africa thus created a society that even in a new democracy does not know how to speak out and to exercise their right to freedom of expression. That the influence of the tradition can not be diminished is clear as Spiegel and Boonzaier state: "The normative prescriptions implied by the idea of 'tradition' derive from the ways in which people appeal to an image of their past to give legitimacy to presently preferred beliefs and practices." (1988:56)

After accepting the Constitution of the Republic of South Africa, Act 108 of 1996 (CRSA), citizens became more aware of their protected and entrenched fundamental rights. Furthermore the Calvinistic orientated population tends no longer to use their Christian and Calvinist doctrine to guide their value system on which decisions are made. There is a tendency that the younger people do not go to church as often as their parents. The urbanisation of black South Africans also alienated them from their traditions.

The mining industry of South Africa forces black male workers to leave their homes for the mines. With the outbreak off their traditional environment, the workers started to lose touch with their cultural customs. The traditionally bounded rules do not have the binding effect of earlier years. This urbanisation and modernisation were at the expense of customs and tradition (Finlayson, 1984:137).

With the new democratic South Africa, black learners attend former white schools. This multi-cultural, -ethnic and –racial interaction, made learners aware of the fact that their traditional culture and custom is not the only and correct way. This adoption to a new ‘Western’ culture made black South Africans lose their culture. This confused learners either still do not use their rights e.g. freedom of expression as this is part of their inherent being or if they became accustomed to the fact that they do have this right, they start to become defensive, absolutise this right and do not know that the right also poses a responsibility and duty on them not to in the process violate any other fundamental rights of other human beings. Therefore, it is imperative to investigate what learners understand under their right to freedom of expression. If one succeeds to determine their understanding of this right, one will understand how they look at it. This will give insight in policy making to ensure that the exercising of this right occurs within the parameters of legislation without infringing on any right of other stakeholders and also to indicate to learners when and how this right can be limited.

3 AIM

The aim of this research is to engage in an in-depth study to determine what learners understand specifically under their right to freedom of expression. This right includes the freedom to receive or impart information or ideas as well as freedom of artistic creativity.

4 THEORETICAL FRAMEWORK

Vithal and Jansen (2001:7) state that a theoretical framework is a well-developed, coherent explanation for an event to signal where research is coming from. This proposed study will focus on learners' understanding of their right to freedom of expression. Before focussing on this right specifically, it is evident to first give a short overview of a global development of human rights.

4.1 The development of human rights

One of the earliest legal principles that addresses human rights came from the canon lawyers of the 11th and 12th centuries. This principle is called the legal maxim "*lex injusta non est lex*" or 'an unjust law is not a law' (Sieghart, 1985a:22). This implied that laws made by rulers need not be obeyed if they were unjust (Alston, 2002:26).

To protect the human rights of society, courts have the right to test the legality of the law. The legal maxim was established as a legal principle in *Marbury v Madison* (1803) 5 U.S. 137 when the court stated "...[i]t can refuse justice to no man" (153).

The very first constitution to protect human rights ever was drafted in 1787. The United States Federal Constitution was drafted after the reigning monarch had been replaced by a republic with elected representatives and begins with the following words:

We the people of the United States, in order to form a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare,

and to secure the blessings of liberty to ourselves and our posterity, do ordain and establish the Constitution for the United states of America.

The French Constitution (France 1789) was drafted under similar circumstances and was named “Déclaration des Droits de l’homme et du citoyen” or ‘Declaration of the Rights of Man and the Citizen (Sieghart, 1985a:27).

Although these two constitutions are the oldest constitutions to protect citizens from unfair rulers or governments, the principle that all men are equal, was found in the 1776 American Declaration of Independence, which begins with the words:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...

It is evident to note that both countries became a republic with representation for all its citizens after overthrowing the monarch via a rebellion. Brinkley (1993:155) points out that amendments to the U.S. Constitution came into force in 1791 to give even bigger protection to the citizens of the USA and that we can refer to these amendments as the Bill of Rights.

The U.S. Federal Constitution became the supreme law of the country and the Bill of Rights was entrenched (Alston, 2002:36). These first constitutions, with their Bills of Rights, objectives were to protect citizens against arbitrary power (Alston, 2002:38).

During the 19th century the focus shifted from the natural rights to evolutionism and utilitarianism (Dlamini, 1995:13). Great wealth was introduced to mankind with the industrial revolution (Alston, 2002:41). This wealth, however, brought even greater inequality among people. Poor people were exploited by the wealthy. The focus then moved from freedom from government intervention in individual lives to laws which place an imperative on the government to intervene in order to protect their rights. This shift in

focus plays an important role in the history of human rights. Now the individual can appeal to higher authority to protect its rights (Alston, 2002:42).

During the 20th century international law developed in order to respect human rights of every citizen in the world. The common striving to end slavery and piracy on the high seas, could be seen as some force in the development of international law to protect human rights (Alston, 2002:43).

The USA, Britain and the USSR started negotiations in 1944 to establish an international organisation that would “facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms” (Van der Vyver, 1979:14). After the Second World War there was a need for external constraints to be imposed on all states (Babbio, 1996: 32). States could no longer be left alone to do their own devices (Sieghart, 1985a:40). This first code of international human rights was found in the Charter of the United Nations in 1946. Dlamini (1995:15) argues that this charter marked a new chapter in the history of human rights. This charter was amended and in 1948 the United Nations passed the Universal Declaration of Human Rights (UDHR). This was followed, in 1950 by the European Convention on Human Rights (ECHR), which proves that everyone at that stage was aware of the protection of human rights.

However, the UDHR, as well as the ECHR did not ensure immediate Utopia and many countries had still violated human rights. It was only twenty years later that states began to ratify two international covenants adopted by the U.N. Human Rights Commission. These two international covenants were the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC) (Human Rights: A Compilation of International Instruments, 1993:8-40).

It is important to remember that the UDHR and ECHR were declarations and conventions to spell out the good intentions of most countries of the world. These human right “pleas” could not be enforced on governments. Zurigen (Daily Dispatch, 10 December 1999)

described the UDHR as “essentially a wish-list, buttressed by a series of non-binding covenants, backed only by moral sanctions” (Aston, 2002:49) and “still very much without teeth.” Similarly Kofi Annan, the U.N. Secretary-General described it as “a mirror that at once flatters us and shames us” (Daily Dispatch, 10 December 1999).

Although the UDHR was the first comprehensive international document on human rights, it was followed by regional and international declarations and conventions which only started to have an influence when it is ratified by specific countries.

South Africa has also decided to join the world in protecting human rights when the first democratically elected government accepted the CRSA in 1996, which is one of the most modern and advanced constitutions with its entrenched Bill of Rights in chapter 2. The new government adopted the CRSA with a Bill of Rights that entrenches the fundamental human rights of all citizens. It is thus necessary for South Africans to consider how international constitutions address human rights and more specifically how human rights are interpreted in international courts.

5 RATIONALE

Freedom of expression is a core fundamental right in a democracy. Even so taking in consideration the fact that no right is absolute, the exercising of this right must always be balanced with the fundamental rights of other human beings in the society. Therefore, the right to freedom of expression may be 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” (Section 36 of CRSA).

Freedom of expression consists of a wide spectrum of entities. It is not generically seen only as the words that one utters but includes the totality of being and one’s freedom to show this to the world. 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.

In the South African school system learners were indoctrinated by the culture of Calvinistic and cultural acceptance and brought up in the mode of unquestioned acceptance of authority. Learners were not aware of the fact that they had fundamental human rights and that these rights were taken away from them. It would be judged as bad manners to speak out if one differs in opinion from one's educator or any authority. The scenario changed on 27 April 1994 when South Africa became a full democratic country. This new democratic government accepted their Constitution, The CRSA, which has a Bill of Rights with entrenched Human rights.

For the first time in the history of South Africa, everybody's human rights were protected. For the first time people started to realize that they have human rights. This newly founded reality, however, caused people to absolutise these human rights because they did not know how to interpret or implement them. They are not sure what the rights entail and are also not aware of the fact that they can be limited or what the criteria for limitation are. Nor do they understand that their fundamental rights also impose a duty or responsibility on them. Basically, they do not understand how to interpret or implement these newly found rights. This result in disciplinary problems or even court cases. The school curriculum needed to be changed to enhance critical thinking and to teach young citizens how to fulfil their lives in a democratic society where human rights are entrenched and protected. The South African school system's methodology thus changed to outcomes-based education (OBE). The new curriculum is planned to be used through the whole system by 2005. Therefore it is called curriculum 2005.

One of the main focuses of curriculum 2005 is to create critical thinking. This is directly in contrast with the culture of total unquestioned acceptance of authority. In a society where one is taught neither to question nor to use one's freedom of expression, the development of critical thinking was left behind. One is not aware of what this right entails

and how it should or could be limited. There is thus a need to find out exactly what learners' understanding of their right to freedom of expression is.

As mentioned, South Africa transformed its government from a government of minorities where the human rights of the majority of the population were violated to one with full democracy. This new government of democracy adopted the Constitution (CRSA) with an entrenched Bill of Rights that protects the human rights of every citizen. The preamble to the CRSA states that the CRSA was adopted to “lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law”. It is also stated in section 1 of CRSA that “[t]he Republic of South Africa is one, sovereign, democratic state ...”

It cannot be expected from people who were brought up and indoctrinated through decades of a certain life view to change their attitudes overnight. South African citizens are not *au fait* with the idea of having their human rights protected. This leads to the fact that many citizens are still not aware of the rights that they have and that are protected by the CRSA. The more people hear or read about their rights, they become aware of these rights. They still do not know exactly what every right entails and how it should be practically interpreted. As a result of this there is then also a tendency for people to start exercising their rights but they forget to balance the scale towards the duty and responsibilities that are posed on them by this right.

When focusing on the schools, one needs to pay attention to the creation of the ethos and basic moral values of a society. In terms of section 1 of CRSA South Africa is founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.

These are the values that ought to underpin every deed and action in South Africa and should also be the core of education in our country. Within the operation of this value system it is imperative to address every stakeholder with human dignity. There should also be equality in dealing with all stakeholders in trying to protect everybody's human rights and freedoms (section 1(a) CRSA). When looking at the right to freedom of expression (section 16 of CRSA) in schools, one should look at all the stakeholders involved, who are the learners, the educators and the parents. Since there is a continuous mutual interaction and interrelationship between the stakeholders, the exercise of one's right to freedom of expression would be balanced against the rights of the other stakeholders. Everyone should also be aware of his partner's human right in order not to violate it.

