THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION: AN EXPLORATION OF ITS RELEVANCE TO THE SOUTH AFRICAN SCHOOL COMMUNITY

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DECLARATION

I hereby declare that this thesis is my independent work and has not been previously submitted for evaluation at any other university, faculty or department.

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The more I know, the more I realize how little I know,
and how much more there is to learn...

ABSTRACT

THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION: AN EXPLORATION OF ITS RELEVANCE TO THE SOUTH AFRICAN SCHOOL COMMUNITY

South Africa has, since the early 1990s, entered a period of radical change that has transformed South Africa in respect of, amongst other things, the law and education. It is when these two aspects meet to form a new educo-legal setting that great uncertainty exists, particularly in respect of human rights in the school setting. It is evident that many teachers are struggling to come to terms with the paradigm shift that has already occurred. The result is a feeling of "fear" for some and, for others, an attitude of "it won't happen here".

Canadian, Terri Sussel, stated that few areas of Canadian life were more deeply affected by the introduction of the *Canadian Charter of Rights and Freedoms* than education. The South African Bill of Rights appears to be having a similar effect.

It is the above which led to this research which focuses specifically on the right to freedom of expression in the school context. This right, on which many other rights depend, is deserving of special attention.

The research was undertaken by means of an intensive study of available literature and legal cases from four selected countries and South Africa. By this means it is possible to draw on the differing experiences of the other countries and relate and compare the South African situation to foreign experiences. This makes it possible to begin to highlight particular issues to which schools will need to give special attention in coming to terms with teachers' and learners' right to freedom of expression in the school.

The study provides a broad canvas background to the development of human rights in general and freedom of expression in particular, with focus on the United States, Canada, Great Britain and New Zealand.

The research focussed on six specific school related aspects of freedom of expression, and their effect, firstly, on the foreign schools. These aspects were namely hairstyles, dress, jewellery, press freedom, artistic creativity and academic freedom.

Particular attention was paid to freedom of expression within the unique South African legal structure, with special attention to application, interpretation and limitations. The same six elements were then examined in the South African context with reference to what effects have already been seen and the possible implications in the future.

The comparative study made of the five countries enabled the identification of similarities and differences, both in terms of the legal contexts and the effects of the six aspects of freedom of expression.

The research provides a critical examination of issues previously taken for granted by many schools and reveals that certain previously "sacred cows", such as hairstyles and dress, are no longer sacred. Further the research has led to a different approach to academic freedom, as being not confined to universities, but stretching as a continuum from early years at school to post-doctoral research.

The right to freedom of expression of learners and teachers is constitutionally protected. This study is aimed to assist the school community in coming to terms with not only allowing, but, as they are required to do by the Constitution, encouraging and promoting the responsible access to freedom of expression. This will enable all to develop their potential in an atmosphere that respects the right to dignity evident in being able to be true to oneself in thought, word and deed, with equal respect for the

rights of others, and without disruption to critical educational processes within the school.

UITTREKSEL

DIE GRONDWETLIKE REG TOT VRYHEID VAN UITDRUKKING: 'N ONDERSOEK NA DIE TOEPASLIKHEID DAARVAN TEN OPSIGTE VAN DIE SUID-AFRIKAANSE SKOOLGEMEENSKAP

Suid-Afrika het sedert die vroeë 1990's 'n periode van radikale verandering betree wat Suid-Afrika getransformeer het ten opsigte van, onder andere, die reg en die onderwys. Dit is wanneer hierdie twee aspekte ontmoet om 'n nuwe onderwysregsopset te vorm dat groot onsekerhede ontstaan, veral ten opsigte van menseregte binne die skoolopset. Dit is voor die hand liggend dat baie opvoeders probleme ondervind om vrede te maak met hierdie paradigmaskuif wat alreeds plaasgevind het. Die resultaat is 'n gevoel van "vrees" vir sommige en ander openbaar 'n houding van "dit sal nie hier gebeur nie".

Die Kanadees, Terri Sussel, het gemeld dat daar min areas van die Kanadese lewe meer diepliggend geraak is deur die instelling van die *Canadian Charter of Rights and Freedoms* as onderwys. Dit blyk dat die Suid-Afrikaanse Handves van Menseregte 'n soortgelyke uitwerking het.

Bogenoemde het gelei tot hierdie navorsing wat uitsluitlik fokus op die vryheid van uitdrukking binne die skoolopset. Hierdie reg, waarvan talle ander regte afhanklik is, verdien spesiale aandag.

Die navorsing is gedoen deur middel van 'n intensiewe studie van beskikbare literatuur, asook regsake van vier gekose lande en Suid-Afrika. Deur middel hiervan was dit moontlik om te put uit die verskillende ondervindings van ander lande, verbande raak te sien en vergelykings te tref tussen die Suid-Afrikaanse situasie en buitelandse ondervindings. Dit het dit moontlik gemaak om sekere vraagstukke uit te

lig waaraan skole spesiale aandag sal moet gee op hul weg na die aanvaarding van opvoeders en leerders se reg tot vryheid van uitdrukking in skole.

Die studie verskaf 'n breë agtergrond van die ontwikkeling van menseregte in die algemeen en vryheid van uitdrukking in die besonder met verwysing na die Verenigde State van Amerika, Kanada, Groot-Brittanje en Nieu-Seeland.

Die navorsing het op ses spesifieke skoolverwante aspekte van vryheid van uitdrukking gefokus, met eerstens hul gevolge op die buitelandse skole. Die aspekte wat aangespreek is, is die volgende: haarstyle, drag, juweliersware, persvryheid, kunssinnige kreatiwiteit en akademiese vryheid.

Besondere aandag is geskenk aan vryheid van uitdrukking binne die unieke Suid-Afrikaanse regstruktuur, met spesifieke aandag aan toepassing, interpretasie en beperking. Dieselfde ses elemente is binne die Suid-Afrikaanse skoolkonteks ondersoek met verwysing na die gevolge wat alreeds sigbaar is, asook die moontlike toekomstige implikasies daarvan.

Die vergelykende studie van die vyf lande het die identifikasie van ooreenkomste en verskille moontlik gemaak ten opsigte van die regskonteks, asook ten opsigte van die gevolge van die ses aspekte van vryheid van uitdrukking vir die skoolgemeenskap.

Die navorsing verskaf 'n kritiese ondersoek na sake wat voorheen as vanselfsprekend deur skole aanvaar is, asook die blootlegging van die kwesbaarheid van sommige "onaantasbare" sake soos haarstyle en drag. Die navorsing het ook gelei tot 'n verskillende benadering tot akademiese vryheid wat nie net tot universiteite beperk is nie, maar aaneenlopend strek vanaf die eerste skooljare tot op post-doktorale navorsingsvlak.

Die reg van vryheid van uitdrukking van leerders en onderwysers is in die grondwet verskans. Hierdie studie is daarop gemik om die skoolgemeenskap te help met die

aanvaarding van die vryheid van uitdrukking, nie alleen deur dit slegs toe te laat nie, maar, soos wat die Grondwet vereis, verantwoordelike vryheid van uitdrukking aan te moedig en te bevorder. Dit sal almal in staat stel om hul potensiaal te ontwikkel in 'n atmosfeer waarin hul menswaardigheid gerespekteer word deur getrou te bly aan hulself in gedagte, woord en daad, met ewe veel wedersydse respek vir die regte van ander en sonder die ontwrigting van kritieke opvoedkundige prosesse binne die skool.

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The Constitutional right to freedom of expression: An exploration of its relevance to the South African school community

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTORY REMARKS

The introduction of the South African (Interim) Constitution Act 200 of 1993 (RSA 1993a) followed by the South African Constitution Act 108 of 1996 (RSA 1996a) brought major changes for the people of South Africa. The inclusion of a Bill of Rights for the first time in South African legal history, demanded a total rethink about relationships and powers. It introduced both protection for the citizens against abuses of power by the State and its agents, and provided clear guidelines to the State and agents of the State in their exercise of power. One of the agents of the State is the public school. The public school is thus, in terms of Sec. 8 of the 1996 Constitution (RSA 1996a), equally subject to the Constitution. Teachers (see 1.4), learners and others in the school community enjoy the protection afforded by the Bill of Rights. At the same time, the teachers and others in management of a public school have limitations placed on their powers over the learners in that school. Equally, the learners' right to freedom of expression is not unlimited. The implications of the Bill of Rights for public schools thus need careful investigation.

From research done by Alston (1998), it became evident that the right to freedom of expression held serious implications and possible conflicts for school communities in South Africa.

1.2 STATEMENT OF THE PROBLEM

Freedom of expression is given a wide interpretation in Section 16 (1) (a) to (d) of the South African Constitution (RSA 1996a) and reads as follows:

> Sec 16 (1) Everyone has the right to freedom of expression, which includes –
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.

It is clear from the wording of Section 16 that, while only four specific aspects of freedom of expression are mentioned, the Section also contains the word '*includes*', implying that freedom of expression can have a wider interpretation than just those four aspects.

In the *Guidelines for Consideration of Governing Bodies in adopting a Code of Conduct for Learners* (RSA 1998b: Section 4.5.1), issued in terms of Section 8 (3) of the South African Schools Act (RSA 1996b), the right to freedom of expression is described as

> ... more than freedom of speech. It includes the right to seek, hear, read and wear, and is extended to all forms of outward expression as seen in clothing selection and hairstyles.

The word 'includes' again implies that there are other aspects beyond those mentioned which might be included under freedom of expression.

It is clear that the wording of Section 16 of the Constitution above makes no reference to what one wears or other apparel or hairstyles. However, taking Section 16 of the Constitution and the reference from the *Guidelines*, it is clear that there are a number of issues, directly relevant to schools, on which the right to freedom of expression can have an impact. How wide the interpretation may be, may take years to unravel as the courts interpret this section of the Constitution.

While the focus of the study is on *freedom of expression* as contained in Section 16 of the Constitution (RSA 1996a), there is a clear connection between Sections 15, 16 and 17 which deal with freedom of religion and belief (Sec.15), expression (Sec. 16) and freedom of assembly (Sec. 17). The following sentence illustrates this linkage, "Mr Jones expressed (Sec. 16) his strongly held beliefs (Sec.15) by joining the protest march (Sec.17)."

This connection is of crucial importance because many of the school related Section 16 issues have overlaps to section 15 and/or 17 and it is possible to debate the category in which they belong. The overlap is most striking in the expression of religious beliefs through dress and grooming (see examples in 4.3.2 and 6.3.5.2).

The key question is thus to what extent the right to freedom of expression will affect the school community in South Africa.

1.2.1 Some Specific Problem Areas

In seeking some pointers as to what freedom of expression may encompass, education law literature, particularly from the United States but also from the other countries, provides many examples of test cases of matters covered by the First Amendment of the American Constitution (Tribe 1978:576-735) and in human rights legislation from those other countries. These issues are briefly discussed below and are the specific school related problems which enjoy the attention of this study.

1.2.1.1 Grooming/Hairstyles

Hairstyles represent changing fashions, cultural identity and expectations, and individual personalities. Over the years the length of boys' hair has been the cause of many battles between schools and learners when the style or length of hair fails to conform to school rules or expectations.

The battle has not been confined to boys only. The colouring of hair, the wearing of braids or the clean shaving of heads have been issues affecting boys and girls.

The American literature makes considerable reference to hairstyles, particularly with reference to the period 1965 to 1975 (Edwards 1971:648-656; Furtwengler & Konnert 1982:209; Valente 1980:279), and to the many court cases in which high school students have challenged the schools. The United States District Courts have not given consistent rulings on school related grooming issues. However, no hairstyle case has ever reached the Supreme Court. To illustrate the contrasting decisions, in

Stull v School Board of the Western Beaver Junior-Senior High School 450 F.2d 339 (1972) the Court found in favour of the student, ruling that the dress code regulations were invalid and stating "... within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes."

In contrast, in *Zeller v Donegal School District Board of Education* 517 F.2d 600 (1975) the Court ruled against the pupil on the grounds that there are "...areas of state school regulations in which the federal courts should not intrude...".

As important, in *Zeller*, was the very strong dissent expressed by four of the judges, including Chief Judge Seitz who quoted from an 1891 case, at 615, as follows:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.... the federal courts' most fundamental task is the protection of constitutionally guaranteed personal liberties.

Grooming issues have not enjoyed such wide attention in Canada, England or New Zealand. However, all three countries have Human Rights legislation of a far more recent vintage.

In the South African context, hairstyles have long been an issue for disciplinary action, but in recent years such cases have been highlighted in the press. Two examples are, firstly, the action taken by a school against a Grade 5 learner (Sunday Times 27 September 1998) who was suspended indefinitely for having a 'step' in his hair, and which needed the Provincial Education Department to intervene. Secondly, a wrangle between a Principal and a Grade 9 pupil (Greese, Personal Interview, August 1998), where a father threatened to take the Principal to Court if he continued to insist that his son have his very long hair cut, despite the fact that his son was a Grade 9 learner taking ballet and performing. Long hair is not acceptable in the ballet world. Research by Alston (1998:91) revealed school rules forbidding hair colouring

or prescribing specific styles, or forbidding beards or moustaches, all of which appear to be in conflict with the extended interpretation of freedom of expression.

The hairstyle issue has many facets and the way a learner or teacher wears his/her hair forms an important part of this study.

1.2.1.2 Clothing

The choice of clothes to wear to school and the challenging of the right of a school to demand the wearing of a prescribed school uniform maybe new in South Africa but Nolte and Linn (1963:225) refer to the 1921 Mississippi, United States, case of *Jones v Day* Miss. 136, 89 So.906, 18 A.L.R. 645, where courts upheld the right of a school to insist on the wearing of a school uniform even beyond school hours. Edwards (1971:569) suggests that this was the only case in the United States where the courts upheld such a rule.

In more recent years a number of court rulings have placed certain limitations on the clothing students may wear to school (McCarthy 1998:24). The same author, referring to an article by Troy Nelson, entitled '*If clothes make the person, do uniforms make the student?*' states that future controversies will probably focus on the increasing number of school boards that are specifying uniforms for school students. The reasons given for such decisions is the belief that uniforms eliminate gang-related clothing, reduce violence, and help improve the climate in a school. The critics of this new approach believe that compulsory uniforms may compromise a student's First Amendment rights to personal expression by way of what s/he wears.

New Zealand has, in the last decade since the introduction of its Bill of Rights in 1990, been faced with high school students challenging school dress regulations, while Canada has seen challenges related to the wearing of religious dress at school (see 4.3.2 and 4.3.4).

The choice of clothes is not just related to school rules and uniform but impacts on religious beliefs and cultural traditions. Ladysmith High School, in KwaZulu Natal (see 6.3.5.2) provides a South African illustration, having been engaged in a long running battle over the right of a Muslim pupil to wear dress other than, or in addition to, the prescribed school uniform (Liversage 1998:1-8). The issue of religious dress has not been confined to Ladysmith in KwaZulu Natal but has been an issue elsewhere in South Africa.

In a country with a long tradition of school uniforms in certain communities, the right to freedom of expression in the light of Sec 4.5.1 of the *Guidelines* (see 1.1), would seem to be a 'scene-set' for clashes between learners and school authorities. While learners may battle over uniforms, teachers might well challenge attempts to impose strict dress codes on them. The rights of both learners and teachers are investigated.

1.2.1.3 Jewellery

The right to 'wear' may not be confined to clothing but may also be extended to the wearing of jewellery of all kinds. Many South African schools have, up to now, had rules controlling what jewellery could be worn, by whom and when it might be worn (Alston 1998:91). When jewellery was confined to studs in ears in place of ear rings during school hours, the issue was fairly simple. However, when the matter extends to ear and other body piercing, tattoos, and cultural and religious jewellery, the potential conflict is far greater. Such conflict between learner and school exists when school rules and the right to freedom of expression are in conflict. To date it has not been possible to find any overseas court rulings forbidding or restricting the wearing of jewellery.

1.2.1.4 Learner Press

The South African Bill of Rights specifies *freedom of the press* as one of the aspects of freedom of expression. While the right to freedom of the press receives no reference in the *Guidelines,* and while it is possibly a new issue for South African schools, the United States First Amendment is extended to high school student press

(Valente 1980:273-274). Literature and case law provides evidence of conflict over freedom of the press in schools and the right or otherwise of schools to exercise controls. The case of *Quarterman v Byrd* (1971) 543 F.2d 54, serves as one example of a school being challenged over its regulations controlling printed material distributed by students to other students. The 1987 case of *Hazlewood School District v Kuhlmeier* 484 US 260 appears to have provided school principals with more control over school sponsored papers but *underground* or off school productions remain uncensored.

Two issues partly related to press freedom in which freedom of expression may have important implications are, firstly, the internet and the establishment of web pages by individual or groups of students. When used as a substitute for an off-campus newspaper they may provide even greater challenges for schools (see 4.9.3). Secondly, and linked to the internet, is the problem of 'undesirable material', particularly where such material is in the form of sexually explicit material, gang related focii, or other subject matters the school would see as outside what is 'educationally desirable' and out of line with the mission of the school.

In the South African context, the wide interpretation of freedom of expression given in Sec. 4.5.1 of the *Guidelines* (RSA 1998b) includes the right to "...seek, hear, read, ..." and raises the question of a school's right to exercise wide ranging controls. Given the on-going debates surrounding censorship of pornographic and other undesirable material (Duncan 1996:31-62; Feris & Bonthuys 1998:66-71), this view of freedom of expression may pose serious problems for a school community, particularly in respect of the learner press and/or internet webpages.

Where such web pages, with or without undesirable material, make reference to the school, the school faces challenges not dreamed of even five years ago. The rapid growth in the internet and the ability of individual learners to set up and access web pages has brought a new dimension to the information/student press debate.

1.2.1.5 Artistic Creativity

Section 16 of the Constitution (RSA 1996a) makes specific reference to artistic creativity. As art is a recognized part of the school curriculum in South Africa this poses the question as to how far such art and 'creativity' will be allowed to go both in the classroom and beyond. However, artistic creativity stretches beyond 'art' as a school subject, and may include photography, music, drama, and dance, with a variety of implications for schools (see 6.3.5.6). Such new challenges for schools are explored in this study.

1.2.1.6 Academic Freedom of Learners and Teachers

Section 16 (d) of the South African Constitution (RSA 1996a) includes, under freedom of expression, the term, *academic freedom.* It has been (and possibly is still) commonly held to refer more specifically to tertiary institutions, and universities in particular, and is often seen as the right of such an institution to decide who will teach and the right of staff to decide on what will be taught (Malherbe 1998:16-18). But the Constitution is silent on defining the extent of academic freedom. It is argued that academic freedom can be applied to schools, giving rise to important issues within the school.

The position of academic freedom in the United States, England, Canada and New Zealand is more difficult to assess because of the lack of specific Constitutional reference to academic freedom. In the United States schools the First Amendment right to freedom of speech has been used in the courts to challenge structures and decisions seen as conflicting with academic freedom. In contrast South Africa has the only Constitution (based on an internet search of constitutions) to use the words *academic freedom.* However, the German Constitution (Germany 1949) refers to freedom to practice science, which may be seen as similar or synonymous with 'academic freedom'. In a draft of an as yet unpublished book, Malherbe (2002) makes reference to the express recognition given to 'academic freedom' in the constitutions of Brazil, Mexico, Portugal and Spain. The relatively unique South

African position raises a range of new issues for consideration, specifically because it is a right for 'everyone'.

The case of *Keyishian v Board of Regents* (1967) 385 U.S. 589, 17 L Ed 2d 629, 87 S Ct 675, provides a useful example of the United States' view on this matter. The Court stated that academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. This case was quoted in *Epperson v Arkansas* (1968) 393 U.S. 97 where a biology teacher in a public school won a ruling against an Arkansas statute which prohibited any teacher from teaching Darwinian theory of evolution. However, United States courts have not been consistent in their judgements, some courts stating that school teachers have no claim to academic freedom.

The Canadian case of *R v Keegstra* 3 S.C.R. 697 was about unlawfully promoting hatred against an identifiable group under s 281.2 (2) [now s. 319 (2)] of the *Criminal Code*. While not primarily about academic freedom, Keegstra used his position as a High School teacher to promote his strongly anti-semetic stance in the classroom, tolerating neither other standpoints nor discussion on the subject. Thus the content of the case addressed crucial elements of academic freedom, and its abuse and limitations (see 4.10.4).

The right to academic freedom raises a wide range of issues to do with teaching and learning, including content, selection of teaching material, methodology, and the exercise of professional judgement. This has implications for teachers in their teaching and these wide ranging issues are explored in this study.

The right to freedom of expression and academic freedom appears too, to have the potential to impact on what learners are allowed to be exposed to, how they may respond to tasks, including what they may write or say in the written or oral work at or for school, provided it does not go contrary to the stated limitations of Section 16 (2) of the Constitution (RSA 1996a), and these too enjoy attention in this study.

These stipulations raise the question as to what real academic freedom a learner has, in a written class or examination essay, or an oral, to express, for example, a strong pro-Palestinian view in a school with a high percentage of Jewish learners, or a strong P.A.C. standpoint in a predominantly 'right-wing' Afrikaans school. Does a school have the right to take any action against such a learner? Could a school suspend such a learner, or more subtly pressure such a learner to leave the school? These examples raise serious questions in respect of the right or otherwise of a teacher to forbid a learner to write or orally express a viewpoint diametrically opposed to the views of the majority of learners (or teachers) in that school.

There is a close link between the academic freedom of teacher and learner. The denial to a teacher of the right to, for instance, work outside the basic curriculum might infringe a learner's right of access to wider knowledge. The denial by a teacher of the expression of differing viewpoints clearly obstructs a learner's opportunity to raise serious issues and challenge unsubstantiated opinions.

