

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.