Being aware of the fact that human rights were violated under the previous government in South Africa and that children – therefore also learners – had no right to speak out, it is important for the researcher to focus on the right of the learner. In the previous government human rights were not protected. It is necessary to find out what learners' knowledge and understanding of their right to freedom of expression is.

Children (learners) are seen in the eye of the law as minors with limited capacity and limited *locus standi in iudicio* (Bondesio, Beckmann, Oosthuizen, Prinsloo and Van Wyk, 1994). It is clear at this point that learners don't have full capacity and that they secondly were not accustomed to the fact that they have rights and thirdly that they were brought up in a culture of keeping quiet and not to question authority. It is imperative to find out at this stage what learners' knowledge and understanding of their right to freedom of expression currently entails. This research will not only be an indication for learners on how to improve their right to freedom of expression but would also be informative to parents, educators and policy makers.

In a democracy it is important for every partner to participate in every decision. It is also imperative to respect the rights of all the other stakeholders and to ensure that their rights are respected. In a democracy every voice should be heard. Therefore it is

important to protect the right to freedom of expression. Everyone should be free to express him/herself without fear to damage him/herself in the process.

Children as minors need to be guided in the school situation to execute not only their fundamental rights but also to deal with their obligations and responsibilities in a democracy. Therefore, it is the purpose of education to develop the necessary skills to enhance a democracy.

A democracy requires critical thinking

The public school, as education-mentor for children (learners) in a democracy becomes a forum where the children are guided to adulthood and guided to fulfil their place in a democratic society.

Though the primary purpose of schools is to educate, it has long been understood that education consists of more than the development of academic skills and the accumulation of knowledge. One of the central purposes of schools in a democratic society is to encourage the critical and independent thinking necessary for effective participation as citizens. This was emphasized 250 years ago by Montesquieu in *The Spirit of the Laws*:

It is in republican government that the full power of education is needed ... One can define this virtue as love of the laws and the homeland. This love, requiring a continual preference of the public interest over one's own, produced all the individual virtues; they are only that preference ... in a republic, everything depends on establishing this love, and education should attend to inspiring it (I, 4, 5) (Cohler, Miller and Stone, 1989:35).

Similarly, James Madison, one of the American 'Founding Fathers', pointed out that "Republican government presupposes the existence of these qualities [of civic virtue] in a higher degree than any other form" (Federalist, 1993:207). Similarly section 7(1) of the CRSA 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.

After the new democracy was established in 1994, it was necessary to change the school methodology in order to develop citizens' skills for participation in a democracy. The old curriculum was based on the retention of information and theory. Tiley and Goldstein argue (1997:6) that "[t]he previous [education] system did not help people learn to make sound, compassionate judgements in a changing world." One of the characteristics of the previous education system was rote learning, while the aim in outcomes-based education is to develop critical thinking, reasoning and reflection. (Tiley and Goldstein, 1997:29) Since the South African government was aware of the importance to develop critical thinking, the whole education methodology has changed from one that was educator centred to one that is learner centred. In the old system the educator possesses all the knowledge. Educators assumed that the learners knew nothing. This teacher-centred approach was changed to the new paradigm (learner centred) where learners possess knowledge and the ability to learn (Anon. 1996:5). The importance of the learner centred approach is also stipulated in the preface to the policy foundation phase: "...education within the formative years follows an integrated child centred approach in which the learner is developed holistically." (Anon, 1997:iii). This new curriculum must be skills-orientated and applicable in practice. One of the seven critical outcomes of this new methodology developed by the South African Qualification Authority (SAQA) for curriculum 2005 is per se to develop critical thinking (Cape Argus, 1997:8) by means of data collection, analysing, organising and to critically evaluate the data (Anon. :5). The pre-1994 curriculum ensured the existence of diversity in race, classes, sex and ethnicity. The curriculum was re-structured to enhance the values and principles of the new democracy (Anon. :2). Therefore, the document, Learning through a National Curriculum Framework, puts the paradigm shift as a prerequisite for the realisation of the vision for the democratic South Africa. "A prosperous, truly united, democratic and internationally competitive country with literate, creative and critical citizens leading productive, self-fulfilled lives in a country free of violence, discrimination and prejudice." (**)

Wielemans (:3) pointed out that education is more than Taylorism. In Taylorism, the totality of the child is ignored to become a subject specialist. In the 21st century the school functions “toenemend als een sociaal podium waarop jonge mensen met elkaar in gesprek zijn en ervaringen uitwisselen” (Wielemans :4). Education tries to solve problems in society. There is a movement back to an holistic approach where the school becomes more than “leerinstituut” but rather “opvoedingsgemeenschap” (Wielemans :5). Similarly the department of education set out the purpose of a General Education and Training Certificate (GETC) as “to equip learners with knowledge, skills and values that will enable meaningful participation in society...” (SAQA, 200:14).

A prerequisite for critical thinking

It is necessary to enhance and respect the freedom of expression in order to develop and encourage critical and independent thinking. Freedom of expression creates a market place of ideas (*Abrams v United States 250 US 616(1919)*) that helps to develop individuals to self-fulfilment (Clayton and Tomlinson, 2001:112 and De Waal, *et al.*, 2001:310). As such De Waal *et al.* (2001:310) argue that the denial of this right would be inhuman because it is an essential human activity to express oneself.

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. As De Waal *et al.* point out (2001:310), 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 ideas should be protected because it provokes further discussion through which the truth may be discovered.

One can 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 (2001:37) 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.

The first ever constitutional rights provisions 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 ...

In Canada, freedom of expression was also regarded as a “core right” even before the advent of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (hereafter 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 globally protected as a prerequisite to a democracy.

In 1988 the UN Commission on Human Rights requested its Sub-Commission on the Prevention of Discrimination and Protection of Minorities to propose a study on the right to freedom and expression. The report suggested that the right to freedom of expression and information should be placed in the core of inalienable rights. This means that even in a state of emergency, this right could not be subjected to restrictions beyond those permissible in a democratic society. Türk *et al.* (1999:38) argue that the right to freedom of expression is indeed a right tending towards the absolute.

An internationally protected right

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 of the major international human rights instruments.

The ICCPR of 1966 was adopted by the UN and was accepted to recognise that “the inherent dignity and the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (Preamble). It continues to state

that it recognise that “in accordance with the Universal Declaration of Human Rights the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”.

The Covenant will also consider “the obligation of states under the charter of the United Nations to promote universal respect for, and observance of, human rights and freedom”.

This right is addressed in article 19:

- (1) Everyone has the right to freedom of opinion and
- (2) 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 print, in the form of art, or through any other media of his choice.
- (3) The exercise of the right 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
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order, or public health or morals.

The freedoms of expression, opinion and information are also protected in article 19 of the Universal Declaration of Human Rights (UDHR) of 1948 which is a clear indication that freedom of expression is a fundamental right (Türk *et al.*, 1999:37).

As is the case with all fundamental rights, the right to freedom of expression is not absolute and must be balanced against other freedoms and rights. According to Rautenbach and Malherbe (1999:345) all rights can be limited “under specific circumstances and in a particular way for the protection of some public interest or the rights of others.” So it was also agreed upon at the Sixth International Symposium on the European Human Rights Convention and Freedom of Expression “that no democratic

society has yet removed the obstacle to full freedom of expression, and it is improbable that any will do so in the near future (Türk *et al.*, 1999:37).

The core human right?

A democratic society is continuously in a process of change and will have restrictions on rights and freedoms and 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.” (Turk *et al.*, 1999:38). Similarly Woods (2001:142) 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 Courts have characterized 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 Amendments belligerent.

It is within this background of the freedom of expression as being seen as crucial in a democracy but which however cannot be absolute that I am going investigate the matter in South Africa.

The South African case

South African legislation

The Constitution of the Republic of South Africa

The CRSA protects freedom of expression as an entrenched human right in section 16.

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

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. O'Regan J 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 1999 (4) SA 469 (CC) para 8*).

Section 16 (1) protects freedom to expression. 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. 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, 2002:6). 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 realize that the mere fact that certain ways of expression are mentioned in section 16 (1) definitely do not single them out for greater protection than other forms of expression (De Waal *et al.*, 2001:311). Although the right to freedom of expression is inherently limited in section 16(2), it can also (as any other right) be limited under the limitation clause (section 36 of CRSA). (See p. 19.)

Of importance to the Higher Education sector is the focus of Section 16 (1)(d) “academic freedom and freedom of scientific research.” One should be aware of the fact that since this is a subsection of CRSA, the right to academic freedom of any academic enterprise is protected and not only “institutions of higher learning”. This emphasizes 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 who engaged in the practice of science. Even if you are a government employee, you still have the right to freedom of expression that includes academic freedom. Since the focus of this study is the right to freedom of expression of the learners in public schools, I shall not focus on Section 16(1)(d) of CRSA.

In South Africa, which is characterized by a multi-cultural diverse society, hate speech, as limited by section 16 (2)(c), needs to be addressed. International law would guide South African courts in implementing legislation in this view. The Canadian Supreme Court has also accepted the legitimacy of controls on hate speech (*R v Keegstra [1990] 3 SCR 697*). Section 16 (2) of CRSA 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 dignity⁵. It is therefore important to guide young learners in executing their right to freedom of expression, not to infringe upon the fundamental rights of another person by using hate speech. Section 16(2) of CRSA defines hate speech as speech that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. At this point we need to focus on the South African Schools Act, Act 84 of 1996 (SASA) and its prerequisite of freedom of expression.

The South African Schools Act

When one focuses on the freedom of expression on school level, we learn that SASA is silent about this right. Freedom of expression will hence be viewed directly from the CRSA as well as through the value system that underpins the CRSA and our democracy.

Evidence that there is uncertainty about the exercising of the right to freedom of expression in the public school sector of South Africa can be noticed when reading the local newspapers. One of these incidents happened to Yusaf Bata, a Muslim teenager who attended Hoërskool Vorentoe in Johannesburg.

He, in acting according to his religion, never shaved his young beard as symbol/notification that he knew the Koran off by heart, was refused admission to school in 1998. Although this was mainly viewed as an infringement of his right to freedom of religion (*Beeld*, 20 January 1998:8) or the right to attend a school of his choice,⁶ this is also an infringement of his right to freedom of expression. The growing of his young beard is 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 freedom to receive or impart information or ideas as well as the freedom of artistic creativity (Section 16(1)(c)).