An issue held in some quarters to be part of freedom of expression is the right not to be a captive audience (Slee 1988:235). A case of a group of East London Grade 12 pupils refusing to study a particular setwork book because the blasphemy and the message of the book conflicted with their Christian values, and their demand for the right to be taught an alternative book on the official list of setwork books (Furman, Personal Interview, March 1999), highlighted a new problem for schools.

What the above examples serve to illustrate is the wide interpretation of the right to freedom of expression and the specific aspects of academic freedom, together with the possible implications for school communities, issues which receive their due attention in this study.

In the field of Education Law little has been written on the impact of the Bill of Rights on the school. In particular Bray (1992:24) states that "[d]ue to historical and political

reasons, research on freedom of expression in our South African education system has also been neglected". In the following ten years, up to the present, very little has been written on the subject. Recent books on education law, published in South Africa, [including Oosthuizen (1998) and Joubert & Prinsloo (2001)] for teachers and university students make either no reference, or only a passing reference to the topic, without exploration of the implications for schools. This research has, thus, a further purpose to make a significant contribution to the field of South African education law and to the education community, and to begin to fill the hiatus in the area of education law research in South Africa.

The full extent of the impact of the Constitution (RSA 1996a) on South African schools, has by no means been reached.

1.2.2 The limitations clause

Parallel and concurrent to the above, is the critical issue of potential limitations that may be imposed on the right to freedom of expression. Section 36 of the Constitution (RSA 1996a) deals with the limitation of rights and the basis for deciding whether a limitation is 'reasonable and justifiable'. It further instructs the courts to examine all relevant factors before reaching a decision on limitations. Section 16 of the Constitution provides three specific limitations on freedom of expression. In terms of the *Guidelines* (RSA 1998b : Section 4.5.1) the suggested limitations are given as follows, "...[h]owever, rights are not absolute. Vulgar words, insubordination and insults are not protected speech. When expression leads to substantial disruption... this right can be limited...". Against this background, the limitations issue is one which needs an in-depth study.

The study includes examining limitations in the countries under discussion, particularly given that the United States has no limitations clause. The following annotation entitled *The Supreme Court and the Right of Free Speech* [United States Law Report (1969) 21 L Ed 2d 976-978], highlights the following important points related to the matter of limitations:

> Under the [USA] Constitution, free speech is not a right that is given only to be circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The constitutional prohibition against the abridgement of the right to free speech permits reasonable regulation of speech-connected activities in carefully restricted circumstances, but does not permit confining the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or *to a supervised and ordained discussion* (italics added) in a school classroom... It was recognised...that a state has a legitimate interest in protecting its educational system from subversion, but that this interest could not be pursued through means of stifling First Amendment freedoms as they relate to the classroom...

In another United States example, the court, in *Police Department of Chicago v Mosely* (1972) 408 US 92 at 95-96, ruled that "...government has no power to restrict expression because of its message, its ideas, its subject matter, or its content...".

The Canadian Constitution (Canada 1982) refers to limitations in Section 1, as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The question of the meaning of "...*such reasonable limitations*..." needed investigation and forms an issue in this study. Beatty (1995: 98) states that "... there is no avoiding the conclusion that the constitutional protection of human rights in Canada has become weaker and weaker over time". The two rights which, however, do enjoy strong protection in Canada appear to be freedom of expression and freedom of religion.

England's guidance on limitations comes from Section 10 of the European Convention on Human Rights, while New Zealand's Bill of Rights Act (New Zealand 1990) provides, in section 5, for limitations which are "subject only to such reasonable

limits as prescribed by law as can be demonstrably justified in a free and democratic society". The wording is identical to the Canadian Charter. However, the New Zealand Bill of Rights is not entrenched, unlike Canada, and can be changed by a simple majority of Parliament.

The study further examines the way the limitations clause has thus far been employed in South Africa, and the various perspectives provided by legal academics. Such study serves to provide a base for critically examining what limitations of freedom of expression, that schools attempt to impose on learners and teachers in the school context, might be supported by South African courts.

Black, quoted by Tribe (1978:571), said it is "...not so much a [particular] case that the law tests but a case that tests the law". The particular problem in the South African education situation is, therefore, the lack of test cases on the right to freedom of expression. How far the law of the right to freedom of expression extends will need to be tested. Such test cases will provide some idea on the extent of what limitations may or may not be imposed. However, this lack of test cases was itself a strong reason to undertake this study. This is not to suggest or imply any attempt to preempt what rulings the Constitutional Court might make. It is rather to critically examine the various options and the possible implications of such options.

Rights and limitations are perceived and responded to in widely differing ways. Such perceptions and responses have serious implications for the way such a critical right as freedom of expression is accepted and acknowledged in a school or, at the other extreme, is rejected and becomes a potential source of great conflict within the school community, particularly where a school might attempt to impose limitations without constitutional support. A further source of potential conflict is how far parents or learners might be willing to go in their demand for the right to freedom of expression.

Neither the courts nor legal academics such as Meyerson (1997) make any reference to learners and schools in analyzing freedom of expression and its possible

limitations. Meyerson (1997) has provided a detailed study of possible limitations on freedom of expression and suggests that any limitations might be difficult to impose, other than, in the case of freedom of expression, those stated in Section 16 (2) of the Constitution (RSA 1996a) as indicated above. Hers is one line of argument but not all agree with her viewpoint.

This separate and yet enmeshed issue will require an in-depth study if the extent of the right to freedom of expression in the South African context is to be fully understood. The topic of limitations is not an isolated, separate issue and is thus interwoven into the freedom of expression discussion.

Against the background described above, the following problem questions need to be examined:

1. What are the historical, philosophical, cultural and religious perspectives which have marked and moulded the development of human rights and provided the basis for the right to freedom of expression at the start of the 21st Century?

2. What is the origin of freedom of expression and how has it developed into international conventions, and developed in a selection of countries (see 1.5, 2.3 and 3.3)?

3. What has been the impact of freedom of expression on specific aspects of schools in the same selection of countries? What can be learnt from the experiences of those countries, and which aspects may provide indications of how the right to freedom of expression may impact on South African schools (taking account of the differences and similarities in historical, legal, cultural and social factors, between those countries and South Africa)?

4. What is the constitutional background to freedom of expression in South Africa, including such issues as interpretation and application, and, in particular, limitations on rights?

5. How has the right to freedom of expression already affected South African schools and/or is likely to affect them in the future in terms of school policies, management, education and discipline, with respect to both learners and teachers if compared with situations in other countries?

1.3 PURPOSE OF THE STUDY

The change in the South African constitutional framework has had and continues to have impact on all facets of South African society. The impact of a Bill of Rights is never a 'one off' impact, but rather an evolving and growing impact. That impact of the right to freedom of expression might be seen by some as negative in the sense that it contains within it the potential for serious conflict within individual school communities.

The first goal of the study is to examine the extent to which the right to freedom of expression has relevance for, and may impact on the school community, and the extent to which limitations might possibly be imposed.

The second goal of this study, beyond the practical implication mentioned above, is to make a significant contribution to this previously neglected area of research in South African education law.

The purpose of this study is, in part, to assist schools prepare the way for change and make that change more smoothly accomplishable. A further purpose of the study is to provide a greater understanding of the right to freedom of expression and avoid conflicts and legal battles. Still further, the study may provide some direction in how the right to freedom of expression can be both accessed and enjoyed by all members

of the school community with responsibility and respect for the rights of others to do so.

In such a situation freedom of expression may be a catalyst for the expression of creative thinking previously bottled up in a rigid schooling system. From such creativity may flow new, dynamic ideas.

While accepting that no issue in a school context can be totally separated from a spiritual, moral or ethical base, much of the focus is on the legal context and the potential impact on the school community. The responses to the problem questions above does not represent a statement of moral agreement or disagreement with each issue.

The stated goal can be achieved by means of the following objectives:

- To provide an introduction to the concept of human rights and, particularly, the right to freedom of expression, by examining the historical development of human rights and some philosophical, cultural and religious perspectives which have affected that development up to the 20th Century, together with the right to freedom of expression as expressed in international human rights treaties of the past half century;

- To provide a closer look at the place of freedom of expression in an international setting by examining the development of the right to freedom of expression in each of the four selected countries (see 1.5);

- To examine some of the key problem areas of freedom of expression in the schools of the selected foreign countries, by scrutinizing literature, case studies and case law on problems which have arisen in those countries;

- To examine the right to freedom of expression in terms of the South African legal system;

- To explore the relevancy of the Constitutional right to freedom of expression for the South African school community;

- To apply an elementary comparative law method to compare the constitutional foundations of human rights and, particularly, freedom of expression in the selected countries and in South Africa, including interpretation, application and, especially, the limitation of rights, and examine the relevancy of the right to freedom of expression for schools (based on law and press reports) together with the possible influence with reference to specific school related issues; and

- To provide a summary, followed by the conclusions and possible recommendations for the interpretation and application of the right to freedom of expression.

1.4 CLARIFICATION OF TERMS

1.4.1 Learner

In referring to those persons attending school up to and including Grade 12, the word *learner,* defined in the South African Schools Act (RSA 1996b) as "any person receiving education or obliged to receive education in terms of this Act", is used only in the South African context. In references to other countries the word pupil is generally used. However, where an author or a law report has used the word *student, pupil* or *child*, the particular word is retained. All quotations are retained in their original form.

1.4.2 Teacher

The word *teacher* is used to refer to those who teach in schools. In order to avoid possible confusion with those who teach in tertiary institutions, the word *educator* as

used in the Schools Act (RSA 1996b) has not been used.

1.4.3 School Communities

The term *school community* is used to refer to the principal, teachers, learners, parents, other staff and the surrounding community as a entity.

1.4.4 Gender

For the purposes of this study the masculine gender, he or him, has been used. This must, however, be seen as referring to both male and female. Only in cases where the feminine gender is specifically referred to in the literature, law reports or other material, will the feminine, she or her, be used.

1.4.5 Model C Schools

The term 'Model C' refers to schools formerly under the control of the House of Assembly, in the early part of the 1990s. These were the formerly "Whites Only" schools which were gradually integrated.

1.5 DEMARCATION OF THE FIELD OF STUDY

The study is limited to the right to freedom of expression as stated in Section 16 of the South African Constitution Act No.108 of 1996, together with Section 36 (limitations) and Section 39 (interpretation). However, reference has already been made to the inter-connectedness of Sections 15 (freedom of belief and religion), Section 16 (freedom of expression) and Section 17 (freedom of assembly). Reference to other constitutional rights under the same Act is made only where there is a direct connection between the particular right and the right to freedom of expression, or the limitations clause.

The literature and case law studies are focussed on, but not entirely restricted to the United States of America, Canada, Britain, New Zealand, and South Africa. Reference is also made to International and Regional Human Rights Treaties. In the

case of Europe reference is made to the European Human Rights Court (ECHR). However, historically the United States has the most developed case law on human rights issues. Together with Canada and South Africa, the United States has an entrenched Bills of Rights.

The choice of the above countries and the ECHR was because of, in the main, their very strong focus on Human Rights and where real attempts are made to translate this focus into the action of enforcing such rights. The inclusion of Britain and New Zealand provided points of contrast because of their different forms of human rights legislation.

Each of the selected countries has differing constitutional structures. The United States has the oldest entrenched Constitution and Bill of Rights but without a defined limitations clause but where there are limitations developed over a long period. Canada has an entrenched Constitution and a limitation clause which has similarities to that found in the South African Constitution (RSA 1996a) although with a less specific framework. New Zealand has a non-entrenched Constitution and a limitation clause identical to Canada, and England has no Constitution but a new Human Rights Act which binds that country to apply the European Convention on Human Rights and the decisions of the European Court. Further, the education systems of South Africa and New Zealand have been heavily influenced by the British system. In the case of South Africa, this influence continued right up to the second half of the 1990s. These four countries formed the base for the comparison with South Africa with an entrenched constitution and a structured limitations clause.

Reference is made to other countries where relevant literature and/or case law are available. Other references are merely by way of illustrating the differences between countries with a strong application of human rights, in contrast to those without such a base or whose human rights policy are mere words but without application.

1.6 METHODS OF STUDY

The following methods have been employed:

A study has been made of relevant cases recorded in law reports from the countries under discussion. Cases focussed on from the United States and other foreign countries were mainly those involving teachers and/or learners in disputes regarding the right to the exercise of freedom of expression, in its various guises, and judgements from other cases which were relevant to the exercise of freedom of expression. Reference has also been made to cases where legal principles have been established even though such cases were not necessarily focussed on an education issue. South African cases are focussed on those cases which provide indications on how freedom of expression has been interpreted, applied and/or limited. To date South Africa has, as far as can be established, had only one High Court case (unreported) involving an aspect of freedom of expression in the school context. Further reference has been made to relevant annotations and supplementary notes contained in such law reports.

A study has been made specifically of some of the relevant literature from the countries concerned, namely South Africa, the United States of America, Canada, England and New Zealand. However, relevant literature from other authors and countries has been used to examine the historical and philosophical background of human rights and, in particular, freedom of expression, together with the impact of political, cultural and religious factors on the application of the right in the various countries.

A comparative study was made of the right to and application of freedom of expression in respect of *grooming, dress, jewellery, learner press, artistic creativity and academic freedom* in the schools of five countries. The comparative law method that was used is defined by Venter *et al.* (quoted by De Waal 2000:8) as a *"unique, systematic and jurisprudential strategy"* (translated) by which similarities and

differences in a specific topic within a variety of legal systems are examined and compared in order to come to a new understanding of the particular topic.

1.7 OUTLINE OF THE THESIS

This introductory chapter provides an overview of the study and illustrates the various strands to be covered. The remainder of the thesis is structured as follows:

Chapter 2 provides an introduction to the concept of human rights, examining the historical development of human rights in general and freedom of expression specifically, and its place in international treaties today, together with some philosophical, cultural and religious perspectives which have affected that development up to the 21st Century.

Chapter 3 examines the development of freedom of expression in four selected foreign countries (see 1.5) with reference to literature and case law.

The effect of freedom of expression on aspects of school life in the four selected foreign countries is examined in Chapter 4, with specific reference to case law.

Chapter 5 is an exploration of the Constitutional right to freedom of expression in the context of the South African legal system.

The right to freedom of expression in terms of South African schools is explored in Chapter 6 with the focus on six specific aspects likely to be affected by the exercise of that right.

A comparison is made in Chapter 7 of the constitutional foundations of human rights and, particularly, freedom of expression in the selected countries and in South Africa, including interpretation, application and, especially, the limitation of rights. The relevancy of the right to freedom of expression for schools (based on law and press

reports), and the possible influence with reference to specific school related issues are examined.

Finally, Chapter 8, provides a summary, followed by the conclusions and recommendations.

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Chapter 2: THE DEVELOPMENT OF FREEDOM OF EXPRESSION IN THE CONTEXT OF HUMAN RIGHTS

2.1 INTRODUCTION

At the start of the third millennium the strong international focus on human rights can leave the impression that the way things are today is the way they have been for a long time. Human rights, in terms of international law, may be seen as a product of the last fifty years. However, human rights have developed over a longer period and have been and continue to be influenced by both cultural and religious factors. In order to examine freedom of expression as a fundamental human right, it is important to understand the historical development of human rights, and the right to freedom of expression in the context of the wider development of human rights.

2.2 HISTORICAL AND PHILOSOPHICAL OVERVIEW

The development of human rights is not neatly defined by identifiable historical events in date order. The view of such development depends rather on the individual's perspective and definition of human rights. Sieghart (1985:3) believes that today's formalized human rights are the outcome of ideas, events and movements over many centuries and the result of an interaction of many forces.

2.2.1 Biblical and Ancient Documents

Amongst the different views on the history of human rights, there is a line of argument which points to the Biblical perspective as given in Genesis where man is given the right to enjoy what he has been given by God. Pagels (1979 : 4) points out that, in the description of creation, Adam, whose name means 'man' or 'humanity', is created 'in the image of God'. Moltman (1977 : 27), on the same line, points to Adam not as the first Jew but as the first man and that being created in the image of God implies an inner dignity, freedom and

responsibility which extends to all. Henkin (1976:437) differs, stating that the Hebrew language did not have an authentic word for 'rights'. The word *Z'khut,* used for 'right' today, had an original connotation of purity, virtue and innocence. The word was originally used for a benefit received or even deserved but it never implied the sense that these benefits were received 'as a right'. Henkin (1976: 437) makes it clear that "...Judaism knows not rights but duties, and at bottom, all duties are to God".

One can find examples in the Bible (N.I.V. 1978) of what could be referred to as 'human rights'. One might, for instance, see in Moses' words to Pharoah (Exodus 10:3) "God says, let my people go and worship..." a cry for freedom from slavery and a cry for freedom of religion, or even a cry by the Israelites for freedom to express their religion. It might also be referred to as a cry for protection of the individual from the abuse of rulers (or government). However, it must be clear that the Bible is not, nor was it ever intended to be a code of individual rights.

Beyond the Bible as a source, there are modern writers who make reference to a number of historical persons and/or documents in their bid to both provide an historical overview and point to human rights having a very early origin. Robertson (1989:7) quotes the Shah of Iran's reference to the *Charter of Cyrus* (circa 540 BC) as containing human rights. Robertson also refers to Polys Modinus' reference to the rights spoken of by the early Pharoahs. Chambliss (1954:21-22) makes reference to the claims that the *Code of Hammurabi* (circa 1700 BC) has wording that could be taken as human rights.

By reference to Ancient Times, elements can be found in various societies which have some similarity to modern human rights. However, that is a far cry from declaring such elements as origins of human rights and then proclaiming, as Robertson (1989 :8) does, that "[t]he struggle for human rights is as old as

history itself...". The problem with all isolated references to the historical past is that of a loss of context – cultural, religious, political or legal.
Cleveland (1979:ix) disagrees with Robertson and believes human rights must be listed as "new business". In support, Pagels (1979:2) quotes Concorcet's observation that

> ... the notion of human rights was absent from the legal conceptions of the Romans and the Greeks (and equally of Jewish, Chinese, and all the other ancient civilizations that have come to light). The domination of this ideal has been the exception rather than the rule, even in the recent history of the West.

Pagels believes that much of the reference to human rights in different cultures prior to the 17th Century has nothing to do with human rights as we understand such rights today. Wyzanski (1979:10) states that "... there is no sound basis either in great authorities or elsewhere in the Ancient World for a true doctrine of human rights".

Before dismissing the past as having no bearing on human rights as they exist at the start of the third millennium, it is wise to remind oneself that such rights are not purely the outcome of the founding of the United Nations in 1945 and the subsequent Universal Declaration of Human Rights in 1948. They are rather the outcome of ideas, events and movements over many centuries and the result of an interaction of many different forces (Sieghart 1985:3).

An understanding of modern human rights requires some knowledge of events and beliefs of the past millennium. While Pagels' view is that the earliest real references to human rights begins in the 17th Century, it is important to review some of the events and ideas from the 11th to the mid 18th century period. Some of these ideas and principles, seemingly way ahead of their time, are today reflected in crucial elements of human rights law and have implications for the exercise of the right to freedom of expression.

2.2.2 Human Rights from 1000 – 1750 A.D.

One of the most interesting developments of the early part of the second millennium A.D. came from the canon lawyers of the 11th and 12th centuries at the universities of Paris and Bologna. From these men came the legal maxim "*lex injusta non est lex*" or 'an unjust law is not a law' (Sieghart 1985:22).

This was a staggering proposition, way beyond its time. It took centuries to come into its own and find general acceptance. The proposition that a law might not be a law at all because it fails to conform to some superior standard, that of *justice*, is described by Sieghart (1985:22) as 'subversive'. It implied that laws made by rulers (who were regarded as supreme or even divinely appointed) need not be obeyed if they were unjust.

Sieghart (1985:23) points out that the Latin word *justum* means righteous and the idea of justice has implications such as uprightness, propriety, integrity, impartiality, fairness, equity and even-handedness. Justice is thus the ultimate test of whether a law is fair or not.

The relevance of this very early maxim to human rights is found in the concept of judicial review, or the right of a court to test the legality of the law, a crucial element in enshrined human rights ensuring that courts can test whether the application of existing laws or new laws are in tune with, or in conflict with enshrined human rights. The relevance of this process of 'judicial review' differs only in degree between challenges in the Constitutional Court to parliamentary legislation, and challenges to a school rule which a learner believes has infringed his constitutional right to freedom of expression.

It took more than 600 years before the legal maxim was firmly established as a legal procedure. In 1803 the United States Supreme Court, in the case of *Marbury v Madison* (1803) 5 US 137, confirmed its own right to exercise judicial review to test the justice of laws against the relatively new Constitution

and Amendments. In the above case, at 153, the court stated "...[i]t can refuse justice to no man" and, at 180, declared "...a law repugnant to the constitution is void". In this statement the 12th century maxim *lex injusta non est lex* found its rightful place in modern law, and, in consequence, ensuring a way for entrenched human rights to be upheld by the Courts (see 2.2.3.2 for a more detailed discussion of the *Marbury* case).

Much has been written of the thirteenth century *Magna Carta*, or Great Charter, and its role in the development of human rights. Lyon (1982: M 48 b) described the *Magna Carta* as the document which marked a decisive step forward in the development of constitutional government in England. However, to describe it as a Bill of Rights or a major step towards human rights would be very misleading. At very best it can be described as part of the long process of change extending over an eight hundred year period of English legal history, the latest step in England being in 1998 with the passing of the Human Rights Act (Great Britain 1998). This Act, which made the *European Convention for the Protection of Human Rights and Fundamental Freedoms* part of the domestic law of the United Kingdom, was described by Gerald Howarth M.P. (quoted by Fortin 1999:350) as a measure which would have "...a seismic impact on the people of this country. It is part of the bulldozing of the constitutional landscape of the United Kingdom" (see 3.3.3 and 4.3.3 for an expansion on the Human Rights Act and its impact).

