

## 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 expression<sup>85</sup>. 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 century<sup>86</sup>.

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<sup>85</sup> 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.

<sup>86</sup> 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 Negroes<sup>87</sup> 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.

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<sup>87</sup> 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”<sup>88</sup> 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;

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<sup>88</sup> 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 5<sup>th</sup> 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 5<sup>th</sup> 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,<sup>89</sup> 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.

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<sup>89</sup> 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* principle<sup>90</sup> 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”.<sup>91</sup> 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.

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<sup>90</sup> The other side must be heard.  
<sup>91</sup> 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).<sup>92</sup> 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).

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<sup>92</sup> 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 9<sup>th</sup> 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).<sup>93</sup> 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

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<sup>93</sup> 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 9<sup>th</sup> 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 hijab<sup>94</sup>.

#### 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",

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<sup>94</sup> 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.<sup>95</sup> The focus in the schedule is on positive discipline<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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 freedom<sup>99</sup> 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 10<sup>th</sup> 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'

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<sup>95</sup> 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.

<sup>96</sup> Section 1.4 and 1.6 of Notice 776 of 1998.

<sup>97</sup> Section 2.3 of Notice 776 of 1998.

<sup>98</sup> Section 1 of the Constitution.

<sup>99</sup> 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 media<sup>100</sup> and the freedom to receive or impart information or ideas,<sup>101</sup> as well as his academic freedom.<sup>102</sup> 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).

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<sup>100</sup> Section 16(1)(a) of the Constitution.

<sup>101</sup> Section 16(1)(b) of the Constitution.

<sup>102</sup> 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)<sup>103</sup>

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

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<sup>103</sup> 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.