⁵ Sec. 10 of CRSA.

⁶ Section 18 of CRSA.

I have already indicated that freedom of speech is recognized as a basic right because it is crucial in a democracy. Saying this, one should remember that even this crucial right can be limited: “Total freedom of speech in the school situation is not feasible (Joubert and Prinsloo, 2001:64). Joubert and Prinsloo argue that the right of learners to freedom of speech must be limited in cases where:

- It will disturb the general order.
- Vulgar language is used.
- It accuses falsely and maliciously.
- It encourages another learner to behave in a disorderly manner.

In all of these circumstances, the fundamental rights of others will be violated hence the limitation will be fair and justifiable in an open and democratic society.

“Generally, it is recognized that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights.” (De Waal *et al.*, 2001:144) All fundamental rights can thus be limited in terms of the general limitation clause in section 36 of CRSA which according to Malherbe (2001:13) is a pivotal provision in the Bill of Rights. This general limitation clause applies to all rights in the Bill of Rights and is the most common form of limitation. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. There must thus be an appropriate balance between the limitation of the right and the purpose for which the right is being limited. All relevant factors to the issue must be taken into account which according to section 36(1) of CRSA includes –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) less restrictive means to achieve the purpose ...

A balance must be found between the legitimate interest of the learner and the duty of the SGB to maintain proper order and discipline in the school. Under section 8(1) of SASA, every SGB must adopt a code of conduct for the learners. Section 8(2) of SASA clarifies that the aim of such 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.” Schools need to be able to identify an appropriate balance and only limit learners’ right to freedom of expression in cases where a legitimate interest of the school’s educational mission is at stake or where fundamental rights of other stakeholders will be violated. SGBs should be pro-active in addressing learners’ right to freedom of expression as part of their code of conduct and develop a separate policy on this matter.

This balancing of constitutional rights must be done in accordance with a 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 fulfill 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 CRSA 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.”

The question, then, is how school authorities can model respect for the right to free expression while ensuring that this right is not abused. While 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 and influence of educators, school managers and SGBs who

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 of a free society where differences of opinion are respected. How can limits on expression be set without restricting it to such an extent that the school becomes an anti-democratic environment?

From the example of Ysaf Bata 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). Furthermore it is also clear schools do not know how to respect or limit this right according to the CRSA. This problem or lack of knowledge leads us to the research problem.

6 RESEARCH DESIGN

6.1 Research problem/working assumption

Since South Africa became an independent country in 1961, it had a minority government and for thirty- three years human rights were not protected by legislation. In 1994 South Africa became a fully democratic country after the first democratic elections on 27 April 1994. The new government adopted the CRSA with a Bill of Rights that entrenches the fundamental human rights of all citizens. It is thus necessary for South Africans to consider how international constitutions address human rights and more specifically how human rights are interpreted in international courts. Section 39(1) (b) and (c) of CRSA provide that international and foreign law should be considered when interpreting the Bill of Rights. Although one can learn from international law and can learn to apply certain legal principles, we must however, not forget that legal principles can only be interpreted in a specific situation and that international scenarios might not always be relevant or appropriate to the South African scene. Therefore section 39(1) of CRSA specifies that when interpreting the Bill of Rights, a court, tribunal or forum “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”

For the first time in the history of South Africa, every citizen has human rights that are protected or entrenched. This is important for all the stakeholders in education, since education focuses on the human sciences. In education one deals with human beings and their interrelationships. The interrelationships of the stakeholders are important, because in interacting with a stakeholder, one can easily infringe upon a human right and perhaps be sued in a court. Most stakeholders in education are by now aware of the fact that they do have protected human rights. There is, however, a tendency that stakeholders do not really know how to deal with these newly found human rights. For example, learners seem to think that they have absolute rights and that they can demand these rights without looking at the situation or without considering any other stakeholder.

On the other hand some learners still think that they cannot exercise their rights because they still believe that they should respect authority and do not dare to differ. This leads towards the working assumption that Grade 11 learners in the Gauteng Province of South Africa do not understand the full implications of their right to freedom of expression and that they either think this right is absolute and abuse it or they are still not aware of the implications of the fact that they actually are allowed to speak out.

I make the assumptions that

- learners have limited knowledge of their right to freedom of expression
- some learners overemphasise their right to freedom of expression
- some learners do not exercise their right to freedom of expression
- school authorities also have a limited knowledge of learners' right to freedom of expression and therefore tends to violate this right.

I need to clarify here that although the right to freedom of expression includes a whole spectrum of expressions, that I would only focus on the learners understanding of their right to freedom of expression of non-verbal and non-written expression.

In the Guidelines for Consideration of Governing Bodies in accepting a Code of Conduct for Learners (RSA 1998: Section 4-5-1), the right to freedom of expression is described as

... more than freedom of speech. It includes the right to seek, hear , read and wear, and is extended to all forms of outward expression as seen in clothing selection and hair styles.

Alston (2002) did a literature study to explore the relevance of the right to freedom of expression to the South African Schools Community. He focuses basically on the application of this freedom in respect to grooming, dress, jewellery, learner press, artistic creativity and academic freedom in schools (Alston, 2002: 20). He has noted critical incidents at schools including above mentioned issues reflected by the media and indicated that the School Community should determine the relevance of the right to freedom of expression and how to balance this right within the school sector (Alston, 2002: 300-315). He also continues by focussing on the educators' right to freedom of expression.

6.2 Research questions

With the research problem in mind, I would like to pose the following research questions to guide and focus this study, although they cannot be explored in equal depth:

- What is learners' knowledge of their right to impart information or ideas?
- How do learners interpret and apply their right to impart information or ideas?
- What is learners' knowledge of their right to freedom of artistic creativity?
- How do learners interpret and apply their right to freedom of artistic creativity?

6.3 Methodology

6.3.1 Knowledge claim

Before continuing I need to clarify my epistemology, as this will be important in understanding my point of departure. I view science as a search to understand a phenomenon. However, there is not A TRUTH out there. People rather give meaning to “their own truth” in search of an understanding of phenomena. That the truth is not static, but rather a dynamic phenomena interpreted by the meaning or understanding people give to it, is clear when looking at the development and different foci of Human Rights (See 4.1). I therefore view knowledge from an amalgamation of two epistemological theories viz interpretivism as well as postmodernism. People assign meaning to their experiences and therefore interpret meaning. This is then the reason for a society having a positive growth in case law. People only go to court to sue one another if they fully agree that they have interpreted the law correctly in other words believing that the meaning that they have given to the law is the truth. The court then needs to adjudicate on the “real” interpretation of the law (knowledge). There are thus a variety of intersubjective meanings that are crucial to achieve understanding and meaning.

Furthermore, knowledge does not only “belong” to the authoritative voice of the expert but it values the subjective and multiple voice of individuals. We look at the world holistically. Everyone constructs meaning from information (interpretivism). The absolute truth doesn’t exist. The truth is rather a dynamic reality, which changes over time. (See the development and change of the face of Human Rights in paragraph 4.1).

I intend to answer my research question for a constructivism paradigm. While the right to freedom of expression is clearly entrenched in the CRSA, everyone gives their own meaning in interpreting their understanding of this right. Therefore, court cases develop to ensure harmony. While assuming that learners give their own interpretation to this right, an understanding about their understanding of this right will enable authorities and

managers to get policies in place to ensure harmony and to be pro-active in avoiding possible court cases.

6.3.2 Approach

According to Russo (1996:34) the primary source of information when doing legal research is the law itself. The traditional method of doing law research is a systematic investigation which involves the interpretation and explanation of the law. While legal research traditionally is neither qualitative nor quantitative, legal researchers try to place legal disputes in perspective in order to inform practitioners about the meaning and status of the law. This method of research is necessary since the nature of the law tends rather to be reactive than a proactive force. Past events (e.g. court interpretations) can thus lead to stability in its application. Therefore, it would be imperative to look at legislation and case law to determine how courts have interpreted statutory law in applying legal principles.

Since this research is conducted in the Faculty of Education, I shall also use research methodology used for research in the human sciences. Therefore, qualitative research will be done in terms of a literature review. McMillan and Schumacher (2001:108) define literature study as a critique of the status of knowledge of a carefully defined topic. It is similarly defined by Garbers (1996:305) as “a systematic circumspect search to trade all the published information about a specific subject in whatever term it exist and to collect useful resources”. Bell (1993:33) also points out that “any investigation, whatever the scale, will involve reading what other people have written about your area of interest, gathering information to support or refute your arguments and writing about your findings”.

An in-depth literature study including articles and case law will be undertaken with the purpose of searching for data relating to the research problem. The literature study will allow me to compare various interpretations of other researchers or courts on this topic. Noteworthy is that in a “normal” literature review, the researcher should determine the primary sources or key publishers on the topic. In the amalgamation of law and social

sciences, the primary source would be statutory law and case law. All other written sources, such as articles, books, and law reports would be secondary sources.

The functions of the literature review according to Ary, Jacobs and Razavich (1990:68) is that it enables the researcher to define the frontiers of a study to place questions in perspective, to limit my questions and to clarify and define the concepts of the study. A critical literature review might lead to insight into the reasons for contradictory results and might also indicate which methodologies have proven useful. The literature would also avoid replication of previous studies and would finally help me to interpret the significance of my results.

The literature review will allow the researcher to gain knowledge and ideas of others interested in the research questions and also to see the results of previous research done on the topic by others (Wallen and Fraenkel, 2001:48). In this way I shall gain background information which appears to be relevant to my topic (Bless and Higson-Smith, 1995:22).

When reading about fundamental rights or the right to freedom of expression, most researches have used the traditional law method of research and a substantial amount of researchers only used a literature review or comparison when interpreting the law. In brief, researchers discuss the relevant legislation and then compare how different courts had interpreted the legislation and deduce the consequences of the interpretation for understanding legislation in everyday life.

Qualitative methods are typically used when researchers intend to determine what went right or wrong in developing and implementing policies. Quantitative methods are used when researchers generalise about practices (Schimmel, 1996:1).

Since I am looking at what the right to freedom of expression entails, I shall start off with a literature review according to the traditional method of law research, as my intention is to determine WHAT learners' knowledge about their right to freedom of expression is.