The history of Europe from 1200 to 1600 was a period of great but erratic change, a description which equally fits the development of democracy and the road to human rights. Sieghart (1985:24) aptly describes this period as a period of two revolutions, one on the battlefield and the other in the hearts and minds of people.

Two of the key shifts, critical to the development of democracy, which itself was an element essential before the rights of individuals could be asserted,

were the decline of the power of the Roman Catholic Church (hereafter, the Catholic Church) and the challenge to kings who had, up until then, claimed their authority as divinely given. An all powerful Church and an all powerful king leave no room for either democracy or an individual's claim to fundamental human rights.

The period from 1600 to 1700 saw crucial changes occur in Britain. The claim of the king to divine power was finally broken and in 1689 a Bill of Rights was passed in Parliament

The Bill of Rights of 1689 cannot be described as comparable with such documents of the modern era. Most modern human rights legislation guarantees freedom of speech, religion, press and assembly and provides protection against the abuse of power by the government and its agents. England in 1689 was not a democracy in the modern sense of the word, despite the existence of Parliament and a new controlled monarch. The severe social class divides prevented members of the lower classes becoming members of Parliament.

This early 'Bill of Rights' did make reference to freedom of speech in "...that the freedom of speech and debate or proceedings of Parliament ought not to be impeached or questioned in any court or place out of Parliament".

Such freedom of speech had no extension to the ordinary English citizen but was a right for members of parliament and guaranteed them protection against being sued for comments they made within Parliament. This is today a characteristic of democratic parliaments across the world.

During this period, men began to exercise their minds and voices, and philosophies offered new ways of thinking. The development of the printing

press made the Bible available to all who could read, instead of just to powerful priests. These two changes were major aspects of this revolution in thinking.

2.2.2.1 THE IDEAS OF WRITERS AND PHILOSOPHERS ON THE RIGHT TO FREEDOM OF EXPRESSION

(a) John Milton

It was during this 17th century that the voice of John Milton, known as a great English poet, began to be heard, and his writings read. Elements of freedom of expression began to emerge. In the 1640s John Milton began a great fight for what today is a key element of freedom of expression, namely freedom of the press.

John Milton, wrote the *Areopagitica* in 1644 as a political protest and addressed it to Parliament in that year. The speech urged the abolition of a new law which required all intended books and pamphlets to be submitted to the scrutiny of a licenser before they could be legally published (Suffolk 1968:1). The unrestricted expression of opinion in peace time was something which could not be taken for granted. It has had to be fought for and, once attained, very carefully guarded (Suffolk 1968:11).

Milton engaged in a "fight" in a period of history when authority was not readily questioned and those who challenged authority often suffered dire consequences. Change was unwelcome and so new ideas or criticism were swiftly stifled. But the 17th Century was also an age of great activity, intellectually and commercially. Milton chose, unlike his contemporaries, to challenge the stifling of ideas. In modern terms, Milton pleaded for freedom of speech in published form, or engaged in a fight against censorship.

He was not just a man of words but of action. The publication of *Areopagitica* was done in complete disregard to the licensing system. Later, in *Defensio Secunda*, Milton states,

> ... I wrote my *Areopagitica* ... in order to deliver the Press from the restraints with which it was encumbered; that the poser of determining what was true and what was false, what ought to be published and what ought to be suppressed, might no longer be entrusted to a few illiterate and illiberal individuals who refused their sanction to any work which contained views or sentiments at all above the level of vulgar superstition" (quoted by Suffolk 1968:16).

The battle around free speech and censorship is further illustrated by the existence of an index of Prohibited Books established by the Council of Trent in the 16th Century and which was only abolished by the Vatican four hundred years later.

Milton, seemingly way ahead of his time, warned Parliament that censorship of print could logically lead to the need to censor everything. He continued by saying, "If we think to regulate printing, thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man" (quoted by Suffolk 1968: 80).

In a reference to much earlier history, Milton referred to the Athenians, showing how in early Greek history any other form of censorship or restriction was unknown (Suffolk 1968:51-52) and declared that widespread literacy, when it is subjected to tyrannical control and manipulation, may in fact profoundly enslave the human personality more forcibly than any crude threat or external domination.

John Milton was a beacon of light in dark times, a man way ahead of his times. Despite Milton's pleas falling on deaf ears and the licensing of books continuing until 1691, his fight against censorship in the seventeenth century is very much part of the history of the development of freedom of speech and expression. As Bajwa (1995:194) indicates, freedom of speech would be insignificant if what is said cannot be printed and disseminated.

Milton was a writer who used his pen to also attack and influence change in political powers of the day. Quoted by Salhany (1986:1), Milton wrote in 1651,

> Our liberty is not Caesar's. It is a blessing we have received from God himself. It is what we are born to. To lay this down at Caesar's feet, which we derive not from him, which we are not beholden to him for, were an unworthy action, and a degrading of our nation.

The choice of "Caesar" would seem to reflect Milton's opposition both to the idea of a divinely appointed, all powerful king, and to the power of Rome in the form of the Catholic Church.

During this same period and well on into the next century, philosophers developed and pronounced new ideas. Much is made of the 17th and 18th century philosophers' roles in the development of human rights. It is clear that men such as Locke (1632 - 1704), Rousseau (1712 - 1778) and Kant (1724 - 1804) had a powerful influence on the minds of the people of their times, but the suggestion by Dlamini (1995:12) that Locke's *Two Treatises of Civil Government* led to the foundation for the doctrine of human rights would seem to be an exaggerated claim, particularly given that the book was published ten years after the English *Bill of Rights.*

(b) John Locke

To illustrate further that the type of equality Locke wrote about was not an equality of abilities but rather of no person having the right to dominate others or exercise arbitrary powers over them, Chambliss (1954:353) quotes Locke as stating:

> Though I have said that 'all men by nature are equal', I cannot be supposed to understand all sorts of 'equality'. Age of virtue may give men a just precedency. Excellence of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom Nature, gratitude or other respects, may have made it due....

It would be difficult to see this as a passage from a 21st century book on human rights in the Western world. One might be inclined to see it as a justification by Locke for differences and inequalities due to birth or other factors. However, in the context of the time, Locke was a powerful influence in the slow steps of changing the perception of the king having divine authority, towards democracy. In the sense of the influencing the change towards democracy, so essential for the protection of human rights, Locke can be said to have played some role in the early steps towards the protection of human rights.

(c) Jean Jacques Rousseau

Shortly after Locke's death, another philosopher on the other side of the English Channel, namely the Frenchman Jean Jacques Rousseau, began making what might be considered as a further major contribution in the steps towards democracy and human rights.

In Rousseau's view, the individual, when he entered civil society, sacrificed his individuality to the *volenté générale* or general will of the body politic and in exchange for his natural rights to life, liberty and equality, the individual now acquired certain civil rights which the government was required to protect, or in French, "S*avoir, l'aliénation totale du chaque associé avec tous ses droits a toute la communauté*". Rousseau wrote of this one overriding principle in the social contract (Van der Vyver 1979:12; Dlamini 1995:13).

Rousseau lived in a time of strong feudalism and a royalty who abused their subjects, a period marked by a rising tide against the reigning powers that culminated in the French Revolution of 1789. That writers, like Rousseau, influenced the French history of the 18th century is clear, and their ideas are reflected in the French constitution which followed the revolution.

(d) Emmanuel Kant

The eighteenth century produced other philosophers whose ideas pointed in the direction of human rights. The German, Emmanuel Kant held the view that man had only one basic human right, namely *innere Freiheit* or inherent freedom. Such freedom is expressed in the independence of one's will within the framework of a supreme ethical norm. Simply put, man is free to act as he chooses as long as he makes allowances for the equal freedom of others (Van der Vyver 1979:12-13). Put in modern terms, Kant might concur that one has the right to exercise one's rights to the extent that they do not interfere with or prevent the exercise of the rights of any other person, an indication of the nature of the possible limitation of rights.

(e) Giambattista Vico

Lest one believes that the 18th century philosophers of Europe held similar views, Giambattista Vico (1668-1744) of Italy vigorously attacked the accuracy and logical necessity of the social contract theory of government. He believed that religion alone could exercise control on people and that the social contract theorists falsely assumed that primitive man possessed the rational powers of the man of the 18th century (Chambliss 1954:386–390).

Vico is remarkable for his views on law, insights which are relevant three hundred years later. He believed, for example, that a nation at one stage of development could not possibly take over the laws of another nation at a different stage of development. Further, he believed that laws are not defined by words but by practices and slowly shaped by human experience, pointing to law as not fixed but interpreted in such a way as to induce right behaviour. Vico saw law as growing out of human needs serving both to restrain action and to guide action into satisfying forms of self-expression (Chambliss 1954:389).

Vico's work provides a possible insight into why the Universal Declaration of Human Rights (hereafter referred to as the UDHR) does not find universal acceptance and application in vastly differing countries and cultures. The shaping of law by experience and defined by practice might be seen as reflected in modern day case law.

In viewing the role of these philosophers in the development of human rights, it is critical to remember that they are viewed today with three hundred years of hindsight and it is essential not to credit such people with exaggerated influence in matters on which they never expressed an opinion, or whose opinions on issues can only be derived as a possibility.

Gough (quoted by Chambliss 1954:357) points to the danger of imputing to philosophers, writers and others, things which they never actually said. As he says,

> I am not sure how far Locke would have accepted ... amplification of his unwritten thoughts, but I suspect that some of the logical difficulties ... found in the Treatise, arise simply because Locke did not notice them, and that he would have been surprised at the ingenuity expended in trying to reconcile them.

In summary, the turmoil of 17th and 18th century Europe was accompanied by the propagation of ideas to explain the present and promote changes for man's betterment in terms of his living in society. These ideas were to influence, in varying degrees, the thinking of leaders, politicians, philosophers and ordinary citizens on the route to democracy and human rights, including freedom of speech in different forms, and the first two constitutions which had a human rights focus.

2.2.3 Revolutions and Constitutions

2.2.3.1 INTRODUCTORY REMARKS

Toward the end of the 18th century, two revolutions on either side of the Atlantic Ocean, in America and France, led to giant constitutional and human rights development. In both cases the rule of the reigning monarch was replaced by republican rule with elected representatives in place of the monarch. Most important was that both countries enshrined their new republics in single documents known as the *Constitution.* The American Constitution (United States 1787) was drafted after the Declaration of Independence in 1776. The French Constitution (France 1789) took the form of the *Déclaration destroits de l'homme et du citoyen* or Declaration of the Rights of Man and the Citizen (Sieghart 1985:27).

2.2.3.2 THE AMERICAN AND FRENCH CONSTITUTIONS

The American Declaration of Independence (1776) begins with the words:

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

The Declaration was not included in the United States Federal Constitution of 1787 which begins with the following words:

> We the People of the United States, in order to form a more perfect Union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The sentiments of the Declaration of Independence and of the Federal Constitution have similarities and laid the foundation for human rights to flourish in American society.

In response to the belief that the American Constitution did not go far enough to protect the citizens, various Amendments were introduced in 1789 and came into force in 1791. These Amendments are referred to as the Bill of Rights (Brinkley 1993:155).

The constitution was no longer just another set of laws but was entrenched as the very foundation of the state, serving as the supreme law against which all other laws could, would and must be tested. This test was a test of whether a law was just and, therefore, legitimate. The ideas of the Canon lawyers from 600 years earlier are clearly visible (see 2.2.2).

The idea of testing laws was not just a nice idea but, in the United States, was clearly demonstrated in the landmark case of *William Marbury v James Madison* [Secretary of State of the United States] (1803) 5 US 137. In this case the Supreme Court established itself as the independent adjudicator of whether laws were just or not, and whether properly applied, and further established the Constitution as the absolute test or benchmark. To quote, at 153,

> The discretion of a court always means a sound legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court is bound to grant it. They can refuse justice to no man.

The Constitution and its role, and the role of judges under the Constitution was extensively analysed in this particular case (at 176-180). The following three extracts illustrate something of this analysis and the supreme role of the Constitution:

> The question whether an act, repugnant to the constitution, can become the law of the land is a question deeply interesting to the United States; but, happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles ... to decide it (at 176).

> The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable (at 177).

And, in conclusion (at 180) the judge stated,

> ... that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The last sentence of the first quote above, is reminiscent of a line from the 1215 Magna Carta, "We will not deny... to any man, either justice or rights" (Lyon 1982:M 48b).

This remarkable judgement of almost 200 years ago is a pointer to an ideal which today is still far from realization in all but a very few countries of the world at the start of the third millennium.

Robertson (1989:3) and Kamenka (1978:3) point out that the first two articles of the French Constitution of 1789 reflect the influence of early philosophers,

Article 1: Men are born, and always continue, free and equal in respect of their rights. Civil distinctions, therefore, can be founded only on public utility.

Article 2: The aim of all political association is the conservation of the natural and unalienable rights of man. These rights

> are: liberty, property, security, and resistance to oppression.

The similarity of the French and American Constitutions is not surprising since both had the same objectives of protecting citizens against arbitrary power and establishing the rule of law (Robertson 1989:6). Between them, the two constitutions included such things as equality before the law, due process of law, freedom from arbitrary arrest and imprisonment, freedom from unreasonable searches and seizures, the presumption of innocence, the right to a fair trial, protection against retroactivity of the law, freedom of assembly, freedom of speech, conscience and religion, and the right to own property (Sieghart 1985:27; Kamenka 1978:3-5; Robertson 1989: 4-5).

2.2.3.3 FREEDOM OF SPEECH : THE UNITED STATES AND FRENCH CONSTITUTIONS

By the end of the eighteenth century, in both France and America, new entrenched constitutions had emerged, bringing with them freedom of speech for the ordinary citizen within the new constitutional frameworks.

The American Constitution's First Amendment, passed in 1791, states:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people to peaceably assemble, and to petition the Government for redress of grievances (quoted by Tribe 1978:576).

Article 11 of the French Declaration (*Déclaration des droits de l'homme et du citoyen)* states:

> The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he be responsible for the abuse of this liberty, in the cases determined by law (quoted by Sieghart 1983: 330).

The United States First Amendment is aimed at restricting the powers of government to interfere with the free speech of its citizens. In comparison, the French Declaration speaks positively of the citizens right to free speech, but it also introduces the first clear statement of limitation on citizens' freedom, namely accountability in law for abuse of that freedom.

Voltaire expressed the French view by saying, "I do not believe a word you say, but I shall defend with my life your right to say it" (quoted by Beckton 1983:102).

Despite the giant step forward made by the contribution of the American and French constitutions, in reality their application and theory were initially far apart. One has only to reflect on the history of France in the last decade of the 18th century, the post-revolution period, to see a constitution on paper but a people reacting brutally to the brutal past. However, one of the most obvious blemishes in the early constitutional implementation was the continued existence of slavery. In human rights terms, slavery was utterly offensive for it deprived a man or woman of his/her freedom and dignity, and removed their humanness by making them an object of trade, another person's possession. In fact slavery was the very antithesis of human rights. "All men are equal ... with rights ..." sounded wonderful, unless one was a slave, a woman, or, in America, a Negro or indigenous Indian. Some might add that today all are still, in reality, not equal.

It was only in 1834, following Wilberforce's great campaign against the slave trade, that slavery ended throughout the British Empire (James 1997:126) but not as a result of a Bill of Rights or an entrenched constitution, but because of very strong evangelical Christian concern for people, not just for slaves.

While the United States First Amendment probably enjoys more exposure in legal literature than any other freedom of expression clause, this should not

cloud the view of developments in various other parts of the world. Richter (1985:2922-2937), in his survey of law and education, points out that the Belgian Constitution of 1831, for example, guaranteed Academic Freedom, a freedom closely linked with freedom of expression.

2.2.3.4 CONCLUDING REMARKS

These two great constitutions differed from all that had gone before. They were not concessions extracted from the rulers of the day or forced on such rulers, as were the Magna Carta (1215), the Petition of Rights (1628) and the Bill of Rights (1689), in England. Instead, these were coherent statements of the fundamental rights and freedoms of the citizens of these countries and which no one had the power to take away. Now the rulers were subject to control and the ruled had criteria by which to test the ruler.

What the French and American Constitutions of the late 18th century serve to illustrate is the uneven development of democracy and human rights, two pockets of development way ahead of their time, the first of their kind in history. But, these constitutions came to exert persuasive influence on the development of human rights elsewhere, and steps towards ensuring respect for such rights in practice.

2.2.4 Shifts in Focus on Human Rights : The 19th Century

Despite the two great constitutions of France and the United States, human rights thinking, to a degree, receded during the 19th century. The emphasis in thinking shifted in focus from natural rights to utilitarianism and evolutionism (Dlamini 1995:13), strongly influenced by writers such as Behtham, J.S.Mill and Pollock, none of whom accepted the doctrine of natural rights (Wyzanski 1979:11). However, strong voices for freedom of speech remained, J.S.Mill being a key figure from the 19th century. His book "On Liberty" (1859) is one strong plea for freedom of speech.

In the midst of changes in philosophical thinking, a new type of right began to arise in the 19th century. With the industrial revolution came great wealth and even greater inequality among people, together with gross exploitation, vividly illustrated in the writings of Charles Dickens. Now, in contrast to the cry for freedom *from* state intervention in individual lives, the exploited, with the support of humanitarian groups, began to demand laws to protect them. They claimed a right *for* state intervention to protect their rights. Because of their sheer numbers, their cry was successful.

This change must not be seen as a return to arbitrary powers for rulers but rather a placing on elected rulers, not just an obligation to respect an individual's human rights, but a further obligation to act positively to protect such rights. Sieghart (1985:29-30) sees in this demand the rise of collectivism and socialism, most clearly illustrated in the avowed claims of Soviet Russia, after the revolution, to be the first socialist, collectivist state.

However, this shift in focus to the state being responsible for protecting the rights of its citizens is a crucial step in the development of human rights. It is clear that the individual citizen cannot protect his own rights unless there is higher authority to appeal to. But the protection of human rights is insufficient. One of the most modern Constitutions takes this a step forward. In the 1996 Constitution of South Africa (RSA 1996a), Sec. 7 (2) states that "[t]he state must *respect, protect, promote and fulfil* (italics added) the rights in the Bill of Rights."

Promotion of human rights is far more than just protection. It is instead a deliberate process of actively seeking to ensure that the citizens know their rights and that these rights become far more than just words on a piece of paper.

2.2.5 International Human Rights in the 20th Century

By the start of the 20th century, countries had clear boundaries of their physical territory. The government of a country had exclusive control over a given area and personal sovereignty over its subjects or the people living in that physical area. Further, leaders also claimed sovereignty over their citizens who were outside the boundaries of their country, that is to say, their citizens in someone else's country. In order not to offend a neighbouring leader one needed to treat the neighbour's citizens living in one's country with care, giving a sense, however vague, of extra-territorial justice.

At the same time there was a strong belief in the non-interference of another sovereign state. How a government ran its country was claimed to be its own affair. Such belief had serious consequences for the exercise of any form of international law and enforcing human rights across international boundaries (see 2.6.4 for the non-interference principle in the Organization of African Unity, hereafter the OAU).

The development of international law was a slow and gradual process simply because it required cutting across the 'non-interference' principle and required co-operation of national governments to be effective. Some specific issues acted as strong forces in this development including ridding the world of slavery and the ending of piracy on the high seas. Today international law is used in the fight against various 'crimes against humanity' as reflected in the Nüremberg trials after the Second World War, the kidnapping of diplomats, hijacking of aeroplanes and, in more recent years, genocide in Africa and Europe, international drug trafficking, and dealing with international terrorism.

These developments in international law and co-operation opened the doors for the wider issue of extending human rights across the globe.

While the 20th century may go down in history as the period when human rights gained international recognition, it will also be remembered as a century of enormous displays of inhumanity to the point of cruelty out of control (Dlamini 1995:14). Some examples are more obvious than others, namely the cruelty of Stalinist Russia and its satellite countries after the 1917 revolution until late into the century, Hitler's Germany, the rise of Communism in China and the crushing of anyone who dared to differ, by the most inhumane of torture. Most recently, genocide in Ruanda and the former Yugoslavia, and the continuing plague of international terrorism are reminders that human rights are not universally upheld, despite the best intentioned declarations.

By 1943 anyone could have been forgiven for believing that the concept of human rights was a dream from a past age, far removed from the reality of a world war. But, in America, the Constitution, then already in existence for 150 years, remained intact with its Bill of Rights.

In 1944 the leaders of the U.S.A., Britain and the U.S.S.R. met and formulated proposals for the establishment of an international organization that would "facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms" (Van der Vyver 1979:14).

The concept of international human rights is, historically, a modern concept (Meron 1989:91). Sieghart (1985:33) points to two strands in political and legal theory. Historically, these strands were that of absolutism and that of constraints on absolutism. In the past the policy of non-interference in the affairs of a sovereign country created the possibility of citizens of a country having an absolutist authority and at the mercy of such a government or dictator and his henchmen. It was events preceding and precipitating the Second World War and the atrocities committed in that war that made it clear to the international community that states could no longer be left to their own

devices to choose one strand or another (Sieghart 1985:40). There was now a need for a set of external constraints to be imposed on all states, an overriding code of *international* human rights.

The proposals from the leaders of the major powers culminated in the Charter of the United Nations in 1946 and marked the start of a new chapter in the history of human rights (Dlamini 1995:15).

The Charter of the United Nations made reference to fundamental freedoms but was not a bill of human rights. There was strong pressure to include such a bill of rights in the Charter but fears of disagreement over the wording of such rights by the great powers, resulted in a compromise. The U.N. Charter was adopted and a decision made to delay the bill of rights to a later date. In 1948 the United Nations passed the Universal Declaration of Human Rights (UDHR).

The UDHR did not arise from a vacuum. The two great constitutions of France and the United States were strong, influential documents. However, between the two World Wars and during the Second World War, a number of lesser known proposals or documents appeared, each of which, in its own way, pointed to the need for the protection of human rights (Dowrick 1979:4-8) and which are discussed below, in lesser or greater detail.

2.2.5.1 FREEDOM OF EXPRESSION AND THE EARLY 20th CENTURY HUMAN RIGHTS PROPOSALS

Dowrick (1979) provides a valuable record of the early proposals which preceded the UDHR. In 1924 del Vecchio, a Rome jurist, published a skeletal scheme for human rights. Five years later, in 1929, the Institute of International Law adopted a declaration entitled "An International Declaration of the Rights of Man" (Dowrick 1979:7,152). This was not a very comprehensive document but pointed out that "the civilized world demands the

recognition of the individual's rights exempted from all infringement on the part of the State" and the need to spread this recognition of the rights of man throughout the world. The six articles contained basic rights and freedoms which today would be generally regarded as non-negotiable issues.

In 1936, in the midst of Nazi control, a German jurist, Hienrich Rommen, published a full argument for the doctrine of *Naturrecht*, including specific natural rights for all citizens (Dowrick 1979:7).

Five years later, in 1941, American President Roosevelt delivered his "Four Freedoms" message to the United States Congress. These were reasserted in the Atlantic Charter of the same year, a Charter which set out the post-war aims as agreed to by Roosevelt and Winston Churchill (Prime Minister of Great Britain) and endorsed in 1943 by the Allied States fighting against Germany, Italy and Japan. These freedoms found their way into the United Nations Charter as the human and fundamental freedom clauses (Dowrick 1979:7,150).

Roosevelt's original message began as follows:

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.
>
> The first is *freedom of speech and expression* – everywhere in the world (italics added).
>
> The second is freedom of every person to worship God in his own way – everywhere in the world.
>
> The third is freedom from want ... - everywhere in the world.
>
> The fourth is freedom from fear... - anywhere in the world.

Roosevelt's message went on to briefly expand on the four freedoms and their necessity, by referring to the on-going war and its tyranny, bombs and concentration camps. He concluded: "Freedom means the supremacy of

human rights everywhere ... To that high concept there can be no end save victory."

High ideals were not just in the minds, mouths and pens of the free nations. In Germany in 1942–43, a group of students and professors at Munich University formed the White Rose Movement to resist the Nazi regime and to devise a more just order (Dowrick 1979:6). They distributed their views in the form of leaflets. Six of the group were arrested, tried, convicted and summarily executed. Dowrick (1979:150), quoting from Inge Schol's *Six Against Tyranny* (1955), provides excerpts which refer to the need never again to have the conception of imperial power, and to the foundations for a new Europe.

The leaflets, while not a structured bill of rights, made clear reference to human rights, an example being,

> Everyman has a claim to an efficient and just government which will secure the freedom of the individual ... *freedom of speech* ... freedom of religion ... protectors of the individual citizen from the arbitrary will of criminal despotisms... (italics added).

In the midst of oppression came a cry for human freedom and rights. The execution of these six young people simply proved their case, clearly demonstrating the lack of freedom of expression in Nazi Germany.

In 1944 Jacques Maritain, French Professor of Philosophy, set out a scheme of human rights in an essay entitled, *The Rights of Man*, a scheme divided into three sections. These dealt with the rights of a human person as such; the rights of a civic person; and the rights of the social person, and more particularly the working person. The rights were set out in 25 statements with a strong theological undertone. These offered pointers for the forthcoming post-war period. While the wording may differ today, Maritain's list of rights are those accepted today (Dowrick 1979:148-149).

A year later Professor Hersch Lauterpacht of Cambridge University published a draft proposal for an International Bill of the Rights of Man. In the immediate post-war period it provided an important basis from which others could work towards such an International Bill of Rights (Dowrick 1979:144-147).

One can only surmise at what other writings on human rights arose before and during the Second World War. By the end of the war, the time was ripe for an international set of norms which would ideally protect the human rights of all people.

Dowrick (1979:4) sums up this development culminating in the Universal Declaration as follows,

> It was not the product of the brain of one man, nor was it the product of one tidal wave of world opinion in 1948... Its sources are many and identifiable up to certain watersheds.

2.2.5.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was passed by the United Nations in 1948. Mrs E. Roosevelt (widow of the former United States President), in commending the Declaration to the U.N. General Assembly said:

> It [the Declaration] might well become the international Magna Carta of all mankind... be of importance comparable to the 1789 proclamation of the Declaration of the Rights of Man... (Dowrick 1979:1).

Given the post-revolution atrocities in France in the 1790s, these words may have been somewhat unfortunate or prophetic, with the blockade of Berlin, the Communist take-over of China, the Korean War (Brinkley 1993:753-771), and the continued crushing of dissidents throughout the Soviet Union, all occurring in or immediately after the year of the Universal Declaration.

These tragic post-Declaration events, however, served to remind the world that paper declarations don't mean instant human rights for all. The UDHR proved to be a big step forward but not the ultimate destination.

On a very positive note, in the period immediately after the UDHR, the Declaration provided a basis for some political reconstruction. Dowrick (1979:2) points to Germany and India as national examples, and the coming into being or the European Convention on Human Rights of 1950 which was invested with regional international law. However, the initial euphoria over the UDHR wore thin over the next 20 years. These 20 years were marked by on-going atrocities which highlighted the fact that the United Nations did not have the power to enforce the Declaration.

On the 20th Anniversary of the UDHR, a Human Rights Conference was held in Tehran to mark the occasion, and the United Nations General Assembly reaffirmed the Declaration. Subsequently states began to ratify two draft international covenants hammered out by the U.N. Human Rights Commission, namely the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (Human Rights: A Compilation of International Instruments 1993:8-40). These two conventions translated various principles of the UDHR into international treaty obligations, thus giving the UDHR some teeth.

A variety of events since 1968 has kept the UDHR and other human rights instruments to the fore, events which reflect both positive and negative moves towards the recognition of human rights. The positive is reflected in the decline of the USSR with the democratization of many former parts of the USSR and its satellites, the democratic transformation of South Africa and the steps towards reconciliation and peace in Northern Ireland. The negative events, the tragedies of Rwanda, Burundi, Iraq, Kosova, and the on-going North Korean problem, serve as constant reminders that much more needs to be done.

One of the greatest problems of the UDHR was the lack of ability to enforce the Declaration. Human rights declarations have, on their own, never been sufficient to ensure the actual protection of human rights and without enforceability, such declarations remain rhetoric (Mullen 1986:15). Zuriga (*Daily Dispatch,* 10 December 1999) described the UDHR as essentially a wish-list, buttressed by a series of non-binding covenants, backed only by moral sanctions and "still very much without teeth". The U.N. Secretary-General, Kofi Annan, (*Daily Dispatch,* 10 December 1999), described the UDHR as "a mirror that at once flatters us and shames us".

Over the past fifty years the development of international law, regional conventions on human rights backed with powers to sanction offending countries, the introduction of the World Court and regional courts in Europe and the Americas, and the recent War Crimes Court to deal with the genocides in Africa and Europe, have all helped to provide some form of visible enforcement.

The UDHR was the first comprehensive international document on human rights. Subsequently a number of other regional and international Declarations and Conventions were signed. While reference will be made to other aspects of these treaties, the focus in the next section is on the protection given to freedom of speech/expression in these major international human rights documents.

2.3 FREEDOM OF EXPRESSION IN INTERNATIONAL CONVENTIONS AND TREATIES

The concept of freedom of expression, as found at the start of the 21st Century, is the result of two hundred years of development from the time of United States and French constitutions. The development could be described as being like jerky waves and backwashes, rather than a smooth tide.

A cursory glance at the literature, at Declarations, and at Conference motions might lead one to believe that freedom of expression is a concept of the last fifty years. More correctly, the wider interpretation of the right and its impact on society has grown dramatically in this period, in line with the wider focus on human rights in the post-Second World War period.

This development has been significantly aided by the protection given to freedom of expression in international human rights conventions.

In the past 55 years, starting from the Universal Declaration of Human Rights, a variety of international treaties and conventions on human rights have upheld the importance of freedom of expression. In the case of Europe and the Americas, the European Court and the Inter American Court have served as regional upholders and enforcers of the respective regional treaties.

These treaties, and the Asian steps towards a regional convention, reflect concern and consensus about the importance of freedom of expression. They also reflect greater reference to the issues of limitations over a period of time. Thirdly, some international documents have unique features. Of special concern is that, in what follows, limited reference is made to some treaties and a more detailed reference to others, and particularly the European Convention on Human Rights. This is specifically because some treaties may have no means of enforcement while three treaties have regional enforcement mechanisms, however effectively or otherwise they may operate. The treaties are presented in date order.

2.3.1 The Universal Declaration of Human Rights (UDHR).

The UDHR, adopted on 10 December 1948 [U.N. Instruments (1993:1)], refers to freedom of thought, conscience and religion in Article 18, followed by Article 19 which states,

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR concludes, in Article 30,

> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Thus the UDHR sets the standard for continents and countries and provides the model for regional and national human rights declarations and legislation. Unfortunately the universal declaration cannot be said to have been universally implemented. It has, however, set in motion expanding freedom of expression.

2.3.2 The European Convention on Human Rights (ECHR)

This first regional human rights document, provided for freedom of expression as follows, in Article 10:

> 10 (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 10 (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

At first glance the "freedom" may appear to be overwhelmed by the "restrictions". Written in an immediately post Second World War Europe, the wording may have been strongly influenced by the political conditions at the time, bearing in time the power being exerted by Russia in east Europe and the memory of the Second World War and the Berlin blockade still sharply in focus. The Convention had to be acceptable to all partners coming from differing perspectives, levels of conservatism or liberalism, and experiences of the past war (Robertson 1977:2-4).

The ECHR, in comparison to other international human rights documents, was the first human rights initiative to have the means of enforcement with the establishment of the European Commission and the European Human Rights Court (Robertson 1977:16).

The broader extent of freedom of expression is reflected in *Handyside v United Kingdom,* A-24 (1976), an appeal against a conviction in the United Kingdom for publishing an obscene book, on the grounds that the conviction violated the applicant's right to freedom of expression.

In this case the European Court stated:

> Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive but also to those that offend, shock or even disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

The first sentence of the quote reflects two of the key elements that underpin freedom of expression, namely the democratic process and the development of each individual person.

However, the words ..."subject to paragraph 2 of Article 10..." would seem to allow for the possibility of an overgenerous interpretation in favour of limiting freedom of expression. Harris, O'Boyle and Warbrick (1995:379) offer the perspective that the wide powers of limitation given by Article 10 "may be applied differentially but not discriminatorily".

Applicants to the European Court have at times attempted to make use of United States First Amendment decisions in support of their cases. However, there are marked differences between the ECHR and the U.S. First Amendment, chief of which is that the U.S. Constitution has no limitation clause nor any statement resembling Article 10 (2) in its statutes, but rather limitations developed over a long period of time.

The European Court has often given strong verbal support to freedom of expression but judgements have been more tempered because of the *doctrine of the margin of appreciation,* the doctrine which allows the European Court to take account of the differences prevailing in different European countries which impact on their internal court judgements.

What is protected under Article 10? It is clear that political speech has almost unlimited protection and that the press enjoys strong protection. Harris *et al.* (1995:382) refers to freedom of expression being extended by the European Court to include pictures [*Müller v Switzerland* A 133 (1998)], actions which express an idea [*Stevens v UK*. No.11674/85, 46 DR 245 (1986)], print [*Handyside v UK*. A – 24 (1976)], media [*Groppera Radio AG v Switzerland* A 173 (1990)] and television [*Autronic v Switzerland* A 178 (1983)]. In the above cases the Court did not necessarily rule in favour of the applicant but the judgements none the less established the principles.

While freedom of expression is a prerequisite for any form of communicative expression, it is equally important to have one's right *not* to reveal one's opinion protected, a right upheld by the European Court in *Vogt v Federal Republic of Germany* No. 17851/91 (1991).

In school related freedom of expression cases, however, the European Court has had little to decide. It appears that most issues are generally resolved locally or at least within national boundaries. Some cases, however, have reached the European Court (Fortin 1999:352).

Freeman (1995:76) argues strongly that a case can be made for the arguing of British children's rights in the European Court. He suggests that the insistence on wearing of a school uniform, or the power of the school to ban almost any item of clothing including jewellery (Ireland 1984:45; Adams 1992:122), could be in breach of Article 13 of the United Nations Convention on the Rights of the Child, which article he believes embraces Article 10 of the ECHR. The case of *Spiers v Warrington* 1 GB 61 (1954) (Adams 1984:153–154) (see 4.3.3) would certainly seem to have been a breach of a child's right to freedom of expression. Jeffs (1986:62–63) is equally critical of English schools obsession with pupils' dress and appearance.

The European Commission, however, in *Stevens v U.K.* No. 11674 / 85; 46 DR 245 (1986), rejected a mother's application that the rules on school uniform breached her son's rights under the European Convention, but admitted that "the right to freedom of expression may include the right of a person to express his ideas through the way he dresses", for example, by expressing a particular "opinion or idea by means of ... clothing". These issues are developed further in Sec. 4.3.3.

Subsequent to all the above references to United Kingdom cases, the Human Rights Act was passed in 1998, incorporating the European Convention. Section 1 of the Act reads,

> **1.** (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in-
>
> (a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

The issue of freedom of expression is covered in Section 10 of the Convention, and by Section 12 of the Human Rights Act of 1998 which deals essentially with the application of Sec. 10 of the Convention in Great Britain.

The advent of the Human Rights Act will hopefully result in challenges to the type of things so criticised by Freeman, Jeffs and others (see third paragraph on previous page).

In the seeming lack of clarity of certain European Court judgements, Hammerburg (1995:xi) may be right when he states, "We know that few areas have been so fiddled by political hypocrisy as children's rights and welfare". Hopefully, clarity will emerge in the United Kingdom with the application of the new Human Rights Act. (See also 2.4.2).

2.3.3 The American Convention Human Rights (ACHR).

The American Convention on Human Rights (ACHR) is the major regional document on human rights to emanate from the Organization of American States (OAS). However, seven months prior to the signing of the UDHR, the OAS, in May 1948, signed the *American Declaration of Rights and Duties of Man.* Reference to freedom of expression is contained in Article iv of the 1948 document and states, "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever".

The 1948 Declaration has no specified limitations other than a brief and broad reference in Article xxviii which reads,

> The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

Given the lack of a limitations clause in the United States Constitution, this is not a surprise.

The Inter-American Commission on Human Rights only came into existence in 1960 as "an autonomous entity of the Organization of American States, the function of which is to promote respect for human rights" (De Villiers, Van Vuuren & Wiechers 1992:107).

In 1969 the Inter-American Specialised Conference on Human Rights produced the American Convention on Human Rights (ACHR) to reinforce and complement "the protection provided by the domestic law of the American states" (paragraph 2 of the Preamble).

The ACHR provides, in Article 13, a longer and more detailed statement on *Freedom of Thought and Expression* than found elsewhere.

> *Article 13. Freedom of Thought and Expression*
>
> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputations of others; or
>
> b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.

Paragraph 3 makes reference to freedom of expression not being 'restricted by indirect methods or means', a reference to subtle ways states may attempt to undermine the entrenched right. Paragraph 5 is closely alligned to what elsewhere appears as *freedom from discrimination* which is not found separately in the ACHR.

To protect the rights of those covered by the ACHR, the Inter-American Commission on Human Rights was strengthened with the formation of the Inter-American Court of Human Rights.

Thus by the start of the 1970s there were two powerful regional organisations to protect human rights (including freedom of expression) on both sides of the Atlantic Ocean.

2.3.4 The International Covenant on Civil and Political Rights (I.C.C.P.R.).

The ICCPR was adopted in 1976. In Article 19, freedom of expression is confirmed in a more inclusive statement than the UDHR and included limitations on the right. The limitations are clearly restricted to what is deemed absolutely necessary for the good of all.

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article comes with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   a) for the respect of the rights and reputations of others;

   b) for the protection of national security or of public order (*ordre public*), or of public health and morals.

Paragraphs 2 and 3 reflect the broadened thinking that had occurred on human rights between 1948 and 1976. A concern that rights must be balanced by responsibilities is also reflected by this international document.

2.3.5 The Banjul (African) Charter of Human and Peoples' Rights

The African Charter (see 2.3.5), in contrast to the American and European Conventions, contains only a very brief statement on freedom of expression in Article 9,

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions *within the law* (italics added).

The brevity of the clause may reflect previous African lack of experience of freedom of expression and/or possible fear of its implications. More serious are the words '*within the law*', widely referred to as a "clawback clause" (Welch 1991:4; Dlamini 1995:87, Mayer 1995:64; Mutua 1999:358) which allows for the right to be nullified by statute.

No bill of rights is ever unlimited. It is not necessarily the limitation which creates the problem in itself but the way in which it is worded and applied. Some limitations are so worded as to undermine the effectiveness of the right concerned or of the entire bill of rights. A total overrule is found in a general limitation clause which forbids the use of a bill of rights to overrule statutes passed by the state. In effect this means the state can pass statutes in direct conflict with its own bill of rights, even if those same laws obliterate the right to freedom of expression or other Charter rights, and cannot be challenged. This is not unique to Africa but the *African Charter of Human and People's Rights of 1981*, clauses repeatedly conclude with words such as or similar to "...in accordance with the provisions of appropriate laws". Article 9(2) above provides just one example. However, it seems that recently the African Commission on Human and People's Rights has shown dissatisfaction with the 'clawback clauses' and that proposals to amend these clauses have been discussed.

The question of human rights in Africa is further developed in Sec 2.6.

2.3.6 Freedom of Expression and Asian Human Rights

Unlike Europe, the Americas and Africa, Asia has struggled to develop a regional approach to the protection of human rights, largely because of great disparities among Asian nations in respect of, amongst other things, social structures, ideologies and legal systems. A breakthrough came in 1983 when

the General Assembly of the Asian Regional Council, a non-government organisation made up mainly of jurists, accepted the *Declaration of the Basic Duties of the Asian People and Governments*. This declaration deplored the failure of Asian governments to ratify international human rights covenants and agreements and urged all Asian governments to incorporate such human rights principles into their own national constitutions (De Villiers *et al.* 1992:165-168). The *Declaration* included the following reference to freedom of expression in Article 1, paragraph 2:

> In particular, it is the duty of each government to respect, implement, enforce, guarantee, preserve and protect, at all times, the following fundamental liberties and rights of the people and ensure that such rights and liberties are incorporated in its national constitution beyond impairment or abridgement by statute or executive order.

There follows a list of fundamental liberties and rights, including,

> 2.06 the right to freedom of opinion and expression.

This right is expanded on in Article 7, headed Mass Communication Media. Paragraph 2 points to the duty of governments to protect the rights of authors, artists, journalists and writers. In paragraph 4 the authors, artists, journalists and writers are informed of their duty to use their rights and freedoms responsibly.

While the Asian Regional Council document has no legal status or means of enforcement, it is a step towards a regional bill of rights and protection for human rights such as freedom of expression.

2.3.7 The United Nations Convention on the Rights of the Child.

The Convention [Human Rights: A Compilation of International Instruments (1993:174-195)], adopted on 20 November 1989, clarifies, in an international document, the child's right to freedom of expression. The Convention followed two previous international documents on children's rights, namely the Geneva

Declaration of the Rights of the Child (1924) and the United Nations Declaration of the Rights of the Child (1959). In the latter document no specific mention was made of freedom of expression but Principle 2 referred to the need for the child to be given opportunities "to enable him to develop physically, mentally... and in conditions of freedom and dignity". It can be argued that mental development, freedom, and dignity are likely to be limited where freedom of expression is denied, particularly if one considers the key arguments for the importance of freedom of expression (see 3.2.1 and 3.2.3).

The preamble to this United Nations Convention begins with reference to "recognition of the inherent dignity and inalienable rights of *all* (italics added) members of the human family". In the seventh paragraph of the preamble, and in part repeated in paragraph 1(d) of Article 29, the Convention states that "the child should be fully prepared to live an individual life in society... in the spirit of peace, dignity, tolerance, freedom, equality and solidarity".

Again it can be argued that a denial of freedom of expression (accepting the necessary limitations) would be contrary to the aim of preparing a child to live an *individual* life. The very essence of individuality includes the right to think for oneself and express one's own ideas, beliefs, and values and, equally, learn to respect the differing perspectives of others in society. Further, the aim of bringing up children in a spirit of peace, dignity, tolerance, freedom and equality, will be difficult to achieve where there is a lack of respect for children's views, and intolerance of their right to express those views.

The implications for signatories to the Convention as spelt out in Article 2 are that such states "should respect and ensure the rights set forth in the present Convention to each child within their jurisdiction...". The signatories bind themselves not only to respecting these rights but ensuring that they become a practical reality, a fact further emphasised in Article 4.

The term, the "best interests of the child shall be a primary consideration" is found in Article 3. While the question of *what* is in the best interests of the

child may be a source of debate, it is equally important to ask whether, in the context of this study, it can be in the best interests of the child to restrict his right to freedom of expression (Article 13) and thereby deny him the right to express his freedom of thought, conscience and religion (article 14).

Article 13 of this Convention states,

> 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of the child's choice.

Paragraph 2 deals with limitations and the wording is essentially the same as that used in the I.C.C.P.R. Article 19 Paragraph 3 (see 2.3.4).