In assuming multiple realities are socially constructed by the individual and the society, the qualitative approach will help me to determine learners' understanding of this right which again will help managers and policy makers. Qualitative research will enable me to understand learners' understanding of this right from their (respondents') perspectives. Furthermore one needs to remember that learners in South African schools are imbedded in a society of a new democracy where human rights are entrenched in the CRSA. This context certainly will have an influence on how learners, but also other stakeholders understand learners' right to freedom of expression. Therefore the qualitative approach will help me to interpret the phenomena in terms of the meaning of the respondents (Smit 2002:7).

Accepting that there is a range of different ways of making sense of the world, a qualitative approach will suit my research the best. Thereby I will be able to construct the "reality" as I see it from my respondents' point of view as Lincoln and Culba (1985: 160-186) argue that the epistemological foundations of qualitative research are based on value judgements. As my research will be an attempt to understand learners' understanding (meaning of their right to freedom of expression), I will do an interpretive research.

6.3.3 Strategies of inquiry

I will use a hybrid case study as strategy of inquiry. I do not intend to research a full case study by looking for instance at a specific school. Although my study will have boundaries, I will have purposeful sampling and I will use the data to generalise. The boundaries of my case study will be the learners. Due to my purposeful sampling the boundaries will extend to Gr 11 learners and then to the Gr 11 learners in the 5 sampled schools in the Gauteng Province.

6.3.4 Methods of data collection

My methods of data collection can be divided into three phases.

In phase 1 intend to use semi-structured open-ended questionnaires, since I want to determine what learners understand under their right to freedom of expression. Questionnaires can be administered without the presence of the researcher and are mostly straightforward to analyse (Wilson & McLean, 1994: 241). Oppenheimer (1992:115) points out that they also enable comparison to be made across groups in the sample. However, where rich and personal data are sought, a word-based qualitative approach will be preferable. Therefore my questionnaire will have a clear structure, sequence and focus. The open-ended questions will enable the respondents to respond on their own terms. This will enable me to collect honest and personal comments about what learners really understand under their right to freedom of expression. With the use of the open-ended questions I hope to contain the “gems of information” (Cohen, *et. al.* 2000:255); the extra data that I have not anticipated within the questionnaire. This will put ownership of the data more firmly into the respondents’ hands which will increase validity and reliability of the data.

Although not typically a qualitative procedure, I intend to use sequential procedures in order to expand the findings of phase 1 in phase 2 and again the findings of phase 2 with phase 3, etc. The results of phase 1 will indicate to me what type of questions to pursue in phase 2. The analysed data of phase 1 will guide me to structure questions for the focus-group interviews. Kvale defines an interview as “an interchange of views between two or more people on a topic of mutual interest (Kvale, 1996:14).

In phase 2 I intend to conduct four open-ended semi-structured, focus group interviews in order to determine why learners are or are not able to exercise their right to freedom of expression. With the focus group interview I intend to get rich data to answer the research question and to see what learners’ understanding of their right to freedom of

expression is. This qualitative semi-structured open-ended focus group interviews will enable me to collect detailed views from the participants.

Focus group interviews are neither strictly structured with standardised questions, nor are they non-directive (Cohen, et al., 2000:272). The reliance of a focus group interview is on the interaction within the group who discusses a topic (Morgan, 1988:9). It is not a backwards and forwards conversation between interviewer and the group (Cohen et al., 2000: 288). In this way data emerges from the interaction of the group. Although focus-group interviews are unnatural settings, they are “very focused on a particular issue therefore, will yield insight that might not otherwise have been available in a straightforward interview. Focus-group interviews are economical on time and produce a large amount of data in a short period of time. Again the analysed data obtained from both phase 1 and 2 will help me to structure questions for phase 3 and 5. In phase 4 I will do a document analysis on the court case *Antonie v SGB Settlers High School, and others 2002(4) SA 738*.

In order to collect rich data I will lastly like to have an in-depth interview with the plaintiff in *Antonie v Governing Body, Settlers High School, and Others 2002 (4) SA 738*. These qualitative open-ended interviews will enable me to collect a detailed view from a learner who has gone through a court case for believing that her right to freedom of expression was violated. This in-depth interview will produce a lot of data because it is on a one-to-one basis and is very time consuming.

6.3.5 Sampling

For phase 1 I will do a purposeful sampling of five secondary public schools in Gauteng Province. Two schools will be sampled from former black schools, and three from former white schools (one English and one Afrikaans as well as Pro Arte because its learners are creative and my topic thus is very relevant for them). I hope to receive at least 100 respondents.

For phase 2 I intend to return to four of these five schools for focus group interviews with eight learners in each interview group. This will also be a purposeful sampling, determined by the analysed data obtained from the questionnaires in phase 1.

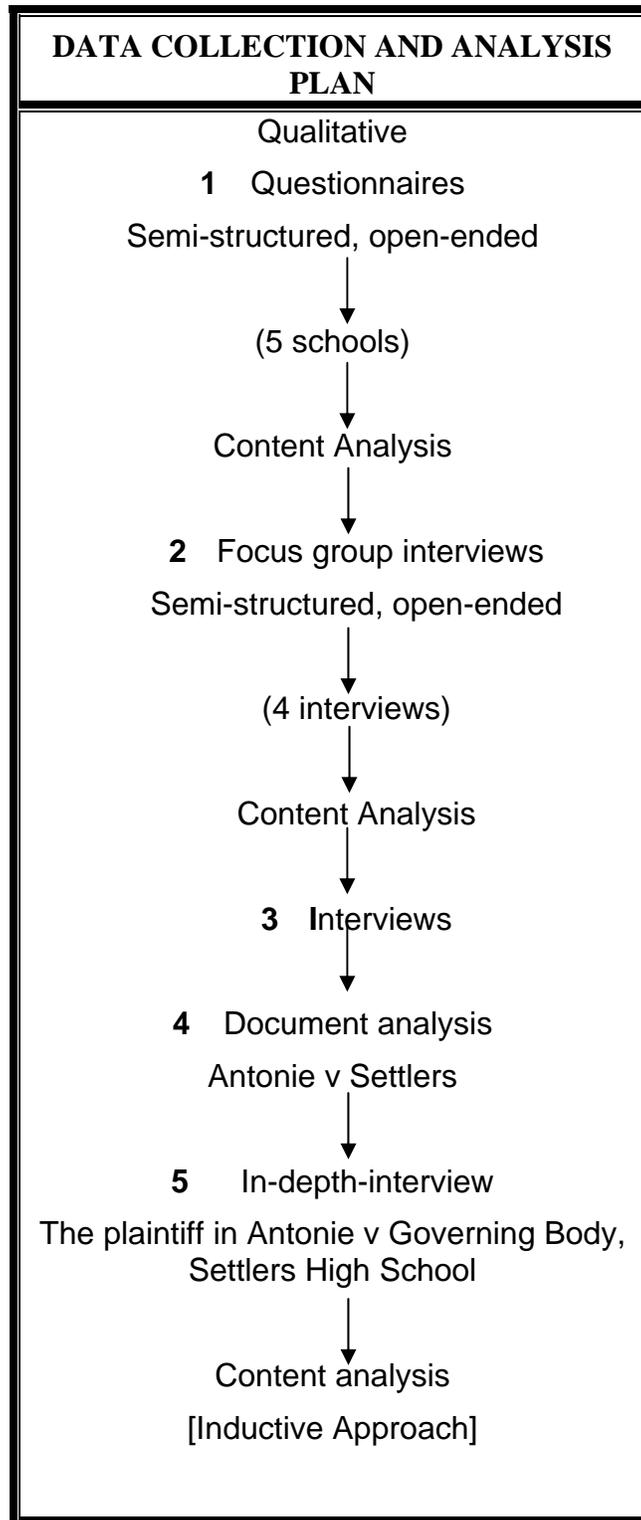
In phase 3 I will target one or two specific person for the interview.

In phase 4 I will do the document analysis and in phase 5 I will target one specific person for the in-depth interview.

Schools will be sample in the Gauteng Province because it is accessible for me. There also already exists a good correlation between the Gauteng Department of Education (GDE) and the University of Pretoria (UP). Furthermore, Gauteng is representative of the Republic of South Africa (RSA). Because of time and funding limitations, I will only work in Gauteng.

The data collection plan and analysis is summarised in table 1.

Table 1:



6.3.6 Research strategy

Although data collection in qualitative research traditionally happens simultaneously. I intend using a sequential, transformative strategy. The result of phase 1 will guide my research to phase 2 and again to phase 3 and 5. By using different phases “a sequential transformative researcher may be able to give voice to diverse perspective... or to better understand a phenomenon ...” (Creswell, 2003: 217). The designs are often emergent and flexible. Because inductive reasoning is emphasised, what researcher learn in earlier stages of the research substantially affects subsequent stages of the research process. Often, qualitative research is quite dynamic. The research and the research subjects and the research setting are all subject to change and development (Paechter, 2000).

The process of the qualitative research is non-linear and non-sequential. Data collection and analysis often proceed simultaneously. They may be modified in tight of early findings, in order to gather more specific information, or explore new and unanticipated areas of interest. Sometimes, early findings may suggest that the original research question itself should be changed because the underlying premise are not supported or the initial question was no salient in the context studied (Frankel & Devers, 2000). New questions might also be necessary from following their initial research questions and aims (Troman, 1996).

7 LIMITATIONS OF THE RESEARCH

Research dealing with the understanding of learners’ right to freedom of expression, should be an inclusive study of the entire Republic of South Africa, cover all the sectors of education and focus on all the different races and ethnic groups. Since such a study would be a time consuming research project, the researcher has decided to only focus on the public school sector in one province. Private schools will thus not be part of this research project. It can be anticipated that the outcome of private schools will differ slightly and interestingly from that of the public schools system.

I will not focus on the highly interesting and information rich sector of higher education. Within the public school sector, I will only focus on Gr 11 learners, which are in the senior secondary phase. The reason for choosing the senior secondary phase resonates with the fact that these learners are more advanced than learners in Grade 1 to 9 in terms of their discretion and decision-making skills. The child is seen as a minor and has a lack of *iudicium* (Davel, 2000:18).

Learning Orientation 2 of the learning area Life Orientation is Responsible Citizenship:

“The learner is able to demonstrate competence and commitment regarding the values and rights that underpin the constitution in order to practise responsible citizenship, and enhance social justice and sustainable living” (2002:12).

Although these learners began their school career under the previous compensation of apartheid, it was already in the time that human rights were very contentious and they have been in the system while the school system have changed and therefore it would be ideal to check how they have understood their right to freedom of expression being part of this culture of changing from the violation of human rights to the entrenchment thereof.