One of the dilemmas of this Article of the Convention is the conflict between the rights of the child "to seek ... information and ideas of all kinds..." and the need to protect the child's moral development by restricting access to undesirable publications and other harmful media exposure. Further, the Convention refers, in Principle 2, to "the best interests of the child shall be the paramount consideration". The dilemma highlights the sometimes conflicting nature of different rights.

Articles 28 and 29 of the Convention relate to the child's right to education and of particular concern is paragraph 1(a) of Article 29 which states the child's education should be directed towards "... the development of the child's personality, talents, and mental and physical abilities to their fullest potential". It is difficult to conceive of a child's personality, talents and mental abilities being developed to their fullest potential if the right to freedom of expression is restricted or denied.

Taken as a whole, it is strongly argued that the United Nations Convention on the Rights of the Child not only spells out the child's right to freedom of expression, in Article 13(1), but that a number of other Articles support this

view, or the implementation of such other articles in the life of the child would be restricted if freedom of expression was restricted [other than as reflected in Article 13(2)].

The Convention binds the signatories but if such signatories do not apply the Convention or do so half-heartedly or with a wide range of restrictions, there is little that can be done. Where, however, a country has an entrenched Bill of Rights, for example as in South Africa, which binds the courts to "consider international law" when interpreting the Bill of Rights [Sec. 39(1)(b) Constitution of South Africa (RSA 1996a)], the Convention is likely to be given its rightful place.

2.3.8 Protecting freedom of expression at the International level: Some Conclusions

The right to freedom of expression is illustrated above as an international human right and supported and reinforced in certain regions by regional declarations. However, on the international front the only means of enforcement is found at regional level in the European and Inter-American Courts, and, more recently, in the African Court. Where such regional enforcement is not accessible to citizens the value of international treaties is to hold up a desired standard of human rights and to act as a form of moral pressure on countries.

Hoffmann (1999:165) believes that, because of differing legal cultures of people and their level of acceptance or otherwise, it is almost impossible to submit all matters to a common court of human rights. Whatever difficulties may exist, the regional courts have played a major role in enforcing human rights in particular regions.

Freedom of expression, described as "... the matrix, the indispensable condition of nearly every other form of freedom" (see 3.2), is a reality for some

but, probably, only a far off hope for the world's majority, living in countries with no bill of rights or giving only token assent to such an essential freedom.

Having examined freedom of expression in international documents, the next section briefly examines the different ways freedom of expression is protected and limited in the context of human rights law in individual countries.

2.4 HUMAN RIGHTS LAW AND LIMITATIONS

2.4.1 Introductory comments

Human rights have been universally declared by means of the UDHR but the interpretation and implementation of human rights, including freedom of expression, varies considerably from country to country. The realization of human rights involves translating the ideals into justifiable rules, which have precision and clarity (Campbell 1986:4-5).

Human rights legislation comes in various forms. However, few if any rights are without any limitation. Limitations too come in various guises. Types of legislation and limitations are examined below.

2.4.2 Human Rights Legislation

Historically the protection of human rights and, in particular, free speech and expression has occurred to varying degrees in various ways, with and even without an entrenched bill of rights.

However, over the past just more than 200 years human rights protection has developed in various forms to what exists today. The types of legislative protection can broadly be divided into two categories, namely either as part of a country's constitution, in the form of a bill of rights, or as a separate statute. The former generally enshrines the human rights legislation as superior to ordinary law and acts as a yardstick in the measure of acceptability of other laws. The enshrining of a Constitution generally makes it difficult to make

changes, thus ensuring a sense of consistency and security for citizens. The written constitution as the supreme law is legally the clearest embodiment of principles and rights (Örücu 1986:39). This approach is seen, for instance, in the United States, Canada, most of Western Europe, India, South Africa and Botswana.

A Bill of Rights as a separate statute, rather than as part of a constitution appears to be similar to constitutional rights but it has two major deficiencies. First, like any other statute, it can generally be altered by a simple majority. Thus a change of government control, at least theoretically, can lead to the scraping of a bill of rights statute. Secondly, its lack of superiority to all other laws makes its use as a test of all other laws very difficult if not impossible. Thus, a government would be free to pass other legislation which impinges on a citizen's human rights, and there will be no superior test by which such impinging legislation can be declared null and void. An example of such a statutory bill of rights is found in New Zealand (Palmer 1992:57-59).

A third type of human rights protection has been recently developed in Great Britain. While Britain signed the European Convention on Human Rights in 1950, and British citizens had access to the European Court of Human Rights, the Convention did not become part of domestic law in Britain. As a result, a citizen had far less ability to enforce his human rights in a British Court than in the European Court (Nicholson 1998:946). The latter, however, was accessible only after a time consuming and costly process. The Convention could also not be used to override an Act of Parliament where such an act infringed a citizen's human rights. According to Ackner, (quoted by Nicholson 1998:950), "[t]he treaty (European Convention), not having been incorporated in English law, cannot be a source of rights and obligations".

Örücu (1986:39) described British freedoms as being regarded as understood or taken for granted so that a citizen may do as he likes unless he clashes with

some specific restriction on his freedom, but his rights are not specified in the form of positive law.

A number of cases at Strasbourg have pointed to the need for Britain to incorporate the Convention. In 1993, Scarman (quoted by Nicholson 1998:953) said, "... let's be done with this legal wriggling and these subtle confusions – let's enact the declaratory provisions of the Convention".

In 1998 the British Parliament passed the Human Rights Act, making the European Convention on Human Rights part of British domestic law. This brought a radical change to traditional thinking (Fortin 1999:350) (see 3.3.3).

The Human Rights Act requires that, as far as it is possible to do, primary legislation and subordinate legislation must be read and given effect in a way "which is compatible with Convention rights", such rights being defined as the rights and fundamental freedoms set out in Articles 2-12 and 14 of the Convention together with certain articles of the First and Sixth Protocols as read with Articles 16-18 of the Convention (Nicholson 1998:953).

This is extended to British courts having to take note of case law from the European Court. However, the British Courts will still not possess invalidating powers of judicial review. As Hoffmann (1999:159-160) points out, the British Court can declare the legislation incompatible with the European convention but cannot invalidate such law. The government and Parliament will be under pressure to change the law.

In summary, Britain's Human Rights Act is not a Bill of Rights in the sense of other Bills of Rights but an incorporation and application of a regional convention in domestic law. As a result, the British Courts lack the powers of for example, the American Supreme Court and the South African Constitutional Court, to declare legislation invalid. It is also a statute and not entrenched,

although unlike other countries with statutory bills of rights, Britain does have enormous pressure from the European Union to conform to the Convention on Human Rights of which it is a signatory.

In the history and development of human rights, the British course is unique. Whether it proves to be a viable route for other countries which are signatories to their own regional conventions, only time will tell.

For countries without an entrenched Constitution and Bill of Rights, and without a statutory bill of rights, and without the British approach, the protection of rights lies within the broad framework of legislation, common law and case law. At times it is by inference in the sense that what one cannot be prosecuted for, is protected, i.e. if the law does not forbid, one may assume it is not forbidden but permissible. This, however, provides no means of challenging the statutes which may infringe human rights. While British writers have claimed that such a system worked for their country, it is a system open to political abuse in countries with a limited history of democracy.

2.4.3 Limiting Human Rights

Human rights within a constitution does not always mean the rights are always protected. Few if any rights are protected under all circumstances, and Constitutions, in their various forms, have some sort of limiting mechanism. If this were not so even criminal behaviour might enjoy protection under a claim that such behaviour was an exercise of 'freedom of expression'.

The approach to limitations varies widely and according to the type of constitutional or statutory provision of protection to human rights. The United States has an entrenched Constitution with no limitation clause but limitations developed by the judiciary over a long period, whereas there are African countries with Bills of Rights but limitations that negate those very rights. Thus, in examining human rights, and freedom of expression in particular, in

any country, it is crucial to critically examine the limitations which can be imposed (see 3.2.5 and following for discussion of limitations in the selected foreign countries). See 5.4.4, 5.4.4.1 and 5.4.4.2 for a detailed discussion of the limitations clause of the South African Constitution (RSA 1996a).

In examining the development of human rights and, specifically, freedom of expression, such development is more than historical, philosophical, and political. It is also more than legislation and limitations. There are other factors which play important roles in this development. Two such factors are *culture* and *religion* which are, in an international perspective, the focus of the next two sections.

2.5 HUMAN RIGHTS : CULTURAL AND RELIGIOUS ISSUES

2.5.1 An Overview

South Africa is a multi-cultural, multi-faith country. Its cultural roots run deep in both African philosophy and traditions, and equally they run deep in the philosophy and traditions of the Western world. Likewise, it is a country of different faiths, strongly Christian and yet for many people, the Christian faith is impacted on by African traditional religious believes. At the same time there is a powerful Moslem voice and influence. Thus there is, in South Africa, a conglomeration of culture, tradition and religion from Africa, from the West and from the East. To understand both the development of freedom of expression *and* the problems around the implementation, application and acceptance of human rights in general and freedom of expression in particular, requires some understanding of the diversity in which such rights have developed, and are still developing, and are applied. In a country with what some have described as having the most liberal constitution in the world, the background enables one to understand the widely differing perspectives and responses to the Bill of Rights in general, and freedom of expression in particular, as contained in the South African Constitution (RSA 1996a).

2.5.2 Cultural Issues

The issue of culture underlies a lot of what has already been written and provides a key to understanding why different peoples see human rights through different coloured spectacles. As Alston (1994:23) puts it, "... no amount of universalistic aspirations can cancel the inevitable influence of cultural values and perceptions".

It is useful to consider the Eskimo in the Arctic and the Bushmen in the Kalahari. In such harsh geographical conditions such people are in a "survival mode", a mode which forces them from individualism to dependence on their group or band. The demand for individual rights and survival in isolation is simply out of the question. The above is true not only of those two societies but also for an array of traditional societies across the world. It has particular relevance in the traditional African context.

There is a great danger that Westerners from the highly developed world will fail to see, hear and comprehend the differences which exist. The attempts by the developed world to impose the Universal Declaration on society, as if it was genuinely one universal society in all respects, reflects a failure to comprehend these cultural differences. As Eisenstadt (1992:93) points out, there are far-reaching ideological and institutional differences [including culture] which impact on human rights and their acceptance.

African culture is not one culture but a multiplicity of cultures. While there may be some common characteristics such as the power of oral tradition, the patriarchal nature of the societies, and the sheer force of the need to survive, there are also distinct differences.

One of the great problems of international norms for human rights and the acceptance of cultural diversity is that it can be argued that such flexibility and recognition of diversity may either hide an unbridgeable normative schism or

lead to a slippery slope of persistent indecision and confusion. In the end there may be much apparent consensus on very little of substance (An-na'im 1994:62).

Alston (1994:2) questions whether human rights are capable of obtaining universality or whether they are inevitably relative to each individual society. There is thus a need for an approach which involves neither embracing an artificial and sterile universality, nor accepting an ultimately self-defeating cultural relativism.

While Alston's focus is on the rights of the child, his references to variations in acceptance of such rights is applicable to human rights in general. The apparent common acceptance of particular human rights (as reflected in the wording of constitutions) may contrast sharply and, potentially, very revealingly with the diverse interpretations that may be given to the particular principle or right in different settings (Alston 1994:5).

Coomaraswamy (1992:105-107) writes of the different problems experienced in South Asia where intolerance is a particular problem. The culture of South Asia is harmony-oriented and there is intolerance with individual's demanding rights not previously part of the society. The stress on the family unit is part of Chinese and Japanese society and is reinforced by strong religious perspectives.

Musa, (quoted by An-na'im 1994:74-75) refers to the negative characteristics of the Arab person which include determinism, excessive submission to authority figures, copying rather than creating and closed-mindedness. Such societies are backward-looking, seeking refuge in the past and, as such find human rights, written under strong western influence, hard to accept or implement. Musa's study describes the negative impact of societies

dominated by tribal patriarchal systems with unquestioning obedience and submission, and where stereotypes, particularly of gender, are perpetuated.

It can be understood that, in such different cultural settings, human rights as found in the UDHR are a totally foreign and unacceptable concept which could be extremely threatening to the leadership.

When, as Pagels (1979:3) states "... in tribal life of Australia, Africa and North and South America hierarchy and custom are perceived to be divinely sanctioned with no recourse of the individual", the idea of individual rights becomes even more inconceivable.

If the community, tribe or cultural grouping believe the leaders to be divinely appointed, it can easily follow that such leaders' actions will be considered as divinely sanctioned. In such a situation, and even more so when it is a small isolated community without exposure to alternatives, abuses of human rights can, and probably will, continue. An'na-im (1994:63) suggests that some form of cultural transformation may need to occur before human rights, as understood elsewhere, will be seen to be important.

In such a situation human rights mean a demand for food and work, balancing opportunities for rich and poor and elimination of exploitation (Lochman 1977:15). Some of the universal rights considered so important in the west, such as freedom of the press, would simply be regarded as irrelevant in a tribal society.

How does one have a Universal Declaration of Human Rights which is not universal because of such deep cultural differences? How can these differences be accommodated, particularly in countries where there is an entrenched Constitution and a society which, in part, is still bound to tradition and customary cultural norms?

At the start of the third millennium this remains an unresolved issue. Alston (1994:19) sees the need to take cultural differences into consideration as "a type of elastic-give which enables the overall human rights enterprise to be held together and remains coherent". He describes this flexibility in terms of concentric circles with an inflexible core with more and more flexible circles as one moves further from the core, these more flexible circles accommodating the cultural differences. The idea is very similar to the concept of Örücu (1986:46-52) in which he wrote of the core of a right, the limit of limits. In developing his elasticity concept, Alston (1994:20) sees culture as a factor which cannot be excluded from the human rights equation but which must also *not* be accorded the status of "metanorm which trumps rights".

2.5.3 Religious Perspectives

Dahl (1992:243) states that, in the field of human rights, it may prove to be a profound mistake for any state to neglect or ignore belief systems and the ways people think about themselves and others.

Where freedom of religion is protected as a fundamental human right, it is equally fundamental that the individual has the freedom to express his religious beliefs.

History makes sufficient reference to "religious" based wars and all the negatives flowing from such wars. Equally religion has been the reason for many great social deeds which have had a powerful positive influence upon thousands and millions of individuals.

2.5.3.1 A BRIEF OVERVIEW

The connection between religion and authority was, in a sense, an accepted fact for thousands of years and remains so among many societies today.

It is clearly impossible to reflect on the host of different religions and their respective perspectives of human rights. This section examines only something of the Christian and Islamic perspectives. This is in no way suggesting other religious perspectives had or have little influence. However, the connection which is at times drawn between Western human rights and the Christian faith makes it important to examine the Christian view. The spread of Islam, together with a claim by some Muslim leaders that many of the ideas of human rights originated with Islam, and some of the atrocities associated with some sectors of Muslim people, suggests a strong need to examine the Islamic view as well.

2.5.3.2 THE CHRISTIAN FAITH AND HUMAN RIGHTS

(a) *An overview*

In the Judeo-Christian faith, the Bible (NIV 1978) points to God's authority over man and man's authority given to him by God (Genesis 1:27-28). The Jewish nation had no king (1 Samuel 8:1-7) but God had appointed judges (Judges 2:16). Only at the insistence of the people did Saul come to power as the first king of the Jewish nation (1 Samuel 8:6-7). The rule of each successive king was summed up as good or bad according to the king's obedience to God (cf. 1 Kings 16:17 and 2 Kings 15:34).

Thousands of years on, kings claimed for themselves divine authority and used this claim exploitatively, abusing their subjects and living and ruling in ways which reflected, not a relationship with God, but a spirit of greed, reminiscent of some of the worst Jewish kings in Old Testament times.

From the 1600s onward the concept of human rights began to emerge in an elementary form and writers made reference to Biblical views. Whether this was an attempt to justify the new philosophies, or whether these were attempts to base new approaches on genuine Biblical insights of the writers of the time is probably destined to remain a matter of academic debate.

It is understandable that the faith of a people should be reflected in their views and actions. Thus the American Declaration of Independence (1776) declares that "[a]ll men are created equal (and) are endowed by their Creator with unalienable rights".

Likewise, the French Declaration (1789) includes the phrase "... in the presence and under the auspices of the Supreme Being ...".

Such an introduction, in a country dominated by the Roman Catholic Church's influence, is hardly surprising.

The powerful influence of the Roman Catholic Church and the wider Church's influence after the Reformation can never be overestimated. Even at the start of the third millennium the connection between Church and State is mirrored in the fact that the ruling British Monarch is also always the head of the Church of England.

To speak of the Christian faith in broad general terms needs clarification. Within the broad Christian Church there are vastly varying ideas, ranging from very conservative to very liberal. By conservative is meant those who hold to a tight Biblical view (some might say a very 'narrow' view), sometimes referred to as fundamentalist. At the other end of the scale is a far more liberal view which takes more account of social conditions and prevailing philosophies and attempts to marry them with broad Biblical views or attempts to see in the Bible justification for their social or humanistic views. It is probably true to say that both extremes and those in between have had their influence in different ways on the development and implementation of modern human rights.

In the African context, and possibly in many other different cultures, the exposure to the Christian gospel has resulted in an intermingling of Biblical

teaching and traditional religious beliefs. The Zionist Church in South Africa, with millions of members, is one example where some intermingling of religious beliefs can be found.

There appears to be an attempt to find justification for human rights in the Christian faith, rather than writings which indicated, on the basis of the Christian faith, a demand for human rights, *prior to* strong human rights declarations. There is also a more modern approach, as Moltman (1977:35) puts it, to ensure that the Christian church does not remain inward looking but concerns itself with the abused and down-trodden and their rights.

It is clear from history that Christians have played major roles in what, with hindsight, can be described as human rights issues. A clear example is that of the ending of slavery driven by Lord Shaftsbury and others. Further, one must not underestimate the impact of the Puritans in America in the 1600s and 1700s. Moltman (1977:31) describes such Christianization of societies as resulting in a focus on human rights.

In discussing the Christian faith and human rights, both the theological aspects and the role of the Church in influencing and promoting human rights are important. Man's belief in God and his relationship with God is firstly a theological issue. The Bible (NIV 1978) defines the basis of that theological relationship. Lochman's statement on 'the right to be a person' is concisely put in John 8:36 (NIV 1978) which reads "If the Son shall set you free, you shall be free indeed". Jesus' words here were not telling His listeners they would be free of Roman enslavement but spoke rather of spiritual freedom and becoming a whole person through their relationship with Him. But that relationship is both vertical (the relationship of God and man) and horizontal (man with his fellow man).

Christianity is not a mere do-good social gospel but rather the individual Christian, because of his/her relationship with Jesus Christ, *must* be concerned with the plight of fellow human beings. The gospel works itself out in the real world through people. Two Biblical examples will suffice to illustrate. John Chapter 4 provides a vivid picture of the outcast Samaritan woman, finding in her new relationship with Jesus, a new sense of her real humanity and her dignity restored. Secondly, Paul's letter to Philemon (NIV 1978) gives insight into the restoration of the runaway slave Onesimus. Centuries later, the restoration of true human dignity to slaves was led by individual Christians applying their faith in daily life with compassion for the dignity of the enslaved.

All of this raises serious issues. How does the Christian Church and the individual Christian respond to the lack of human rights, to others being abused and denied their dignity, to governments' engaging in tyranny and genocide?

(b) *Translating the Christian Faith into Human Rights*

The translation of the Christian faith into bringing about human rights is not a simple, but rather a complex and hotly debated, issue. On the one side is the view that the Christian is concerned only with spiritual well being. At the other extreme, there is the idea of Christianity being purely a social concern.

Brown and Oosterhaven (1977:50) speak of the concept of human rights arising from the Christianization of societies and states, and how, through that, the dignity of human persons came to be recognised in politics and law. Gellner (1992:113) strongly disagrees, describing human rights in the West as profoundly secularized, applying to believers and non-believers, with their validity not dependent on any religious premise. Man, he says, is credited with inalienable rights as man and not as a corollary of any theological doctrine.

Gellner is correct in the sense of the application of human rights to all. However, like many others, he does not explain *why* man should have such rights. It is here that a strongly Christian perspective differs markedly from secular thinking on human rights. The theological perspective provides a reason beyond man himself. But this is not to imply one simple, clear Christian perspective. Koops (1977:56) writes of "the paucity of literature on theology and human rights".

The second aspect of the role of the Christian Church in influencing and promoting human rights, is not a simple issue. Clearly the theological perspective should influence the actions of the individual Christian and the Church, for neither can divorce themselves from the plight of the people. That would be a contradiction of the example of Jesus Christ. The problem here is further complicated in the intermingling of the Christian faith and traditional religions where the members of such Churches also have deep cultural traditions which do not fit well with modern international (or Western) perspectives of human rights.

That individual Christians and the Christian message have played a role in promoting the right to human dignity and concern for people as God's creation, seems clear from history. The role of Christianity in further promoting the value of human beings and care for the oppressed is a Biblical perspective. Whether that role extends to promoting the UDHR or any other bill of rights is one on which difference of opinion seems set to remain.

2.5.3.3 ISLAM AND HUMAN RIGHTS

(a) *An Overview*

There is no single, settled Islamic Model for, or perspective of, human rights, but rather a variety of ideas which reflect both varying political philosophies as well as the local contexts in which they have arisen (Mayer 1995:2). One may speak instead, of three broad tendencies. Piscatori (1992:130) describes

these as, first, the *conservative* view which overlaps with much of the thinking of the former Iranian leader Khomeini; the second is the *modernist* view which sees human rights as totally compatible with Islamic thinking; thirdly the *radical revisionist* tendency articulating a powerful criticism of traditional Islamic order. In between there are no doubt countless variations.

Further, it is important to understand that the Islamic faith plays an extremely important role in the political life of a country where there is an Islamic majority. Unlike the Christian faith which today may influence political life through individual Christians and sometimes through the Church as a group, Islam, in Muslim dominated countries, acts as the core of politics. Perhaps, the nearest but poor comparison in the wider 'Christian world' would be in influence exerted by the Roman Catholic Church in those countries where it holds sway.

When considering human rights issues, this political power becomes important. Gellner (1992:114) describes the central idea of Islam as that of an eternal, transcendent, unmanipulable and publicly accessible law. The principle obligation of the state is to implement such law (the Qur'an).

In the modern world the trend is toward secularization, the extent varying from place to place. In such secularized places, the state and society must perform their functions independent of the truth of specific religions, convictions or doctrines, a fact strongly emphasized by "freedom of religion" and the right to change one's religion. The Muslim world defies this secularization thesis (Gellner 1992:119) and in most Muslim run countries the authority of the Islamic faith over state and society remains unchallenged both in conservative regions where there is clerical rule, and in radical military states such as Libya.

The past 50 years has seen a growing display of Islamic fundamentalism, reaching fanatical proportions in some areas. The Khomeini led revolution in Iran in 1976 led to one of the most extreme and purest forms of Islamic

fundamentalist clerical rule. A similar fundamentalist rule was found in Afghanistan until the fall of the government in 2002.

When a religion radically perpetuates a belief that martyrdom is a sign of devotion and ensures a special place in life after death, and when people are persuaded in such belief, then logic and common sense give way to fanaticism. In such Muslim states *the Law* as set out in the Qur'an, is enforced with severity. Obedience is the key and in return the people obtain an enforced morality and liberation from the ills of the faithless western world (Gellner 1992:128). In such societies the concept of human rights as advocated and practised in the West is an anathema, despite the failure of Muslim countries to oppose the UDHR.

Mayer (1995:11-12) points out that the 1972 Charter of the Organization of the Islamic Conference, to which all Muslim countries belong, expressly endorsed international law and fundamental human rights, treating them as compatible with Islamic values. The following from the Preamble to the Charter serves to illustrate this:

> REAFFIRMING their commitment to the UN Charter and fundamental human rights, the purposes and principles of which provide the basis for fruitful co-operation amongst all people.

The enforcing of human rights requires the state to be denied absolute powers by the forces of civil society. The ballet box of a democracy is a powerful restraining force to guard the guardians of society. Such democracy clearly precludes any state from being the enforcer of absolutely revealed and unquestionable faith and law and accountable only to God for such implementation, allowing no room for the possibility of opposition or allowing people to differ from them. On this basis genuine democracy must be anathema in a conservative Muslim country.

(b) *Limitations in Muslim Rights*

In the Islamic world there is, at times, *unlimited limitation* of human rights, contrary to the specific, narrow conditions of limitations laid down in the UDHR and other international human rights treaties. These limitations are justified by reference to Islamic beliefs as though such beliefs provide substantial conditions for restricting the basic human rights, even when it involves beatings, imprisonment, torture and execution to enforce policies (Mayer 1995:12).

Those who differ from Islamic belief have no rights. Piscatori (1992:129-130) quotes an unnamed but, according to him, leading Muslim, as saying,

> ... how could those doomed to roast in hell be given the same rights and prerogatives as those who are marked for an eternal life in paradise?

This limitation of human rights results in various accepted rights having no place at all in the Muslim world. Freedom of religion and the right to change one's religion is anathema to the fundamentalist. The Muslim who changes his/her religion commits a heinous crime punishable by death. Even where changing religion is not listed as a crime, the murder of an apostate may be carried out quietly by faithful family members.

Women's rights are a second major problem and this is reflected in the enforced wearing of clothing which allows only the eyes to be seen. It is reflected also in marriage laws and divorce laws. The Muslim woman has no choice to marry outside the Islamic faith. As for divorce, Piscatori (1992:131) points out that there is no gender equality in matters of divorce.

Konea Kuris reflects the restrictions on women's rights. She was a devout Muslim and a feminist writer who devoted much of her writing to proving that true Islam does not restrict women's rights but guarantees them. She spoke against gender segregation and argued that separate is not equal. For this

she paid with her life at the hands of the Turkish based Hizbollah Islamic revolutionary group (Dyer: *Daily Dispatch* 1 February 2000). Dyer argues that such horrendous things happen, not because Islam cannot change but because it *is* changing and the social rules are crumbling.

The above incident contrasts sharply with the views of Mary Robinson (2000: Internet), United Nations High Commissioner for Human Rights, who stated that the principles of Islam relating to human dignity and social solidarity are a rich source from which to face the human rights challenges of the present time, and Islamic concern with human dignity is dynamic as it confronts the challenges of today.

Konea Kuris and Mary Robinson seem to be at opposite sides of a very wide chasm.

Freedom of expression is likewise incompatible with clerical rulers who claim divine authority for their words, rules and actions. How can a citizen dare to contradict or differ from a divinely inspired directive? For the same reasons, freedom of the press is unacceptable.

All of the above is not to suggest that there is one line of Muslim thought only. There is, in fact, a diversity of thought and profound forces at work (Mayer 1995:17). However, as to how universal, universal human rights are in Muslim countries, the situation in countries under Islamic control indicate that universality is still a long way off.

(c) *Islamic Declaration of Human Rights*

Islam and human rights becomes more confusing when Islamic countries speak of and develop their own declarations on human rights. The Universal Islamic Declaration on Human Rights (UIDHR) is a key example. Such a declaration had to be uniquely Islamic (and the question of divine revelation

had to be included as an overriding principle). At the same time it had to follow the same areas covered by Western declarations (which Muslim leaders had rejected) in the hope of finding acceptance beyond their own boundaries.

The Preamble of the UIDHR illustrates "... that by the terms of our primeval covenant with God our duties and obligations have priority over our rights". This statement will open the possibility of the UIDHR effectively denying rights, including those guaranteed under international law (Mayer 1995:51) by establishing Islamic duties as a strong form of limitation.

Brohi (quoted by Mayer 1995:53) stated that divine revelation and obedience to God's Law, meaning the Qur'an and the dictates of the Shari'a, will ensure that government will be in line with God and the individual will have no reason to complain about the government.

Mawdudi (quoted by Mayer 1995:54), puts it more strongly in stating that

> ... the order of the State, be it palatable or unpalatable, easy or arduous, shall be obeyed under all circumstances ... also obligatory on the citizens of the Islamic state ... to make sacrifices of life and property for it ....

One needs to contrast this view with Dworkin's description of a right (Dworkin 1977:190-192) as "... a claim that it would be wrong for a government to deny an individual, even though it would be in the general interest to do so".

In summary Mayer (1995:177) describes Islamic human rights schemes as products of their political context. She states:

> Their Islamic pedigrees are dubious, and the principles they contain do not represent the outcome of rigorous, scholarly analyses of the Islamic sources or a coherent approach to Islamic jurisprudence. Instead, they seem largely shaped by their conservative authors' negative reactions to the model of freedom in Western societies and the scope of rights protections afforded by the International Bill of Human Rights.

Any discussion of the religion of Islam and human rights leads one to a conclusion that religious perspectives do not inspire concern for human rights but rather impose greater burdens on the majority of the Muslim people.

The problem of Islam and human rights is more global than one at first may suspect. There are millions of Muslims living outside of Islamic countries who find themselves confronted by Islamic obligations on the one hand, and by obligations imposed by the law of their 'adopted' country (Freeland 1999:130).

(d) *The Muslim and Rights outside the Muslim Countries*

The Muslim living outside an Islamic country is likely to have little problem with the more ritually oriented obligations such as when to pray or when to fast. But on issues of marriage or divorce and his wife's rights, the Muslim man's problems are now to do with a clash of Islamic law and belief, including Muslim Personal Law (MPL) and the law of his country as issues of western based human rights come into play (Moosa 1998:509).

For the non-Muslim country with an entrenched bill of rights, attempts to allow Muslim Personal Law to be practised alongside the entrenched constitution is highly problematic because there are aspects of MPL which are diametrically opposite to aspects of the constitution. A country with a liberal Constitution cannot proclaim gender equality, freedom of religion and freedom of expression and at the same time accept Islamic interpretations of such freedoms which clearly conflict with that country's Constitution.

In a Western country a more fundamentalist Muslim may be able to exploit both perspectives to his own ends, claiming freedom of expression such as giving his child the right to wear Muslim dress in place of the specified and agreed school uniform (Liversage 1998:1-8) (see 6.3.5.2), while at the same

time denying his wife equality, by claiming freedom of religion and the right to exercise his Islamic beliefs in his own home.

Barbieri (1999:921) highlights a problem for Muslims living in Western Europe where the German government refuses employment to female Muslim teachers who insist on wearing a head scarf. This is done on the grounds that their actions would violate the religious freedom of the students, and could be seen to be giving German support to cultural exclusivism, the repression of women, and intolerance (because the head scarf is seen to represent repression).

However, the issue poses a problem for Western governments in that the very act of refusing teaching posts to such Islamic women represents a violation of their right to religious freedom. This presents a catch-22 situation.

The question of Islam and the Third World raises other pertinent and troublesome issues. Western culture is characterized by a strong emphasis on individualism whereas such individualism is not a characteristic of Islamic religion or Muslim culture (Mayer 1995:40) or of traditional Third World societies. When Islam takes a hold in a traditional society, for example in Africa (northern Nigeria being an on-going modern example), one is forced to consider the possibility that it could reinforce the position of traditional leaders and culture adding a new religious dimension, and present a powerful obstacle to the advance of human rights. It is clear that the process is far more complex than it may appear from the above.

2.5.3.4 CONCLUSIONS

Two very strong religions with very different theological perspectives and differences in their approach to individual people have been examined above.

There is no CDHR, or *Christian Declaration of Human Rights*, unlike the UIDHR (and, therefore, no *limitations,* to consider). One can draw many comparisons and these will be heavily influenced by the individual's religious persuasions. Perhaps at the core of the differences is a difference in the perspective of God, one seeing Him as demanding duties to win His favour, the other seeing God as demonstrating His love for His creation and providing a way of spiritual restoration accompanied by a new sense of dignity and worth.

South Africa, situated at the southern end of the African continent, has a large population, many of whose roots are deep in African culture, tradition and religion. In examining the development of freedom of expression in the context of human rights, it is important to examine the historic and on-going development, and lack of development, of human rights in Africa and the problems that have been encountered. The final section of this chapter addresses the African issues.

2.6 HUMAN RIGHTS ON THE AFRICAN CONTINENT

2.6.1 An Overview

The period since the Second World War has been marked internationally by big steps forward in the provision of protection for human rights through various international conventions and declarations. The history of human rights in Africa over the past 50 years is, however, uninspiring (Dlamini 1995:27). There are some positive signs but, weighed in the balances, Africa is found woefully wanting.

The history and culture of Africa is very different from that of Europe and the Western World. Understanding the problems of human rights in Africa requires some understanding of these considerable differences.

The UDHR is a document which defines human rights as those things which are perceived to be fundamental to human existence. The very title of "*Universal* Declaration ..." declares such rights to be universal or transcending the differences in various societies. This implies that these fundamental rights or freedoms transcend issues such as gender, race, age, descent, social class, ethnic or tribal affiliation, wealth or poverty, occupation, talent, religion or philosophy.

An understanding of African history will immediately point to problems raised by the issues listed above. The development of the State in Europe and the West involved the gradual redefining of the relationship between the individual citizen and the state, and the powers and limitations on the powers of those in authority. Preceding and during the long period of this change, there were writers who penned and circulated their ideas. There were universities where scholars took time to ponder, to study and to debate these ideas and issues. None of this background was part of African history or culture, other than in very small pockets, prior to colonialism.

This is not to suggest that the lack of Western type government in Africa indicated lawlessness and anarchy (Dlamini 1995:21). In Africa groups of people were ruled by a chief or king who did not enjoy permanent tenure but depended on the support of his people. Dlamini (1995:22) illustrates this type of control by reference to the saying of the Zulu people *"inkosi yinkosi ngabantu bayo"* meaning, a king is a king by virtue of his people.

Further, boundaries between people were tribal boundaries, not artificial political boundaries drawn by super-powers. Such boundaries were often natural boundaries of rivers or mountains or other distinctive geographical features.

But what of Western type individual rights in Africa? The relationship of and dependence of the individual on his community is crucial to understanding human rights in Africa. The rights of the individual were limited by the rights of the community of which the individual was a member and on which the individual was dependent. The rebel or individualist who chose to exert his individual "rights" (Western type) had nowhere to go if excluded from his tribe. Within the community he enjoyed their support.

The individualistic approach of the first world and the group dependence of traditional societies highlight the very different views on the value of society, the leadership and a person's view of his/her own rights and duties. Mboya (1992:67) referring to human rights in traditional African Society, states that the individual is subordinated to the group. Rights and duties are intermingled in favour of the community and the integrated individual.

2.6.2 Colonialism and African Human Rights

With the advent of colonialism, the colonial powers tended to ignore the structures and customs of the colonized people and attempted to introduce European values and education. In this process new political, economic and social structures developed. The colonialists provided employment and training for some of the colonized population and probably most were leaders of the people. This process developed an elite group among the colonized and the elite became alienated from the rest of the people.

The colonial powers were not promoters of democracy or human rights. Their rule was more authoritarian and the colonized did not enjoy such rights as liberty, due process and free speech (Dlamini 1995:25).

The arrival of independence for colonial African countries was preceded by the introduction of new constitutions, largely prepared by the colonial service. These new constitutions included emphasis on free elections, free speech and

freedom of religion. Such things were both foreign to the African people and had not been demonstrated to them by the colonial powers.

The African leaders, the new elite, who had been raised in colonial academic institutions and schooled in colonial administration, agreed to these constitutions in their keenness to gain independence.

2.6.3 Independence in Africa

Welch (1991:11) believed that the adopting and adapting human rights appropriate to existing circumstances in Africa required both political independence and growing domestic awareness of the issues involved. The independence which states gained from the colonial powers was not accompanied by such required awareness.

In most newly independent African countries, human rights were embodied in the substantive sections of their constitutions, modelled largely on the UDHR or the European Declaration (Read 1979:22). On the basis of their bills of rights and impressive guarantees, African states should have been paragons of liberty. The truth, according to Dlamini (1995:27,33), is that the picture of human rights in Africa has been uninspiring.

2.6.4 Human Rights and Bills of Rights in Africa

One of the features of bills of rights in Africa has been the concentration on civil and political rights but without full attention to economic, social and cultural rights.

Van der Vyver (1979:18) puts the issue as follows:

> Circumstances have compelled the Third World nations to give preference to the basic exigencies of survival in the face of famine which threatens their very existence, and they have accordingly prowled upon the purpose of abolishing colonial structures, overcoming racial discrimination, securing the goal of cultural authenticity....

Van der Vyver is seeming to suggest that human rights has been seen as a political rod for leaders to use, rather than to ensure that their people have what are, in the West, classified as *universal rights.* This would be in line with Welch's suggestion of a lack of awareness of the real issues involved in human rights. Welch (1991:2) further confirms this in his view that the Organization of African Unity (OAU) "historically considered human rights largely in the guise of self-determination, through ending alien or settler rule".

It is possible to find a multiplicity of factors, often interrelated, which have affected the implementation of human rights on the African continent. These include tribal division and warfare, dictatorship, poverty and illiteracy. Democracy is an essential foundation for human rights but, where people are weak and illiterate, they are increasingly dependent on the strong and the literate and are deprived of real, informed participation in the political, economic and social life of the country. Survival becomes more important than many of the rights.

If democracy is a key foundation for human rights, so too is an independent judiciary, without which guarantees mean nothing. Although some processes of litigation and legal argument were found in traditional communities of Africa, the idea of an independent judiciary was unknown. Modern African experience of an independent judiciary is far from good. A government can contaminate the judiciary's independence in many ways, from very subtle to blatant interference, bribes and threats, and replacing judges who attempt to retain judicial independence. Modern Zimbabwe provides the most recent examples of such interference with the judiciary.

A key part of a Chief's role in the community was the settling of disputes and the restoration of harmony. In Africa today, the independent judge has no army to enforce his decision so he had/has to accommodate new rulers who

come to power in coups or military takeovers. His only alternative is to resign (Read 1979:157-158). As a result there has not been enthusiastic support for judicial activism or for interference with unconstitutional legislation, nor for reaching decisions which are either politically sensitive or controversial.

Personal liberty means the freedoms an individual should enjoy, such as freedom of thought, religion, conscience, expression and the press. It should also include the right to make ones own decisions and accept responsibility for such, as well as the right to proper legal processes. For many African people such personal liberty is a myth when there is no effective constitutional protection of rights or judicial independence to act against those who infringe an individual's human rights.

Despite the entrenchment of human rights in the constitutions of many African countries and proclaimed in the African Charter, the protection of such rights reflects a dismal history. One has only to reflect on the history of Africa from 1970 to find examples of such failure in Uganda, Tanzania, Somalia, Sudan, Nigeria, Liberia, the Congo, Rwanda, Zimbabwe, to name but a few.

A major underlying cause for the violation of individual human rights in Africa lies in the difference between Western thinking with its stress of individualism and the protection of the individual, in contrast to the African stress on collectivism and collective expression. Further, Western thinking holds the rights of the individual to challenge the government as important, whereas African rights are seen in the context of kinship and applicable within cultural boundaries.

The Organization of African Unity (hereafter referred to as the OAU) was formed in 1963 for the purpose of presenting a united African front on the international stage. The Charter of the OAU (1963) did not provide for the protection of human rights, and the principle of non-interference in the internal

affairs of another state was strictly adhered to. Thus, the abuse of human rights in a particular OAU member state could never be discussed at any OAU forum (Peter 1990:7; Welch 1991:2). Umozurike (quoted by Welch 1991:2) states that

> [w]ith regard to breaches of human rights, even of a grave nature such as genocide, the OAU has been bogged down by the domestic jurisdiction clause.

The one sign of hope in 1975 was the boycotting of the OAU summit by a few countries, led by Botswana, Mozambique, Tanzania and Zambia, in protest at the appointment of Ugandan dictator, Idi Amin, as the OAU President. The Tanzanian protest (quoted in Peter 1990:14) noted that,

> Africa is in danger of becoming unique in its refusal to protest crimes committed against Africans, provided such actions are done by African leaders and African governments.

Welch (1991:3) described African politicians attending the OAU summits as having a "hear no evil, speak no evil, see no evil" approach. Perhaps the silence on human rights has the effect of increasing the audacity of those who violated such rights.

2.6.5 African Charter of Human and Peoples' Rights

Only in 1979 did the OAU begin to deal with issues of human rights abuses and the drafting of the "African Charter of Human and Peoples' Rights". This Charter was adopted in 1981, ratified, and came into force in 1986. The event was described by Peter (1990:7) as an "epoch making event... the crescendo of attempts ... to create a legal mechanism that would guarantee fundamental rights and freedoms to the common people".

The reaction of others was not as enthusiastic, ranging from mild to skeptically critical. The Charter might be seen as having modest objectives and flexible in its approach to human rights. The *West Africa*, a weekly newspaper (quoted by Welch 1991:4), noted that the Charter's "...congenital defects in no small way

accounted for the near irrelevance of the Charter and its institutions to Africa's political life". This comment is echoed by Nguema (1990:261), "... the Charter is a far cry from responding to the hopes and legitimate aspirations of populations for whom it was intended to serve".

Umozurike (1997:29), reflecting on human rights in Africa, stated "...[t]he situation is... not as grim as some authors put it...". However, his final chapter on 'Prospects for Human Rights in Africa', provides a less than convincing picture with the admissions of gross violations well into the 1990s.

The great problem with the Charter is that it cannot be described as binding nor does it provide any real guarantee of human rights since it has up to now had only an ambiguous protective function and no credible enforcement mechanism (Mutua 1999:345). The same author (1999:352) goes on to describe the African Human Rights system as "a disappointment, if not an embarrassment for the continent". An article in the *Daily Dispatch* (10 December 1999) quotes Zuriga as saying, "The history of human rights is the history of the fight against impunity." The African Charter did nothing to stop African countries from violating human rights with impunity.

At best the African Charter can be described as a step forward in the struggle for the recognition and protection of basic human rights.

As part of the Charter, the African Commission on Human and Peoples' Rights was created to ensure that African states complied with the Charter. It began functioning in 1987. In his five year report on the work of the Commission, Welch (1991:1) describes the protection of human rights provided domestically by most African states, and regionally by the African Charter, as far weaker than in West European States, and significantly weaker than in most Western Hemisphere countries that have ratified their respective regional conventions. In this connection, Ankumah (1996:135-137) with reference to the

Commission's failure to act stated that, "...violation of... rights has been the order of the day in a number of African countries... limitations under the Charter seem to swallow the rule".

What Africa lacked was a human rights court to complement the Commission, without which the Commission had no teeth to act against a country which refused to comply. It thus, in reality, functions more as a promoter of human rights than a protector.

2.6.6 The African Human Rights Court

The move toward an African Human Rights Court began in the late 1990s. Mboya (1992:67) gives some reasons for the long delay. He suggests that conciliation is important among African peoples and is preferred to legal proceedings. He quotes an African saying "to go to court means to dispute, not to discuss". Mboya suggests that when one attacks an *act* or action of someone, the author of the act will consider himself personally attacked.

Mboya (1992:88) highlights the immense difficulties with and differences from Western values. The imposition of an African Court is not, therefore, a simple, logical step which will solve all the problems. Mutua (1999:343) emphasizes this point when he states that

> ... the mere addition of a court, although a significant development, is unlikely by itself to address sufficiently the normative and structural weaknesses that have plagued the African human rights system since its inception.