Despite the limitation I intend to do research in a diverse school system where former black and white schools will be part of the research. Urban as well as rural schools will ensure that the sample is representative of the total population of the Republic of South Africa.

8 SIGNIFICANCE OF THIS STUDY

While knowing that the implementation of freedom of Expression will pose challenges to school managers in balancing everyone’s rights; I am going to focus on what learners understand under their right to freedom of expression, as this may alert authorities of learners expectations and perceptions of this right. Since these rights entails such a wide spectrum of nuances, I will also only research learners understanding of their right to

freedom of expression, excluding their right to written and spoken expression. I will thus focus on their understanding of their right of freedom of expression, which will include their understanding of their grooming, dress, jewellery and artistic creativity.

This research is intended to help authorities to realise what learners' understanding of their right to freedom of expression is. This will secondly guide them to develop timeous policies to ensure that this right is respected and balanced correctly to avoid being sued.

9 DATA ANALYSIS PROCEDURE

In phase 1 the open-ended questions will be analysed in order to find out certain themes or issues, which appear generally.

In phase 2 it will be necessary to have a description of the individuals in the focus group Interview, which will also generalise certain themes and issues.

In phase 3 interviews will be held with some of the focus group respondents to triangulate the findings and data from phases 1 and 2.

In phase 5 there will be a detailed description of the individual for the in-depth interview. Here I will also look for the appearance of certain themes or issues.

The data analysis of the three phases will help me with my triangulation, reliability and validity of the data. The three phases of data collection will help me to triangulate and to enhance thick and rich data. The amalgamation of the questionnaires, focus group interviews as well as an in-depth interview would add greater depth, breadth and insight to my research. Furthermore, it will allow me to approach my problem from multiple perspectives. The use of this sequential procedure will allow me to expand the findings of the one phase with the next phase and also allow me to change my questions and foci all the time as required by the received data.

In the first phase the non-structured, open-ended questions will address the relationship between the knowledge of the rights and the grade 11 learners at the five sampled schools. In phase 2 (focus group interviews), phase 3 (interview), phase 4 (document analysis) and phase 5 (in-depth interview) the data will be used to probe significant knowledge by exploring aspect of the understanding and interpretation of their rights to freedom of Expression with the 5 schools (focus group interviews) and the one in-depth interview with the plaintiff in *Antonie v Governing Body, Settlers High School*.

10 TRIANGULATION, RELIABILITY AND VALIDITY

The use of data collection in three phases will not only help me to triangulate, but also to increase the reliability of my data. I suspect that I definitely will be able to generalise some facets of my three phases which will enhance reliability of the data.

To ensure validity, I will have a interviewer of colour doing the focus group interviews at former black schools in order to enhance trust and to use learners' mother tongue if language will be a problem.

If I manage to generalise some issues or themes from the 5 phases of data, this would also enhance the validity of the data.

Furthermore, for phases 2,3 and 5 I will definitely do a final report by asking participants whether they agree with the transcribed data to ensure validity.

Delimitations

I will not be able to research in all the provinces of the Republic of South Africa and will also not research the private school sector. The primary phases as well as the junior secondary phase will also not be included in the research.

In this research I will only investigate the understanding of learners' right to freedom of expression. I do not intend to look at the right to freedom of expression of educators.

11 TIME FRAME

The following time frame is proposed to ensure that I keep on track and that I can check my performance on the way and to ensure that I deliver on time.

January 2003 – June 2003	:	Proposal
May 2003 –	:	Literature review
December 2003 – April 2004	:	Development of data-collecting instrument
January 2004 – April 2004	:	Develop questionnaires and case studies for focus group interviews
May 2004 – July 2004	:	Focus group interviews
August 2004 – December 2004	:	Analysing and interpreting of questionnaires and focus group interviews and interviews
January 2005 – February 2005	:	In-depth interview with court case participant and document analysis
March 2005 – August 2005	:	Writing of PhD
September 2005 – October 2005	:	Finishing of PhD.
November 2005 – January 2006	:	Editing, binding, etc.
31 January 2006	:	Delivery date!

12 WORKING DEFINITIONS

Learner

The SASA, defines a learner as “any person receiving education or obliged to receive education” in terms of the Act (Section 1(iv) of SASA).

In terms of section 2(1) of SASA “[t]his Act applies to school education in the Republic of South Africa.

Therefore a learner would be a person receiving a school education.

Freedom of expression

In defining the concept: "*expression*" it is necessary to focus on the choice of this word. *Expression* is a wider concept than speech and includes activities such as painting and sculpting, displaying posters, dancing and the publication of photographs. Cachalia, Cheadle, Davis, Hayson, Maduna and Marcus (1994:54) state that symbolic acts such as flag burning, the wearing of certain items of clothing and physical gestures amalgamates under the right to freedom of expression. This is also emphasised in *Tinker v Des Moines Independent Community School District* 393 U.S. 503 (1969) when pupils were suspended for wearing black armbands to show that they disagree with the Vietnam war. An express or belief can also be communicated through other forms of non-verbal expression. For example, the wearing of certain insignia and the length of one's hair could also represent a statement or expression (Wood, 2001:142). As De Waal, Currie and Erasmus (2001:311) summarise it "...every act by which a person attempts to express some emotion, belief or grievance should qualify as constitutionally-protected 'expression'." Van der Westhuizen (1994:269) expresses the diversity of expression in his definition: "It is submitted that any expression, verbal or otherwise, which is intended to be observed by one or more person(s) and even though it may not be 'speech'". Freedom of expression also includes one's freedom of belief and opinion as well as freedom of association and vocational freedom, because it is within one's execution of these fundamental rights that you exercise your right to freedom of expression.

During the first phase of this research (Survey by means of questionnaires) the whole spectrum of expression will be covered. In the second phase (focus group interviews and in-depth-interviews) I will only concentrate on the non-written and non-spoken freedom of expression, which include section 16(1) (b) and (c) of the CRSA.

- "b freedom to receive or impart information or ideas;
- c freedom of artistic creativity"

13 CHAPTER PLAN

Chapter 1: Introduction and orientation

Chapter 2: Literature review

Chapter 3: Methodology

Chapter 4: Research

Chapter 5: Findings, recommendations and conclusions

14 CONCLUSION

As indicated in the background, learners in South African Schools' right to freedom of expression is often violated. It is therefore proposed that an in depth study be done on determining what learners understand specifically under their right to freedom of expression. It is clear that because of the Calvinistic life view, as well as a life view of respect to the elder, people in South Africa are not accustomed to exercise their right to freedom of expression or to respect those who want to exercise their right to freedom of expression. In a democracy where human rights are internalised, learners should understand exactly what it means to exercise their right to freedom of expression. They need to understand that this right is not absolute. Not only does it have an inherent limitation, but it can also be balanced in terms of section 36 of the CRSA. This research aims to determine what learners understanding is of their right to freedom of expression. The research will conclude with findings as well as recommendations to address what is discovered.

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Zykan v. Warsaw Community School Corp. 631 F.2d 1300 (7th Cir. 1980)



Date:	18 March 2004
Name of Researcher:	Willem van Vollenhoven
Address of Researcher:	849 Church Street
	Arcadia
	Pretoria 0083
Telephone Number:	(012) 4203340/0828723782
Fax Number:	(012) 4203581
Research Topic:	Learners' understanding of their right to Freedom of Expression in South Africa
Number and type of schools:	5 Secondary Schools
District/s	Tshwane South

Re: Approval in Respect of Request to Conduct Research

This letter serves to indicate that approval is hereby granted to the above-mentioned researcher to proceed with research in respect of the study indicated above. The onus rests with the researcher to negotiate appropriate and relevant time schedules with the school/s and/or offices involved to conduct the research. A separate copy of this letter must be presented to both the School (both Principal and SGB) and the District/Head Office Senior Manager confirming that permission has been granted for the research to be conducted.

Permission has been granted to proceed with the above study subject to the conditions listed below being met, and may be withdrawn should any of these conditions be flouted:

- 1. The District/Head Office Senior Manager/s concerned must be presented with a copy of this letter that would indicate that the said researcher/s has/have been granted permission from the Gauteng Department of Education to conduct the research study.*
- 2. The District/Head Office Senior Manager/s must be approached separately, and in writing, for permission to involve District/Head Office Officials in the project.*
- 3. A copy of this letter must be forwarded to the school principal and the chairperson of the School Governing Body (SGB) that would indicate that the researcher/s have been granted permission from the Gauteng Department of Education to conduct the research study.*

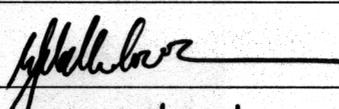
4. **A letter / document that outlines the purpose of the research and the anticipated outcomes of such research must be made available to the principals, SGBs and District/Head Office Senior Managers of the schools and districts/offices concerned, respectively.**
5. **The Researcher will make every effort obtain the goodwill and co-operation of all the GDE officials, principals, chairpersons of the SGBs, teachers and learners involved. Persons who offer their co-operation will not receive additional remuneration from the Department while those that opt not to participate will not be penalised in any way.**
6. **Research may only be conducted after school hours so that the normal school programme is not interrupted. The Principal (if at a school) and/or Senior Manager (if at a district/head office) must be consulted about an appropriate time when the researcher/s may carry out their research at the sites that they manage.**
7. **Research may only commence from the second week of February and must be concluded before the beginning of the last quarter of the academic year.**
8. **Items 6 and 7 will not apply to any research effort being undertaken on behalf of the GDE. Such research will have been commissioned and be paid for by the Gauteng Department of Education.**
9. **It is the researcher's responsibility to obtain written parental consent of all learners that are expected to participate in the study.**
10. **The researcher is responsible for supplying and utilising his/her own research resources, such as stationery, photocopies, transport, faxes and telephones and should not depend on the goodwill of the institutions and/or the offices visited for supplying such resources.**
11. **The names of the GDE officials, schools, principals, parents, teachers and learners that participate in the study may not appear in the research report without the written consent of each of these individuals and/or organisations.**
12. **On completion of the study the researcher must supply the Senior Manager: Strategic Policy Development, Management & Research Coordination with one Hard Cover bound and one Ring bound copy of the final, approved research report. The researcher would also provide the said manager with an electronic copy of the research abstract/summary and/or annotation.**
13. **The researcher may be expected to provide short presentations on the purpose, findings and recommendations of his/her research to both GDE officials and the schools concerned.**
14. **Should the researcher have been involved with research at a school and/or a district/head office level, the Senior Manager concerned must also be supplied with a brief summary of the purpose, findings and recommendations of the research study.**

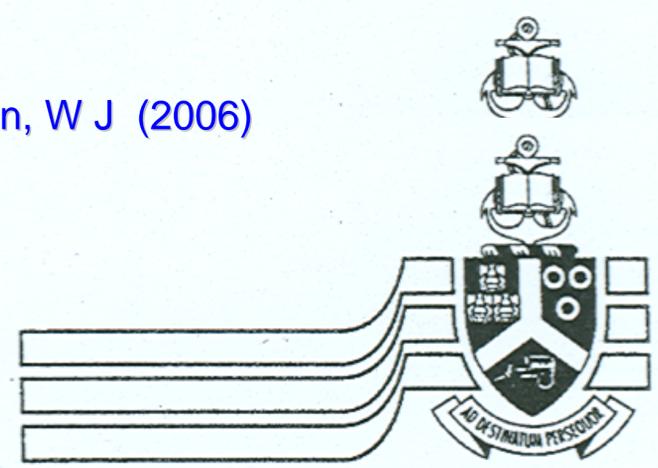
The Gauteng Department of Education wishes you well in this important undertaking and looks forward to examining the findings of your research study.