The need for a human rights court has steadily gained ground helped by the effectiveness of the European Court and the Inter-American Court and recognition of the general ineffectiveness of the African Commission for Human and Peoples' Rights. Added to this is the increasing embarrassment of the failure of the African Charter to stem the tide of gross human rights violations.

In June 1998 a Protocol to the African Charter was adopted on the Establishment of an African Court of Human and Peoples' Rights (African Human Rights Court). Access to the Court is limited to the Commission, state parties or African inter-governmental organizations. The access of individuals or NGOs can be denied by the Court itself or by the state who is challenged refusing to sign a declaration of acceptance of the Court's jurisdiction to hear cases brought by individuals (Mutua 1999:355). Given that a human rights court is essentially to assist individuals to gain protection against state violation of their human rights, the limits on access will make the proposed Court virtually impotent.

Mutua (1999:358-360) suggests that, before the Court can function effectively, the weaknesses of the African Charter will need to be addressed to provide a sound legal basis for protecting human rights. It is the "clawback clauses" in particular which must be addressed, that is, qualifications or limitations imposed on clauses in the Charter which severely limit fundamental civil and political rights.

In summary, what is required to provide genuine protection of human rights is a revised Charter with real legal substance. The "clawback clauses" need to be removed and a clear statement on non-derogatable rights or on rights which can be derogated only under very specific circumstances needs to be made. Secondly, a separate and clearly independent Court of Human Rights is needed. Such a Court must have the authority to act against states which violate the human rights of individuals. Such a Court has effective examples elsewhere in the world from which to learn. If a revised Charter, an effective Commission and an Independent Court are given both financial backing and moral support from the OAU and member states, then effective protection of human rights for the people of Africa may be a reality of the new Millennium.

The Universal Declaration of Human Rights may be universally declared but far from universal in application. *The Banjul Appeal to African States and Peoples on Promotion and Protection of Human Rights* (quoted by Benidek 1990:255) stated that

> ... the time has come for the African continent to develop a culture of respect for human rights, human dignity, humane treatment of all human beings, as well as principles of democracy.

2.7 CONCLUSIONS

Human rights, including freedom of expression, were neither always part of human history nor did such rights suddenly arrive on the stage with the UDHR in 1948. Certainly the development was slow and coming in response to events and situations, circumstances and philosophies including cultural and religious perspectives.

The origin of human rights is strongly contested by those who claim that beliefs and human rights type values can be found in all great moral documents, and those who believe such human rights evolved in Europe out of Christianity, Stoicism and Roman law (Kamenka 1978:5-6). Bobbio (1996:33) states "... human history is ambiguous, and responds differently according to who is asking questions and from what point of view".

While great strides were made with the UDHR in 1948, the universality of the UDHR is questionable, at least in terms of application. From what is discussed above, it is not universal. There are vast differences from region to region, from religion to religion, from culture to culture, from country to country.

At the 1993 World Conference on Human Rights in Vienna, the conference produced the Vienna Declaration and Program of Action, which stated that "[t]he universal nature of these rights and freedoms is beyond question..." but added that "... the significance of national and regional peculiarities of various

historical, cultural and religious backgrounds must be borne in mind" (Mayer 1995:181).

This is universal ambiguity at its best! If logic is followed, it is open for all to apply or deny human rights as they feel constrained and proclaiming that what is done is in line with their historical, cultural and religious background.

What emerges is the conclusion that the 1948 Universal Declaration of Human Rights was a major step forward in the human rights saga, built on the past and setting the pattern for future steps towards human rights which have true universality.

Some rights possibly are more universally accepted than others. It would appear that freedom of expression is one such right, but one cannot speak of universal acceptance of this right. The further development of freedom of expression and each other right has and will continue to tell its own particular story.

The development of the right to freedom of expression and its application have been and continue to be influenced by many factors, including religious and cultural viewpoints. The focus in the next chapter will be on defining and examining the development of the specific right to freedom of expression in some detail in an international context. The focus will be specifically on the United States, Canada, England and New Zealand (see 1.6).

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Chapter 3: FREEDOM OF EXPRESSION : AN INTERNATIONAL PERSPECTIVE

3.1 INTRODUCTION

Freedom of expression is an established, fundamental human right in terms of the UDHR and other international conventions. It is important to define the term *freedom of expression* in terms of its breadth and depth. The term as used today has a wide meaning, which was not always so. The definition as applied in the various countries is influenced by the broadening scope of the right in the other countries, rather than developing in an entirely independent manner. The focus of this chapter is on examining the broadening definition of the right to freedom of expression, and examining the development of the right in the four selected countries. This chapter serves as both an introduction to and a base for the following chapter where the focus will be on an examination of the application of selected aspects of freedom of expression in the school communities of the four selected countries.

The availability of literature varies from almost encyclopaedic tomes from the United States to miniature guidebooks on rights from other countries. These differences reflect both historical circumstances and, to a degree, the *legal culture* of particular countries, a culture described as the view people have towards legislation and legal challenges.

Due to language difficulties, access to literature is confined to what is available in English.

In the midst of all the variety, one must be wary of drawing, too hastily, similarities and conclusions. Justice La Forest of Canada reminds everyone to

"... be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances ..." (quoted by Sussel 1995: 37-38).

3.2 WHAT IS 'FREEDOM OF EXPRESSION'?

Freedom of expression has been variously described as the core of all other freedoms. Justice Cardozo in *Palko v Connecticut* (1937) 302 US 319 described freedom of expression and the press as the foundation of individual freedom and democracy, and "... the matrix, the indispensable condition of nearly every other form of freedom".

In similar vein, Sieghart (1983:330) and Moses (1996:191) see freedom of expression as constituting one of the essential foundations of a democratic society, a basic condition for both the development of every member of the society and for the society's progress.

Freedom of thought and conscience and its connection to freedom of religion is described by Richards (1986:166) as forming the background right which underlies freedom of expression. He suggests that speech and writing make it possible for the individual to reason about his beliefs and to express those beliefs or what his conscience dictates.

This connection between thoughts, beliefs (including religious beliefs) and expression is often artificially separated in bills of rights in various forms. Of what value are deeply held beliefs, developed in the thought processes, unless one is able to express such beliefs? Part of being human is the need to share one's beliefs, ideas and ideals. Equally the ideas and ideals of members of society are important for the development of society. In this sense, freedom of expression is seen as critical, both for the individual and the wider society.

In *Griswold v Connecticut* (1965) 381 US 479, at 482-483 Justice Douglas provided the following wide angle picture of the breadth of freedom of speech:

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

Definitions and theories abound, and while it is clear that a person can, physically, say what he likes, a key issue of the right to freedom of expression is concerned with the *protection*, in terms of law, that a person enjoys in saying what he likes. There may be a vast gap between the physical ability to use one's voice (or pen) and the protection which the utterances (or writings) may enjoy. Tribe (1978:605) states, "One may not be privileged to mislead a blind man into thinking a window is a door". This distinction was clearly illustrated by Justice Holmes in *Schenk v United States* 249 US 47,52 (1919) when he stated that no one enjoys a protected right to shout "fire" in a crowded cinema and thereby setting in motion panic and the possibility of serious injuries.

In defining freedom of expression, it is thus important to consider both *the extent of protected expression* and *the various forms expression may take.* These two issues extend to the examining of the *limitations* which a state may place on such freedom of expression.

At first glance the issues may appear relatively straight forward but an examination of court rulings, particularly in the United States, and also in other countries across the world, reflects widely differing perspectives on all three issues. Further, an overview of the decisions shows a constantly changing and broadening perspective, sometimes marked initially by strong minority dissentions in judgements, at other times by landmark decisions of which *West Virginia State Board of Education v Barnette* (1943) 319 U.S. 624, and *Tinker v Des Moines Independent School Community Board* (1969) 393 U.S. 503, serve as just two examples related to expression in the area of schooling.

The differences and changes are also reflected in the constitutional development of various countries. Countries which fifty years ago had no bill of rights, may today have clear legal protection for freedom of expression. This reflects an evolutionary process. Countries at different stages of development, with widely differing cultural and societal values may have widely differing views on the above three key issues [see 2.2.2.1 (c)].

McCorquodale and Fairbrother (1999:735) point to the impact of globalization on human rights. The presence and pressure of international and regional human rights commitments and organisations may hasten the changes.

3.2.1 Freedom of speech and freedom of expression

It is essential to understand the relatively synonymous nature of these two terms. The former term arises chiefly from the United States Constitution's First Amendment, stating that "Congress shall make no law... abridging the *freedom of speech,...* (italics added).

The latter term is widely used in both national and international documents of the 20th Century. Linguistically *expression* would appear to have wider connotations than *speech*. Early United States judgements appear to reflect this narrower perspective. Further, the term *speech* provided powerful ammunition for those Americans wishing to see the First Amendment continue to be applied in a narrow context, even within the last fifty years. Equally powerfully, others have argued for a very broad interpretation to include almost all forms of expressive communication.

In the United States context, expression which goes beyond pure speech has been referred to by terms such as *speech plus* [Justice Goldberg in *Cox v Louisiana* (1965) 379 US 559, at 563] and *symbolic speech* (Collins & Davis 1968:1091; Michelman 1969:154; Waldman 1997:1844). Judges also began

to use the term *freedom of expression* as equivalent for speech when referring to the First Amendment (Nimmer 1973:33).

For the purpose of what follows, the two terms are used synonymously, although reference will be made to some of the debate and the narrower interpretations.

The literature highlights many differing perspectives which both the judiciary and academics have on freedom of expression, together with changing perspectives over a period of time. At best it is possible to refer to only a selection of such perspectives.

Every right has a core element that defines its essential content (Wellman 1995:194). This core of freedom of expression may have a variety of associated elements.

A very broad definition is given by Abraham (1988:205) in stating that the connotation of freedom of expression is a broad freedom to communicate. This concept goes beyond speech and includes communication visually, verbally or on paper without prior restraint. The definition extends to conduct 'laced or tinged with expression', such as the press, assembly, petition, association, lawful picketing and other demonstrations. The core element of Abraham's definition, to use Wellman's term, is to *communicate.*

Beckton (1983:107) argues that the real test of freedom of expression in any society is whether that society can tolerate criticism of its fundamental values and institutions. Clearly, freedom of expression goes beyond mere criticism but Beckton's perspective helps towards an understanding of the differences that exist in the acceptance or otherwise of freedom of expression. The insecure or threatened leader, government, particular group or individual teacher is far less likely to give criticism unfettered reign in whatever form.

Coliver (1998:12-13) and Braun (quoted by Moses 1996: 103) point to the way free speech has been suppressed on grounds of national security, leading to some of the worst human rights violations and subversions of democracy and threats to peace. Coliver argues that freedom of expression actually protects legitimate national security by guarding against abuse by the state.

One implication of the above is that a firmly established democracy in an economically and socially stable country has far less reason to be overly concerned about its citizens being outspokenly critical.

Describing freedom of expression as an almost absolute human right and cornerstone of democracy, Moses (1996:189) points to all other rights and freedoms being dependent on an effective right of dissent. Referring to Braun, Moses (1996:193) suggests that the most powerful argument for freedom of expression is based on the discovery of truth and advancement of knowledge and that such freedom reflects a confidence in a society's ability to distinguish between truth and falsehood.

In essence, something of the Biblical truth that "men love darkness rather than light because their deeds are evil" [NIV 1978: John 3 v 19] seems applicable when viewing the refusal of states under the guise of 'security', to allow citizens to know about or speak about state actions. One has to look no further than Hitler's Germany, Uganda under Amin (see 2.6.4) or South Africa in the 1980s to see how abuse can abound when "state security" expunges freedom of expression in various forms.

In contrast, in the Namibian case of *Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS), the judge stated:

> In order to live in and maintain a democratic state the citizen must be free to speak, criticize and praise where it is due. Muted silence is not an ingredient of democracy because the exchange of ideas is essential for the development of democracy.

The value of freedom of expression is other than criticism of the state. Chafee, (in Bollinger 1984:1447) refers to two kinds of interest, namely an *individual interest* meaning that people have a vital need to express their opinions, and a *social interest* in the attainment of truth, so that "a country may not only adopt the wisest course of action but carry it out in the wisest way".

The individual interest is developed in the view that free speech should be a matter of principle, not only so that other people benefit, but because the inability to express oneself could lead to "some unacceptable injury or insult". It can be argued that, unless there is some great risk to the community, an individual's right to freedom of expression should outweigh the interests of society.

A famous and often quoted perspective on freedom of speech (and expression) comes from Justice Holmes in his dissenting opinion in the case of *Abrams v US* (1919) 250 U.S. 616, at 630 in which he stated:

> [C]ompetition among ideas strengthens the truth and roots out error; the repeated effort to defend one's convictions serves to keep their justification alive in our minds and guards against the twin dangers of falsehood and fanaticism; to stifle a voice is to deprive mankind of its message, which we must acknowledge might possibly be more than our own deeply held convictions... Just as an unfettered competition among commodities guarantees that good products sell while bad gather dust on the shelf, so in the intellectual market place, the several competing ideas will be tested by us, the consumers, and the best of them will be purchased.

The "market place of ideas" has had its strong supporters and opponents. Holmes' view is reflected by Lester (in Moses 1996:189) who states that unpopular ideas should be freely expressed and those which are false or evil will ultimately be defeated by public education and debate rather than by censorship or prosecution.

However, Dickson in *R v Keegstra* [(1990) 3 S.C.R. 697] reminds us all that we should not "overplay the view that rationality will overcome falsehoods in the unregulated market place of ideas". In objection to Holmes, Wellington (1979:1106-1107) similarly, warns that truth may win, and, in the long run, it may always win, but millions of Jews died when falsehood prevailed over truth. He goes on to state that most people "do believe the book is closed on some issues ... genocide is an example".

Redish (1982:591) believes that freedom of speech has one overriding value of *individual self-realization* and that "all forms of expression that further that self-realization value ... are deserving of full constitutional protection".

The emphasis on "self" and individualism has itself been the focus of much criticism in the issue of rights, including freedom of expression. The contrasting perspectives are summed up in statements from Sandel and Adams' response. Sandel (quoted by Adams 1997:510), stated that a society in which individualism and claims to individual rights are pre-eminent, results in a poor society and easily leads to indifference and extreme individualism. In response, Adams (1997:510) points out that freedom of expression, religion and association facilitate not just individualism but its opposite, sociability. This sociability allows communities to flourish.

At the other end of the scale there are those who have held much narrower perspectives on the meaning and importance of freedom of speech. Bollinger (1984:148) refers to Mieklejohn and Bork as examples of two Americans holding the very narrow view that only political speech should be protected by the First Amendment. This would be similar to the English Bill of Rights of 1689 which protected freedom of speech and debate within the confines of Parliament. Mieklejohn denounced freedom of speech as protecting any individual interest, believing instead that only state or collective interest was

meant to be protected. In later years Mieklejohn widened his views to agree that other areas, which he saw as connected to political expression, merited some protection.

The debate on the differing perspectives is ongoing. What it highlights for countries in developing new constitutions and bills of rights, is that each country will in turn be forced by similar theoretical, philosophical, political and legal questions on the meaning of freedom of expression, and the extent of protection that should be given to such freedom. These questions were reiterated by Wellington (1979:1105) when he asked,

1. Why should expression have greater immunity from government regulation than most other forms of human conduct?
2. What are the limits of this immunity?

The first question gives rise to another question of how one is to identify such protected expression.

While Wellington's questions are asked in the context of the United States, they are of universal significance. The answers to Wellington's first question have been presented in the context of the perspectives of freedom of expression. The matter of limitations is intertwined with any debate on rights and freedom of expression. Reference to limitations will occur throughout this work. At this point it is important to note the remark of Justice Warren in *US v O'Brien* (1968) 391 U.S. 367 that the extent of protection for conduct such as speech or expression is not limitless. Nimmer (1973:36) reflects that this clearly must be so or most crime would qualify for protection!

3.2.2 Freedom of Expression and the Right to Hear

An underlying issue of freedom of expression is that of the right of others to hear and know. The ability to make choices from a range of possibilities is an essential part of being human. Denied the right to hear, see or read various

viewpoints, drastically reduces the range of choices open to one. Fundamental to democracy is the right of the electorate to know the options and to vote accordingly. Fundamental to education is exposure to differing ideas, views and perspectives. The State cannot control the individuals thoughts and ideas but it may attempt to influence those thoughts by imposing its own views and restricting access to alternative views. Such denial is the hallmark of dictatorships in the political realm and indoctrination in the educational sphere.

The right to hear, however, does not imply a right to force others to listen (Sieghart 1983:330). Being forced to be a captive audience is to deny a person the right to differ. This is not a simple issue for, to a degree, the entire schooling system has an element of the "captive audience" syndrome. But it extends to general society when the state controls the radio and the press. Short of hibernation, the individual becomes a captive audience of a state which controls the media simply by removal of alternatives.

3.2.3 Attempts to decide what is covered by Freedom of Expression

While the differing perspectives reveal the difference between the narrow and broad views of freedom of expression, it is necessary to ask what is covered or protected by the right. While speech and expression are treated here as synonymous, the debate in the United States over the wider meaning of freedom of speech has provided useful direction for the rest of the world. In seeking to clarify what is meant by *symbolic speech* or *speech plus*, the debate has provided some guide as to what can or might be protected under freedom of expression. This is not to suggest that consensus has been found in the United States, or that United States decisions should override different decisions in other countries.

The United States Courts have had to deal with a wide variety of cases, each being an issue of whether the particular conduct qualifies for protection under

the First Amendment. This has to be seen as a developing process. What would have enjoyed no protection at the start of the 20th Century may enjoy full protection a hundred years later. Bender (1986:444) stated, "The United States has been dealing with these issues, [the right to free speech and expression and limitations] for many years... each time one issue is settled, new interpretational problems inevitably occur".

With reference to Canada, but equally applicable to any country with newly enshrined rights, Bender added, "[W]e certainly must not expect quick, completely comprehensive answers to all the difficult individual rights questions that will arise under the new *Canadian Charter of Rights and Freedoms*".

This change of interpretation and lack of quick answers is not unique to the United States and Canada. Judicial interpretations and changes in societal views and values may be intertwined. Perhaps the title of Bollinger's book *Tolerant Society* (1986) may describe both today's society and the change which has taken place.

Amongst the gradual changes in the United States have been the greater freedom of press and an acceptance that reporters can be wrong and not be sued for libel [*New York Times Co. v Sullivan* (1964) 376 U.S. 254]. Another shift in thinking concerns the rights of high school students, particularly as reflected in *Tinker v Des Moines Independent School Community Board* (1969) 393 U.S. 503, and a third issue has been the decreased restriction on pornography and material previously considered offensive. These and other issues are dealt with in sections on freedom of expression in different countries.

In the American debate, reference has been made to "framers intentions" particularly by conservatives wanting to limit what enjoyed protection. They asked, "What did those who wrote the First Amendment in 1791 intend by

these words?" This line of reasoning is fraught with danger. Sandalow (1981:1043) points out that those writing 200 years ago could not possibly have begun to have anticipated many of the ideas and things which would dominate the world at the start of the 21st Century. To get into the minds of the framers is impossible. To hold a country and a world, so vastly different to when words were written, to an interpretation of intentions, is removed from reality. This whole issue is superbly expressed by Holmes in *Missouri v Holland* (1920) 252 U.S. 416, at 433-434 as follows:

> [W]hen we are dealing with words that are also a constitutional act, like the Constitution of the United States, we must realise that they have called into life a being, the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and cost their successors much sweat and blood to prove they had created a nation. The case before us must be considered in the whole of our whole experience and not merely in what was said a hundred years ago... We must consider what this country has become in deciding what the [First] Amendment has reserved.

It must be accepted, based on developments over the past 200 years, that interpretations of freedom of expression given in the late 20th and early 21st centuries in various countries, be it Canada, New Zealand, South Africa or Great Britain, will be highly likely to change over the coming decades.

In deciding what should be protected, there have been differing views and guidelines. In *Spence v Washington* (1974) 418 U.S. 405, at 410-411 the Court provided three criteria for judging symbolic speech (read '*freedom of expression*') namely,

- the intent of the speaker,
- the likelihood of audience understanding, and
- the content of the activity.

'Speaker' here broadly includes the person engaged in expression, be it via the press, or art or demonstration or in whatever other form the expression might take. Waldman (1997:1844) argued that *actual* intent need not always be present for recognising that particular conduct conveys a message. What Waldman is pointing to is that the audience may understand a message which the conveyor had perhaps not even intended. None of this discussion provides absolute clarity and Emerson, (quoted by Nimmer 1973:32) sums up the uncertainty when he states, "The answer, to a great extent, must be based on a common sense reaction...".

Tribe (1978:601) suggests that expression and conduct, the message and the medium are all inextricably linked together in all communicative behaviour. If one accepts Tribe's wide view, what remains is to decide what is worthy and what is unworthy of protection, raising the issue of limitations on the exercise of rights.

The conflict over unrestricted freedom of speech (which one could extend to unrestricted expression) is highlighted in two differing judges' views expressed in *Gitlow v People of the State of New York* (1925) 268 US 652. In this case Justice Sanford (at 669) stated that

> ... a single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration ... the [State] may, in the exercise of its judgement, suppress the threatened danger in its incipiency.

In a strong dissension, Justice Holmes (at 673) argued that

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

Sanford and Holmes illustrate how differently one issue can be viewed. It points to the fact that there are likely to be freedom of expression issues on which total consensus may never be reached.