Kind regards

pp. Nomvula Ubisi

MZWANDILE KIBI
DIVISIONAL MANAGER: OFSTED

The contents of this letter has been read and understood by the researcher.	
Signature of Researcher:	
Date:	2004/03/23



University of Pretoria

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<http://www.up.ac.za>

Faculty of Education
School of Educational Studies
Department of Educational Management
and Policy Studies

23 March 2004

REQUEST TO COLLECT RESEARCH DATA

Our telephone conversation at 10:40 on Tuesday 23 March 2004.

Please find attach the Department of Education's letter of approval to do research in your district.

Also find attach the names of the five schools involved.

I would appreciate it if you can provide me with the telephone numbers and principal's name in order to contact them.

Warmly

A handwritten signature in black ink, appearing to read 'W. van Vollenhoven', with a long horizontal flourish extending to the right.

Willem van Vollenhoven

082 872 3782

Telephone: (012) 420 3340

Fax: (012) 420 3581

IDS DISTRICT D4
 University of Pretoria etd – Van Vollenhoven, W J (2006)



UMnyango WezeMfundo
 Department of Education

Lefapha La Thuto
 Departement van Onderwys

Enquiries: Gonnies Leurs
 Reference: Policy and Planning

Telephone: 012-341-6362
 Fax: 012-341-6844/9197
 16 April 2004

Mr Willie van Vollenhoven
 Dept. Education Management and Policy Studies
 Faculty of Education
 University of Pretoria
 Pretoria

Fax 012-420-3581

Dear Mr van Vollenhoven

Approval to enter schools to do research.

The Gauteng Department of Education has given approval to you to do research on the topic:

“Learners’ understanding of their right to freedom of expression in South Africa”.

at the following schools:

School	Principal	Telephone	Fax
Hoërskool Eldoraigne	Mr F. Roos	012 660 2066/7	012 654 2350
Pro Arte Alphen Park	Dr W H Kirstein	012 460 6221/2	012 346 1740
Lyttelton Manor H/S	Ms P B Malherbe	012 664 5698/9	012 664 5039
Phelindaba H/S	Mr B Bodiba	012 373 7928	012373 7928
Gatang H/S	Mr P M Selesho	012 801 0897	012 801 0897

Please contact the schools in order to secure dates and times to visit them. Should you require assistance please contact Gonnies Leurs at the District Office.

Yours sincerely

T S Makofane
 T S Makofane : Senior Manager : District Tshwane South

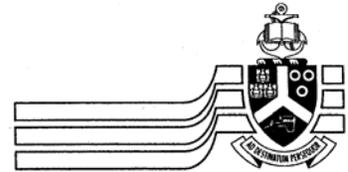
SENIOR MANAGER: T S MAKOFANE; TSHWANE SOUTH DISTRICT OFFICE
 (Mamelodi/Eersterust/Pretoria East/Pretoria South/Atteridgeville/Laudium)

Cnr Gerard Moerdyk & Walker Street, Sunnyside, Pretoria, 0002

Private Bag X27825, Sunnyside, Pretoria, 0132

Tel: (012) 341-6362/-9 Fax: (012) 341-0061

Web: www.education.gpg.gov.za



Universiteit van Pretoria

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Fakulteit Opvoedkunde
Skool vir Opvoedkundige Studies
Departement Onderwysbestuur en Beleidsstudie

Addendum O: Request Letter to do research to School Governing Body

16 April 2004

Die Voorsitter
Beheerliggaam

Geagte Meneer

NAVORSINGSPROJEK

Hiermee doen ek aansoek vir goedkeuring om data-insameling in u skool toe doen. Ek is 'n voltydse dosent in die Fakulteit van Opvoedkunde se Departement van Onderwysbestuur en Beleidsstudie by die Universiteit van Pretoria.

My vakgebied is Onderwysreg. Ek is tans besig met my doktorale studies. Die titel van my skripsie is: ***“Learners’ understanding of their right to freedom of Expression.”***

Ek het by u distrik sowel as die GDO toestemming verkry om by vyf skole waarvan u skool een is, data in te samel. Die data-insameling sal in drie fases gebeur. Vir fase 1 van my data-insameling moet 'n Graad 11-registerklas 'n vraelyste voltooi. Vir fase 2, sal ek met agt, Graad 11 leerders in fokusgroeponderhoud voer en vir fase 3 'n persoonlike onderhoud met twee Graad 11 leerders voer.

Die doel van die studie is uit die aard van die saak om my PhD te voltooi, maar ook om aan beleidmakers aan te dui wat leerders huidiglik verstaan onder hul grondwetlike mensereg van vryheid van spraak. Dit behoort beleidmakers in staat te stel om pro-aktief op te tree en die nodige beleid en regulasies daar te stel sodat die reg van leerders in skole nie geskend sal word nie, maar ook hoe dié reg in ons demokratiese samestelling in skole gebalanseer kan word.

Die name van die vyf deelnemende skole sowel as elke respondent sal nêrens bekendgemaak word nie.

University of Pretoria etd – Van Vollenhoven, W J (2006)

Ek vertrou dat u die aansoek gunstig sal oorweeg en dat u skool ook baat mag vind met die navorsingsprojek.

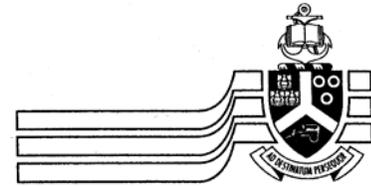
Vind aangeheg:

- (1) Toestemmingsbrief van die Gauteng Departement van Onderwys
- (2) Toestemmingsbrief van die Tshwane South Streekkantoor.

Willie van Vollenhoven

Departement Onderwysbestuur en Beleidstudie

082 872 3782



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Faculty of Education
School of Educational Studies
Department of Educational Management
and Policy Studies

Addendum O: Request Letter to do Research to School Governing Body

26 April 2004

The Chairperson
School Governing Body

Dear Sir

RESEARCH PROJECT

I hereby apply for approval to collect data in your school.

I am a fulltime lecturer in the Faculty of Education in the Department of School Management and Policy Studies at the University of Pretoria. My study field is Education Law. Currently, I am busy with my doctoral studies. The title for my thesis is *Learners' understanding of their right to freedom of expression*.

The GDE as well as the Tshwane South District, approved my request to collect data for this project at five secondary schools of which your school is one. The collection of data will happen in three phases. In phase 1, every learner in a Grade 11 register class, should complete a questionnaire. For phase 2, I will conduct a focus-group interview with eight of the Grade 11 learners and in phase 3, I will have an interview with two of the Grade 11 learners.

The purpose of the study is firstly to complete my PhD but also to indicate to policy makers what learners at schools currently understand under their right to freedom of expression. This might help policy makers to be pro-active in developing policies and regulations to ensure that this right will be respected in schools but also to indicate how this right will be balanced in a school situation to ensure that the school authorities will not be sued by learners for infringing upon their right to freedom of expression.

The five participating schools and all the respondents will be totally anonymous.

University of Pretoria etd – Van Vollenhoven, W J (2006)

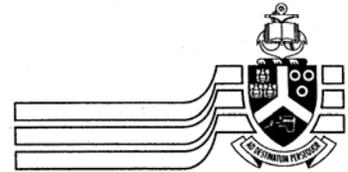
I firmly believe that both your school and myself will benefit from this research relationship and that you therefore will agree on the approval.

Attach please find:

- (1) Letter of approval from the GDE
- (2) Letter of approval from the Tshwane South District Office.

King regards

Willie van Vollenhoven
082 872 3782



Universiteit van Pretoria

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Fakulteit Opvoedkunde
Skool vir Opvoedkundige Studies
Departement Onderwysbestuur en Beleidstudie

Addendum P: Request Letter to do Research to Principals

16 April 2004

Die Hoof

Geagte Meneer

NAVORSINGSPROJEK

Hiermee doen ek aansoek vir goedkeuring om data-insameling in u skool toe doen. Ek is 'n voltydse dosent in die Fakulteit van Opvoedkunde se Departement van Onderwysbestuur en Beleidstudie by die Universiteit van Pretoria.

My vakgebied is Onderwysreg. Ek is tans besig met my doktorale studies. Die titel van my skripsie is: ***“Learners’ understanding of their right to freedom of Expression.”***

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Die name van die vyf deelnemende skole sowel as elke respondent sal nêrens bekendgemaak word nie.

Ek vertrou dat u die aansoek gunstig sal oorweeg en dat u skool ook baat mag vind met die navorsingsprojek.

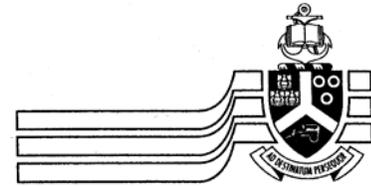
Vind aangeheg:

- (1) Toestemmingsbrief van die Gauteng Departement van Onderwys
- (2) Toestemmingsbrief van die Tshwane South Streekkantoor.

Willie van Vollenhoven

Departement Onderwysbestuur en Beleidstudie

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Faculty of Education
School of Educational Studies
Department of Educational Management
and Policy Studies

Addendum P: Research Letter to do Research to Principals

26 April 2004

The Principal

Dear Sir

RESEARCH PROJECT

I hereby apply for approval to collect data in your school.

I am a fulltime lecturer in the Faculty of Education in the Department of School Management and Policy Studies at the University of Pretoria. My study field is Education Law. Currently, I am busy with my doctoral studies. The title for my thesis is *Learners' understanding of their right to freedom of expression*.

The GDE as well as the Tshwane South District, approved my request to collect data for this project at five secondary schools of which your school is one. The collection of data will happen in three phases. In phase 1, every learner in a Grade 11 register class, should complete a questionnaire. For phase 2, I will conduct a focus-group interview with eight of the Grade 11 learners and in phase 3, I will have an interview with two of the Grade 11 learners.

The purpose of the study is firstly to complete my PhD but also to indicate to policy makers what learners at schools currently understand under their right to freedom of expression. This might help policy makers to be pro-active in developing policies and regulations to ensure that this right will be respected in schools but also to indicate how this right will be balanced in a school situation to ensure that the school authorities will not be sued by learners for infringing upon their right to freedom of expression.

The five participating schools and all the respondents will be totally anonymous.

University of Pretoria etd – Van Vollenhoven, W J (2006)

I firmly believe that both your school and myself will benefit from this research relationship and that you therefore will agree on the approval.

Attach please find:

- (1) Letter of approval from the GDE
- (2) Letter of approval from the Tshwane South District Office.

King regards

Willie van Vollenhoven
082 872 3782

ADDENDUM Q: TEN SCENARIOS

SCENARIO 1:

Jonathan is a grade ten pupil at Achievement High School and he wears a golden sleeper ring in his left ear. The Code of Conduct for learners specifically mentions that only girls are allowed to wear a golden stud or sleeper ring in their ears. Jonathan is instructed to remove the earring or face possible disciplinary action against him.

QUESTIONS TO BE POSED:

- (1) What would you do if you were Jonathan? Why?
- (2) Do you think that wearing an earring could be a form of expression of his freedom of expression?
- (3) Suppose Jonathan is suspended from school because he refuses to remove the earring, would he be successful in suing the school for infringing his right to freedom of expression?

SCENARIO 2

Bianca is a grade eleven learner at New Life Secondary School. She embraced the principles of the Rastafarian religion. As a way of expressing her religious beliefs she grew her hair in dreadlocks and covered her hair with a cap. She knew that this was contrary to the hair rules set out in the school rules and proceeded to ask permission from the principal to do this. Her request was turned down by the school principal stating that the school embraced Christian religious principles as part of the school ethos and code of conduct, which her parents accepted when she was enrolled at the school. Believing her right to freedom of religion and expression was infringed; she continued to attend school wearing a navy cap because this matched the prescribed school colours. The school regarded her behaviour as constituting serious misconduct and Bianca was subsequently suspended for five days. Her parents appealed this decision of the school governing board.

According to section 4.5.1 of the Schedule, issued by the Ministry of Education, which deals with guidelines for consideration of SGBs in adopting a code of conduct for learners:

Freedom of expression is more than freedom of speech. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles.

QUESTIONS TO BE POSED:

- (1) Do you think the school violated Bianca's right to freedom of expression?
- (2) Do you think the school can legally limit Bianca's right to freedom of expression? Give reasons for your answer.

SCENARIO 3:

The SGB of a school decided to make condoms available to all learners who wish to have access to them. The condoms are kept in the administration office. A group of female learners felt offended by this decision and asked the principal to hold a meeting in the school hall. This was granted and they held the meeting during break. They decided to form an action group that would promote abstaining from premarital sex, to wear a white ribbon that would identify them as members of the group and to demonstrate against the issuing of condoms on the school premises.

QUESTION TO BE POSED:

- (1) Did they act in accordance with their right to freedom of expression?

SCENARIO 4:

Riverside High School's ethos is based on Christian principles. They have a very strong Christian association where learners can freely participate in prayer and worship ceremonies during break time. The members of this association wear a badge on their uniform to witness to fellow learners.

Rebotile, a grade eight learner, was suspended from school for wearing a badge on her uniform to promote Satanism. She sued the school claiming that her right to freedom of expression was violated.

QUESTIONS TO BE POSED:

- (1) Do you think the school may allow the wearing of badges of the Christian organisation?
- (2) Do you think Rebotile had a strong case in the court?
- (3) What do you think would be the best precaution that the school can take in order to prevent legal action for cases like this?

SCENARIO 5:

John Doe was suspended for wearing a black armband to school with the abbreviation WWJD (what would Jesus do?) on it. The Code of Conduct clearly states that no type of jewellery is allowed with the school uniform.

QUESTIONS TO BE POSED:

- (1) Can John claim that this was an infringement of his right to freedom of expression?
- (2) Do you think that the school can legally prohibit the wearing of this armband?
- (3) Would the scenario change if the slogan on the armband read “Satan is King?”

SCENARIO 6:

According to the draft Revised Curriculum Statement in the learning area Arts and Culture (RSA 2001), pupils are supposed “to convey particular feelings and moods” and “communicate ideas, thoughts and feelings through dance”. Annah and John, two Grade 11 learners at Sunrise Secondary School, performed their dance and suggested through their dance the whole passionate ritual of intimate sex. The rest of the class were embarrassed, while some whistled and cried out sexual slogans. The two learners were suspended.

QUESTION TO BE POSED:

- (1) Can they argue that their right to freedom of expression was infringed?

SCENARIO 7:

Kim, a grade 11 learner at Starview Secondary School, was suspended for having a tattoo on his right arm.

POSING QUESTIONS:

- (2) Can Kim claim that this was an infringement of his right to freedom of expression?
- (3) Do you think that schools can limit this practice?

SCENARIO 8

At Atteridge High School, they offer art as a subject. The Grade 11 learners had to submit a portfolio of their work which also included personal choice of work. Tsepo submitted amongst his work a nude painting. The model was another Grade 11 pupil of the opposite sex. The art teacher refused to mark the work as it could not be displayed at the annual art gallery for the art students. She reported the case to the principal who started with a disciplinary hearing to expel Tsepo from school.

QUESTIONS TO BE POSED:

- (1) Do you think Tsepo can claim that it is an infringement of his right to freedom of expression because the teacher refused to accept his painting?
- (2) What criteria do you think should be used to limit one's right to artistic freedom of expression?
- (3) Would the scenario be different if the model were not a pupil from the school?
- (4) Would the principal act within his legal power to start with disciplinary measures?

SCENARIO 9:

A Grade 9 Xhosa-speaking learner at Prestige High School was suspended for shaving his head.

QUESTIONS TO BE POSED:

- (1) Did the SGB act within their legal power in suspending this learner?
- (2) Was this an infringement of the right to freedom of expression?
- (3) How would the situation change if the boy argued that he shaved his head as an act of respect for a deceased relative?

SCENARIO 10:

The grade 11 pupils at Sunrise Secondary School had to write, compose and sing their own lyrics in the learning area, Arts and Culture. One group's lyric is:

LSD gives us power

LSD makes us strong

The best investment in our future is dedication to LSD.

The whole group was immediately summoned to the principal's office and expelled after a disciplinary hearing.

QUESTIONS TO BE POSED:

- (1) Can the learners claim that the expulsion is a violation of their right to freedom of expression?
- (2) Do you think there should be a limitation of the right to freedom of artistic creativity in this case?



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Addendum R: Letter to Critical Friends

Dear

FREEDOM OF EXPRESSION

Section 16 of the Constitution of the Republic of South Africa, Act 108 of 1996 states:

- 16(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.

I am doing my PhD research on this topic under the title:

“Learners’ understanding of their right to freedom of expression.”

My intention is thus to determine what learners understand at this stage by this right to freedom of expression.

Of course, this right entails the written and the spoken word. I am however focusing on freedom of expression that is neither the written nor the spoken word. My focus will thus be on sections 16(1)(b) and 16(1)(c).

For my data collection, I would like to have focus group interviews with Grade 11 learners. In the focus group interviews, I will sketch three scenarios to them and ask questions in order to determine what they understand by their right to freedom of expression.

University of Pretoria etd – Van Vollenhoven, W J (2006)

I would like to use you as a critical friend to help me with the selection of the scenarios, since you work daily with Grade 11 learners and know what is really an issue for them. I would therefore like you to prioritize according to your opinion the ten attached scenarios using the criteria of

- (1) This really is a burning issue among Grade 11 learners
- (2) Grade 11 learners will really want to talk about this topic.

You are also welcome to sketch your own scenario and give it to me, if you believe that there is an important scenario which is not represented in the ten provided scenarios.

Thank you for your time.

Willem van Vollenhoven.

ADDENDUM S: FINAL SCENARIOS FOR FOCUS-GROUP INTERVIEWS

SCENARIO 1:

Jonathan is a grade ten pupil at Achievement High School and he wears a golden sleeper ring in his left ear. The Code of Conduct for learners specifically mentions that only girls are allowed to wear a golden stud or sleeper ring in their ears. Jonathan is instructed to remove the earring or face possible disciplinary action against him.

QUESTIONS TO BE POSED:

- (1) What would you do if you were Jonathan? Why?
- (2) Do you think that wearing an earring could be a form of expression of his freedom of expression?
- (3) Suppose Jonathan is suspended from school because he refuses to remove the earring, would he be successful in suing the school for infringing his right to freedom of expression?

SCENARIO 2

Bianca is a grade eleven learner at New Life Secondary School. She embraced the principles of the Rastafarian religion. As a way of expressing her religious beliefs she grew her hair in dreadlocks and covered her hair with a cap. She knew that this was contrary to the hair rules set out in the school rules and proceeded to ask permission from the principal to do this. Her request was turned down by the school principal stating that the school embraced Christian religious principles as part of the school ethos and code of conduct, which her parents accepted when she was enrolled at the school. Believing her right to freedom of religion and expression was infringed; she continued to attend school wearing a navy cap because this matched the prescribed school colours. The school regarded her behaviour as constituting serious misconduct and Bianca was subsequently suspended for five days. Her parents appealed this decision of the school governing board.

According to section 4.5.1 of the Schedule, issued by the Ministry of Education, which deals with guidelines for consideration of SGBs in adopting a code of conduct for learners:

Freedom of expression is more than freedom of speech. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles.

QUESTIONS TO BE POSED:

- (1) Do you think the school violated Bianca's right to freedom of expression?
- (2) Do you think the school can legally limit Bianca's right to freedom of expression? Give reasons for your answer.

SCENARIO 3:

According to the draft Revised Curriculum Statement in the learning area Arts and Culture (RSA 2001), pupils are supposed “to convey particular feelings and moods” and “communicate ideas, thoughts and feelings through dance”. Annah and John, two Grade 11 learners at Sunrise Secondary School, performed their dance and suggested through their dance the whole passionate ritual of intimate sex. The rest of the class were embarrassed, while some whistled and cried out sexual slogans. The two learners were suspended.

QUESTION TO BE POSED:

- (1) Can they argue that their right to freedom of expression was infringed?

ADDENDUM T: THE RIGHT TO FREEDOM OF EXPRESSION IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

FREEDOM OF EXPRESSION IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1 The United Nations Charter (UNC) of 1945

By ratifying the UNC, South Africa pledged to promote “universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion”¹. Yet, the policy of apartheid was implemented and the fundamental human rights of the majority of citizens were violated. Every fundamental right enshrined in the UDHR was violated by South Africa (Patel & Watters, 1994 p. V) and this led to the imposition of economic sanctions against South Africa by the countries which had ratified the UNC and the UDHR. It specifically mentions the right to freedom of expression. As the fundamental human rights of South Africans were violated, the right to freedom of expression, which is a core right in a democracy, was also violated.

2 The Universal Declaration of Human Rights (UDHR) of 1948

Article 19 of the UDHR provides that:

...[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (“UDHR”, 1948 article 19).

The way the right to freedom of opinion and expression is stipulated in article 19 of the UDHR corresponds with the literature which resonates with the fact that the right to freedom of expression tends to be an absolute right. There is absolutely no inherent limitation to article 19 and it provides for opinions to be held without interference and for the recital of and imparting of ideas through any media, regardless of “frontiers”.

¹ Article 55 of UNC.

3 The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1976

Although the intention of this Covenant is not primarily to address human rights, it notes in article 18 and 19 that the Commission on Human Rights will be advised on this issue as required. It states in article 19 that:

- 1 Everyone shall have the right to hold opinions without interference.
- 2 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 ("ICESCR", 1976 article 19).

Again, 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 looks as if it tends towards an absolute right. It elaborates, however, wider than the UDHR by stating that this right is not only for oral (verbal) or written expression, but also includes not only printed media, but also creativity and artistic expression.

It then adds to the protection of this right as provided in article 19(1) and 19(2) an inherent limitation in article 19(3) which is not found in the UDHR. None of the earlier covenants and declarations included inherent limitations to the right to freedom of expression. It states the inherent limitation in article 19(3):

- (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 ("ICESCR", 1976 article 19).

In other words, in terms of article 19(3)(a) the right to freedom of expression can be limited if any other right of a person is violated in the process. (See § 2.4.2.1) Furthermore, in terms of article 19(3)(b) it can also be limited in order to protect the national security or public order, or public health or morals. It is clear, judging by these inherent limitations, that the right can be balanced by responsibilities. In other words, when exercising your right to freedom of expression, one has to remember that you have to abide by your responsibilities that are reciprocal to your right.

4 The American Convention on Human Rights (ACHR) of 1978

The ACHR provides for the rights to freedom of thought and expression in article 13. This is a fairly lengthy provision. Article 13: Freedom of Thought of Expression

- (1) Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of his choice.
- (2) The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.
- (3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
- (4) Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
- (5) Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law ("ACHR", 1978 article 13).

Article 13(1) echoes article 19(2) of the ICCPR which indicates a whole spectrum under the right to freedom of expression.

Article 13(2) limits the right to freedom of expression in article 13(1) as the right to freedom of expression is limited in the same way in article 19(3) of the ICCPR. It continues, however, in article 13(3), to state that "government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions", may not restrict this right. In terms of article 13(4) the right to freedom of expression may be limited for the moral protection of childhood and adolescence. Finally, it ends in article 13(5) with the limitation that, if freedom of expression amounts to "propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to lawless violence or to any other similar illegal action against any person or group of persons on any grounds, including those of race, colour, religion, language or national origin, shall be considered as offences punishable by law."

This offers a broad framework of the conditions under which the right to freedom of expression can be limited, which is in accordance with the fact that freedom of expression is limited if the rights of others are violated in the process of exercising one's own right to freedom of expression (see § 2.4).

5 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1953

When looking at article 10 of the ECHR, one notices that it is based closely on article 19 of the UDHR. (See § 2) At article 10(1) a new sentence is added, which reads:

This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises ("ECHR", 1953 article 10).

This indicates that governments may have a certain amount of control over these enterprises. Both the UDHR as well as the ICESCR refers to "freedom to seek, receive and impart information". Noteworthy is the fact that the ECHR omits the word "seek". They avoid this word to imply that public authorities have a corresponding obligation to give information. This section refers thus to the duties and responsibilities of everybody and that one's right can be balanced by one's duties.

It is stated in article 10 that this right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. It continues then, with a limitation, stating that "[t]his article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

Although the concept of freedom of expression is not defined, it includes the whole spectrum of expression of own opinion and to impart or receive information by any method or in any way. It gives, however, the right of government to decide or to have control over the broadcasting industry's licensing meaning that government still has a veto right on what can be broadcast or not which in fact boils down to a limitation (perhaps a violation) of the right to freedom of expression. The more the government control and the limitation of this right, the less is the right to freedom of expression of citizens to speak their minds through the media or to hear or see through the media what they want or should see.

In article 10(2) this right is inherently limited when it is in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure and impartiality of the judiciary. This limitation therefore comes into effect whenever the right of someone else is violated when someone exercises this right (see Canon Lawyers § 2.2.2). This is not a legal document but needs to be ratified by countries.

6 The African Charter on Human and Peoples Rights (1986) (African Charter)

In connection with the right to freedom of expression the African Charter provides briefly in article 9 that:

- 1 Every individual shall have the right to receive information
- 2 Every individual shall have the right to express and disseminate his opinions within the law ("The African Charter", 1986 article 9).

The only limitation built into this provision is that the exercising of the right to freedom of expression must be within the boundaries of the law. This term allows for the right to be nullified by statute (Alston, 2002:59) and is in line with the tendency that the law or the government or society (collectively) has more power than the right of the individual.

7 The Universal Declaration of Islamic Human Rights (UDIHR) of 1981

In connection with the right to freedom of expression, the UDIHR provides in article XII:

- XII Right to Freedom of Belief, Thought and Speech
- (a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.
 - (b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.
 - (c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the State.
 - (d) There shall be no bar on the dissemination of information, provided it does not endanger the security of the society or the State and is confined within the limits imposed by the Law.

- (e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims ("UDIHR", 1981 at XII).

In short, the protection of the right to freedom of expression in the UDIHR does not vary much from other international declarations. Some of the inherent limitations are in line with those of other international declarations, e.g.:

- XII(a) "... No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspirations on other persons" ("UDIHR", 1981 at XII(a)).

It emphasises however, the fact that the duty of the Muslim has higher value than the right, e.g.:

- XII(b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim ("UDIHR", 1981 at XII(b)).

Further, the tension between religion and government is also spelled out within this right

- XII(c) ... right and duty to protest and strive (within the limits set out by the Law) against oppression can, if it involves challenging the highest authority in the State ("UDIHR", 1981 at XII(c)).

In other words, The Muslim may by law challenge government if they or their laws contradict the Shari' ah Law. It is also evident that every right that is allowed, is allowed only if under the auspices of the Shari'ah Law of the Muslim. It is within this provision, where the Law is supreme to the international or national legislation that tension can develop between a government and its Islamic citizens. The UDIHR, however, is not insensitive toward the value systems of society and governments, as is clear in article XII(d) on freedom of expression. Furthermore, it provides in article XII(e) that "respect for the religious feelings of others is obligatory on all Muslims".

8 The Cairo Declaration on Human Rights in Islam (Cairo Declaration) of 1990

As the Law of Allah has priority over the constitutional rights of international laws, freedom of expression can also be limited for the Muslims in terms of their law.

An example is the legal school rule of deciding on school uniforms. A Muslim student, however, can wear his/her Muslim dress/headscarf to school, instead of the school uniform, claiming his/her right to freedom of expression. Clearly, this poses a problem for school managers. Can this right be limited in terms of Section 16(2) of the Constitution or can it be limited in terms of a legitimate school rule?

In regard to freedom of expression, article 22(a) of the Cairo Declaration provides that everyone has the right to express an opinion freely, but as with all other rights, it is limited in the way that the right of expression may not be contrary to the principles of the Shari'ah Law. It also includes being free to "advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah" ("The Cairo Declaration", 1990 article 22(b)).

Information is seen as a vital necessity to society, but must not be used to undermine moral and ethic values (Art. 22(c)). Art 22(d) poses an inherent limitation on freedom of expression if it would arouse nationalistic or doctrinal hatred, or do anything that may be an incitement to any form of racial discrimination.

Alston (2002:81) states that freedom of expression is not accepted by Muslims, as a citizen cannot disregard a divinely inspired directive. There is, however, not only one line of Moslem view and the Islam Human Rights Instruments is an attempt to bring human rights in line with the beliefs of the Western world but the tension between individual human rights and the rights of the society or Shari 'ah Law remains an issue in Muslim countries.

9 Declaration of the Rights of the Child of 1959

The Declaration makes no specific mention of freedom of expression. In terms of principle 2 the child needs opportunities "to enable him to develop physically, mentally ... and in conditions of freedom and dignity".

As freedom of expression is viewed as a prerequisite for individual development (Alston, 2002 p. 61); Section p. 3 (freedom of expression)) one could argue that the goal of principle 2 can be achieved only if freedom of expression is applied and is therefore implicitly included in this principle.

10 The Convention on the Rights of the Child of 1990

The Convention respects the right to freedom of expression of the child, but balances it against the human rights and responsibilities of others. Although it views the right to freedom of expression of the child as a serious issue which deserves due weight, its views certainly are not the only ones to be considered. This Convention became the most widely accepted human rights

treaty ratified by 191 countries in a very short time. On freedom of expression it states in article 12:

State Parties shall assure the child who is capable of forming his/her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child ("CRC", 1990 article 12).

It further states in article 13(1) that:

- (1) The child 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 print, in the form of art, or through other media of the child's choice ("CRC", 1990 article 13(1)).

In 13(2) it continues with an inherent limitation, stating that freedom of expression may be subject to certain restrictions when necessary:

- (2) The exercise of this right may 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; or
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals ("CRC", 1990 article 13(2)).

This provision is identical to article 19 of the ICESCR (see § 3).

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