3.2.4 The differing effects of freedom of expression on recipients

One of the difficulties of assessing what should or shouldn't be protected is what effect that expression may have on people who may vary greatly from person to person, and according to such factors as the recipient's age, maturity, personality, culture and background. All of these factors may affect an individual's perception of what is being 'said', verbally or non-verbally. One person may, for instance, respond violently while another may be persuaded to consider various alternatives suggested by the same free expression. This difference in perception is particularly important in freedom of expression in the form of protest, or when ideas are put across to a young audience or an audience which includes young people whose varying ages and maturity may allow some to receive unchecked expression without any negative effect, while others need to be protected from such expression. Such differing reaction is well illustrated in *Bethel School District v Fraser* (1986) 478 US 675 (see 4.10.1).

Freedom of expression, a wide and essential human right, lacks a totally consistent definition and neatly drawn boundaries. The impact of such expression on recipients with such great personal differences can be neither accurately predicted nor controlled. It seems doubtful that consensus on freedom of expression is anywhere near at hand.

Despite the lack of consensus, the right to freedom of expression is reflected in international conventions and treaties, and is part of the legal framework in each of the four countries under discussion. The development of freedom of expression in each of these countries is the subject of sections 3.3 to 3.3.4 .

3.2.5 The limitation of freedom of expression

Under what circumstances can constitutionally protected freedom of expression be regulated, limited or prohibited? Bender (1986:441) regards this as a question which has produced enormous amounts of confusion, particularly in the United States.

The term "fundamental rights" would seem to suggest rights that are so important that they either cannot be limited or can be limited only under very exceptional circumstances.

It is rightly said that no right is absolute. As early as 1789, the French recognised this in their Constitution. In Article 11 "the unrestrained communication of thoughts and opinions" was subject to an individual accepting personal responsibility if he abused the liberty (see 2.2.3.3).

Various constitutional systems have differing approaches to the issue of limitations. At one end of the spectrum is the United States which has no limitations clause. Its northern neighbour, Canada, has a limitations clause which is brief and, according to Neuborne (1986:384) is an "invitation to judicial timidity", and which Stone (1986:180) describes as having a standard "too vague to be of much aid in deciding concrete controversies". Bleckmann and Bothe (1986:106) refer to the German Constitution attaching limitations to specific clauses and having some clauses with no limitations. These three serve as samples to illustrate some of the variety of approaches.

The United States, without a limitation clause, is not "limitation free" but has rather a judiciary who over a long period have developed limitations in the form of "test questions" which they use. As the word "developed" suggests, these are not static, but developments that have arisen with differing cases and circumstances. In broad terms, Baker (1986:87) suggests that the rationale for a particular right will affect the appropriateness of the limitation placed on it.

While the Constitutional limitations of the four selected countries are discussed in the sections which follow, for now it is useful to view some factors which seem common to limitations applied in most constitutional systems. These common elements include,

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

There is conjecture over the defining of the 'core' of certain rights. The core raises the question of whether there is an essential substance in a particular right to which no limits can be attached. At the same time not all rights are seen as being of equal importance. In this context it is important to note that *freedom of expression* is widely regarded as one of the fundamental rights. Cardozo (see 3.2) described it as a condition of almost all other rights. If that is accepted, then the application of limitations to freedom of expression should be stringently controlled and applied only under very special and essential circumstances. One might even think of measuring the value a country places on freedom of expression by the ease or otherwise in which limitations are applied.

The Constitutional limitations of the United States, Canada, Britain and New Zealand are discussed within the sections which follow.

3.3 DEVELOPMENT OF FREEDOM OF EXPRESSION IN FOUR COUNTRIES

Despite the lack of consensus, the right to freedom of expression is reflected in international conventions and treaties, and is part of the legal framework in each of the four countries under discussion. The development of freedom of expression in each of these countries is the subject of the sub-sections that follow.

3.3.1 Development of Freedom of Expression in the United States

The history of the First Amendment is briefly discussed in sec. 2.2.3.2 and 2.2.3.3. However, in providing an overview of freedom of expression in the United States, changes to the interpretation of the right appear closely related to historical events of the 20th Century. Without over-simplifying, the post First World War period was marked by political turmoil. The Bolshivic revolution caused great anxiety and, probably out of fear of such events occurring in the United States, those who spoke in favour of the communist revolution or against American interference, found their right to freedom of expression challenged. Two of the most notable cases were *Schenk v United States* (1919) 249 US 47, and *Abrams v United States* (1919) 250 US 616. There were, however, Supreme Court judges who expressed very strong dissent with the judgements, dissension which gave rise to great statements on the importance of freedom of speech, including that made by Holmes in his famous 'market place of ideas' view in *Abrams v United States* (see 3.2.1).

In the post Second World War period there arose again an extremely strong anticommunist stance in the United States, giving rise to fresh clamps on freedom of expression. This showed in the form of the introduction of compulsory loyalty oaths and investigations of individuals, often those in the academic field. Because of the perceived powerful influence of teachers, both at school and at university level, any suspicion of communist leanings amongst

the educational fraternity were viewed by some as a potential threat to the United States.

The third historical event came in the form of the Vietnam War. Strong opposition to the War was freely *expressed* in ways other than just words – protest marches, burning of draft cards [*United States v O'Brien* (1968) 391 U.S. 367], wearing of black arm-bands and other symbols [*Tinker v Des Moines Independent School Community Board* (1969) 393 U.S. 503], and words on T-shirts [*Cohen v California* (1971) 403 US 15]. Attempts were made to quell opposition by means of prosecutions. The limits of freedom of expression were tested and, in many judgements, extended to protect previously unprotected expression.

During this period, freedom of expression in schools received a major boost in the case of *Tinker v Des Moines Independent Community School District* (see above). Mr Justice Fortas (at 506) stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gates". Fortas (at 511) went on to say that

> ...state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students... In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

The oft-quoted *Tinker* judgement was not unanimous. Justice Stewart expressed reservations as follows, "I cannot share the Court's uncritical assumption that ... the First Amendment rights of children are co-extensive with those of adults" (at 514). Justice Black presented a very strongly worded and lengthy dissent (at 515 to 526) including,

> ... this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected officials of state supported public schools in the United States is in ultimate effect transferred to the Supreme Court (at 516).

While later judgements have been seen as attempts to undo the breadth of the *Tinker* judgement, for example *Hazlewood School District v Kuhlmeier* (1987) 484 US 260, *Tinker* was a landmark judgement which placed freedom of speech and freedom of expression together as a right, as applicable to high school students as to any other person. The judgement made reference to limitations. The fact that schooling was not disrupted by the black arm band protest was an important issue. *Tinker* did not thus give approval to unlimited freedom of expression but prevented schools from applying unreasonable limitations on the students' right to such freedom.

In the thirty three years since *Tinker* a number of other freedom of expression matters have been the focus of legal action in the United States. Each of these issues has had and continues to have implications for the extent of freedom of expression in the schools.

Throughout the period 1965 to 1975 schools were the centre of a new challenge to the extent of freedom of expression. Students challenged school rules on hairstyles and dress (see 4.2.1 and 4.3.1).

Starting in the 1960s freedom of the press was extended by decreasing individual protection against defamation by the press. The case of *New York Times Co. v Sullivan* (1964) 376 US 254, serves as a landmark judgement.

The past thirty years has been marked by challenging the limits of pornography in its various forms, a key case being that of *Miller v California* (1973) 413 US 15.

The most recent and ongoing freedom of expression issue is that of the internet. The internet poses enormous challenges to those seeking limits to freedom of expression since it has provided a global freedom undreamed of twenty years ago (Vick 1998:414-421). Infringements are very hard to police.

Burchell (1998:12) suggests that with the advent of communication in cyberspace, the marketplace or 'virtual marketplace" has been expanded beyond what any of the proponents of free speech theory could have ever dreamed of. The same author asks (1998:vii),

> Will the common law of defamation, impairment of dignity or invasion of privacy be ready, if called upon, for the challenge? Or, will cyberspace be regarded as public domain, free from some of the normal legal restrictions?

Currently it appears that the *information superhighway* is an open sesame to almost every imaginable form of free expression with unlimited access for anyone of any age with any access to the internet. Cyberspace and free speech is not just available to the select few. The availability of computer access in an ever growing number of schools is a challenge to schools, who now must confront the issue of deciding when and how to control their students without invading their legitimate right to freedom of expression.

Starting far earlier but now with increasing focus, the issue of academic freedom, once considered the domain of universities only, has become an issue for teachers and students in the schools (see 4.10 for detailed discussion of academic freedom).

Uniforms and hairstyles, freedom of the student press, pornography, the internet, and academic freedom are all issues which impact on the school and the freedom of expression of those who work and those who study there.

What marks out the United States as unique from most other countries is its "culture of legal challenge" and the resultant multi-volumes of case law at District, Federal and Supreme Court level.

This "culture" is related to the heavy emphasis on individualism, rights and self-development. It is probably fair to say that much of the legal challenging in the United States would currently be unthinkable in Africa or Asia and certainly far more limited on other continents. It is equally true, however, that with

increasing globalisation, United States case law increasingly influences the thinking and development of freedom of expression far beyond its borders and, if it does not already do so, may in time impact on the case law of other countries.

The development of freedom of expression in the United States highlights the role of case law and the way judicial decisions have shaped the broadening perspectives of this fundamental right. The development in the United States serves too as a constant reminder that freedom of expression is not a static constitutional component but one open to changing and widening interpretation. This in turn is of value to other countries with newly introduced bills of rights that today's view of freedom of expression may undergo considerable change in interpretation over the coming years. It is, however, possible that existing case law from countries with well established bills of rights, such as the United States, may play a role in reducing the 'catch up' process in other countries' case law by having an influence on their judicial decisions on freedom of expression from the start.

The lack of a limitations clause in no way can be seen to imply that there are no limits on freedom of expression. As early as 1803, in *Marbury v Madison* the Court reached a crucial decision that the legislature could not introduce legislation which overruled constitutional rights. However, the Courts developed limitations over a long period. At the start of the 1900s the role of the courts was limited by the so-called "presumption of constitutionality". The assumption was the legislature knew best and, apart from dealing with obvious serious blunders, laws were taken to be acceptable. However, this view gave way to a perspective made clear by Chief Justice Burger in *Landmark Communication v Virginia* (1978) 435 US 829 at 843-844,

> Deference to a legislative finding cannot limit a judicial enquiry when [constitutional] rights are at stake... the judicial function commands analysis of whether the... legislation is consonant with the Constitution... [if not] the function of the Constitution as a check on legislative power would be nullified.

One of the difficulties of the United States First Amendment is its reference to *speech* rather than expression. This has allowed courts to draw distinctions between speech and action, or between speech and non-speech. Neuborne (1986:387) suggests that higher levels of justification for limitations appear to be required where attempts are made to limit traditional forms of speech, while lower levels of justification are required for non-traditional speech forms.

A second difficulty arises where courts show deference to school authorities (school boards, principals and even parent groups), a sought of "schools know better than us about things to do with education" and an accompanying reluctance to interfere in issues of fundamental rights in school related situations. While, in terms of teaching and learning this may be true, it is very unhelpful to students when school authorities limit their right to freedom of expression on what might be seen as 'trivial' grounds.

One of the difficulties in reading United States judgements is the apparent contradictory findings. While Bleckmann and Bothe (1986:108) refer to the court having an approach to limitations which varies according to importance of the interest to be protected, this raises serious questions. Who decides on "the *importance*" of the interest to be protected? Is this a subjective value judgement of the judiciary, as conceded by the majority in *Zeller* (see 4.2.1)? Is there an objective test to address "importance"? These issues are not unique to the United States but a possible characteristic of any limitation discussion. Judges also differ in their own approaches to limitations. Nowak and Rotunda (1995:995) refer to Justice Harlan as being pro-"balancing" while judges such as Black and Douglas were described as more absolutist, believing that there were very few justifications for any limitations, but even Black engaged in a more covert type of balancing when, in a dissenting opinion, he separated speech as protected expression and non-speech as unprotected [*Street v New York* (1969) 394 US 576].

Nowak and Rotunda (1995:996-1109) provide some examples of what could be termed "limitations tests" (these do not form an exhaustive list).

The first is "the least restrictive means test". Can the purpose of the restriction be achieved by a less restrictive means? If so, the proposed limitation should be rejected in favour of that less restrictive means of achieving the same end.

The second test is that of "a clear and present danger" to which two words were added over the years namely "immediate" danger, and "incitement" of violence (danger). The test was first referred to in *Schenk* and in *Abrams* (both in 1919). In *Schenk* Holmes made his oft quoted statement,

> The most stringent protection of free speech would not protect a man who falsely shouted "fire" in a theatre, causing panic... It does not even protect a man from an injunction against uttering words that may have the effect of force... The question in every case whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* (italics added) that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

In *Abrams* Holmes extended this test to words or actions which "...present danger of *immediate* (italics added) evil or an intent to bring it about...".

In *Whitney v California* (1927) 274 US 357, Brandeis, with Holmes, added a new element,

> ... it is not a justification for denying free speech *where the advocacy* [of violence] *falls short of incitement* (italics added) and where there is nothing to indicate the advocacy would immediately be acted upon.

A third test is of what has been termed "fighting words". The words are still just words, *but* are an emotional message and can be incitement to unthinking, immediate, violent action, that is, there is no time to engage in debate over the issues of the "message" of those fighting words. Here the manner or mode of expressing such words is at issue.

Beyond these three tests mentioned by Nowak and Rotunda, there is a test related to "time, manner and place restrictions". The right to freedom of

expression is here simply seen as not appropriate or acceptable at a particular time, or in a particular way or at a particular place, or a combination of these three. A noisy protest is acceptable and enjoys First Amendment protection, but not outside a hospital. It may be acceptable outside a school, but not while school is in session. It may be acceptable in the main street but not when speakers resort to inflammatory speech.

Despite the lack of a limitations clause, free speech in the United States is not a licence for any form of expression in any form, at any time and anywhere. The right may be challenged and the court may apply these or other tests in balancing the particular right with other valid interests in a form of balancing.

The United States uses tests which, with their application, to varying degrees show great similarity to structured "limitations clauses" found in modern Constitutions developed in the last fifty years.

3.3.2 Development of Freedom of Expression in Canada.

Despite being the northern neighbour of the United States, Canadian case law on freedom of expression is far more limited. Historical and cultural issues have played a major role in this country with its resultant more conservative approach than its southern neighbour.

Prior to 1960 Canada had no bill of rights. However, the Canadian Bill of Rights of 1960, while not entrenched but an ordinary statute, marked the first step towards legally enforceable rights (Morissette 1998:294). As a non-entrenched statute, the bill of rights proved ineffective in the long run. Freedom of expression, prior to 1960, had no protection other than within the broad legislature process. In essence it allowed no legal challenges on the issue (Beckton 1983:102).

In the period 1960 to 1982 there were a number of limitations on freedom of expression. The period was marked by the constant dilemma of avoiding

unjustified limitations and, at the same time, remaining true to the principle of parliamentary sovereignty.

Parliamentary sovereignty is a key issue in understanding Canadian thinking on rights. Being elected by the people, Parliamentarians and their decisions were seen as supreme. The idea that courts could challenge and overturn these decisions of the legislature was not acceptable. In *AG of Canada v Dupont* (1978) 2 S.C.R. 770, Justice Beetz made it clear that none of the so-called freedoms was so enshrined in the 1960 constitution that Parliament could not overrule them. This confirmed judicial deference to parliament.

However, Justice Abbott in *Switzman and Elbing v AG of Quebec* (1957) remarked that, in his opinion, Parliament itself could not abrogate the right of discussion and debate [free speech]. The remarks of the two justices highlight the differences of opinion within the judiciary prior to the 1982 Constitution (Beckton 1983:110-111).

In 1982 the *Charter of Rights and Freedoms* (Canada 1982) entrenched human rights for the Canadian people. This was a major shift from the non-entrenched 1960 Bill of Rights. However, the new entrenched *Charter* had its critics. One such critic, Morissette (1998:296-297) suggests that the Charter has brought a marked tendency by those unhappy with their lot in life to formulate claims for redress in the language of rights and entitlements. She further suggests that the *Charter* has transferred power from parliament to the judiciary. In a sense this is an indicator of the conservative nature of people who find the shift from Parliamentary to Constitutional democracy a very difficult step to make.

Freedom of expression is covered in Section 2 of the Charter as follows,

> Sec.2 a) everyone has the following fundamental freedoms;

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication (Canada 1982).

However, an absolute view of freedom of expression in Canada is not possible because of clearly stated limitations in Section 1 of the Charter which states that none of the rights are absolute but subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Canada 1982). Cotler (1986:372) refers to Justice Quigley's reminder that such a right is not absolute. In *Keegstra* [(1984) 19 C.C.C. (3d) 254 (Alta. Q.B.) Quigley stated, at 268,

> In my opinion, the words "freedom of expression" as used in Sec. 2 (b) of the *Charter* do not mean an absolute freedom permitting unbridled right of speech and expression.

In the early years of the *Charter* Canadian courts dealt with more freedom of expression related cases than in the previous hundred years. Such cases have had a profound effect on the lives of Canadians, on what they are able to say and write, read, hear, disseminate and receive.

Neuborne (1986:384) described Sec 1 of the *Charter* as being characterized as an invitation to judicial timidity in enforcing the rights guaranteed by the Charter [including the right to freedom of expression] against "majoritarian overarching" by which he, presumably, meant the wishes of the democratically elected majority in Parliament. Sec. 1, if taken literally, he suggested can be stripped of its basic value and effect, since the majority can always find a "reasonable" basis for limits on fundamental freedoms, especially if the exercise of those rights is by controversial persons. Stone (1986:182), similarly, suggested that Sec. 1 does not define how far the judiciary should go in deferring to the legislature, and the standard set is "too vague to be of much aid in deciding concrete controversies".

In Canada, where a person claims that his right to freedom of expression (Sec. 2) has been denied, the claimant must first prove that this is so. Thereafter, the offending party (who imposed the limit) has the burden to proof for why the use of Sec. 1 limitations should be regarded as reasonable, a two step process. Thus, Stone (1986:182) argued that the Courts must engage in "levels of scrutiny" analysis. This means that the more fundamental the right, the greater the burden on the lawmaker to show justifiable reasonableness.

Neuborne (1986:384) believed that the judiciary does not have to display timidity toward the legislature. He argued that virtually no right is absolute, but rather such rights describe "a series of activities deemed fundamental to society and, therefore, immune from governmental interference in the absence of showing extraordinary public necessity". This, he suggested, compels the political majority to persuade an independent arbiter (the Supreme Court) that there is a real social necessity for the proclaimed right to be limited. If Sec. 1 is applied in this way, Neuborne suggested, the tendency will, if anything, be error in favour of the value of the constitutional right rather than the reverse.

Two key issues are needed with any form of limitations, be it as a specific clause in a Constitution or in the 'developed form' as in the United States. Firstly, there must not be override clauses such as in the Banjul (African) Charter of Human and Peoples' Rights (see 2.6.5) and, secondly, there must be judges with the courage to insist on the State fulfilling its responsibility to prove a seriously valid need for the exercise of particular limitations.

Very early on, in the first Charter decision, Estey, in *Law Society of Upper Canada v Skapinker* [(1984 9 D.L.R. (4th) 161] spoke against the Charter being used with a "narrow and technical interpretation" (Sharpe 1987:49) while Dickson, in *R v Oakes* [(1986) 1 S.C.R. 103 DLR (4^{th}) 200 S.C.C at 224 –225], stated that only those limitations which meet the "stringent standard of justification" would be tolerated.

Petter (1989:151-152), Beatty (1991:149-151; 1995:74-83; 1997:482) and Gibson (1993:418) point to a disturbing measure of inconsistency in the first ten years of Charter decisions by the Canadian Supreme Court. They suggest that the judiciary is not exercising its independence but showing an apparent deferment to the legislature, in a sense confirming the potential "timidity" of which Neuborne wrote (see above). As evidence Gibson points to successful claims based on freedom of expression falling from 53% to 24% with Sec.1 of the *Charter* being used to limit the claims. In contrast, Sharpe (1991:469-470) and Moon (1992:228) disagree strongly with Beatty and other like minded persons.

Despite the above, MacKay and Sutherland (1990:171) believe it is the entrenched Charter which has had the most significant effect on education law in Canada while Sussel (1995:xiii) believes there are few areas of Canadian society which appear to have been as deeply affected by the Charter as the field of education. Despite the initial limited case law relating to education in the 1980s, Sussel (1995:123) believed that "[t]his trend may be reversed in the 1990s as students, being educated in a more rights-conscious legal culture, begin to more actively challenge school boards ...".

Black-Branch (1997:19) pointed to the entrenched legal principles in the Charter as having legal repercussions for school systems in Canada. The basis is that state schools are considered 'government' in terms of Sec. 32 (1).

The Charter is designed to protect individuals from the power of wrongs committed by the State. As schools are agents of the state they too may not act in ways which violate the Constitution. Private Schools are, however, exempt from many of the Charter provisions (Black-Branch 1997:20).

Canadian education systems differ from province to province and even within provinces. The rules governing education differ too from system to system and thus the effect of the Charter may differ from province to province (Black-Branch 1997:22).

Canadian case law covers a number of issues. The 1986 case of *Cramer v British Columbia Teachers' Federation*, relates to teachers' intramural academic freedom, Cramer having critisized a colleague's guidance programme and her as a person (see 4.10.5). Cramer was charged with breach of the British Columbia Teachers' Code of Ethics. While the Court ruled that freedom of expression *could* override ethics, personal attack was not protected. The case thus has serious implications for frank and even heated staff room discussion or 'intramural academic freedom'.

Dress codes, haircuts and jewellery issues, together with teachers' intramural academic freedom, have reached Canadian courts but with minimum frequency compared to the United States. In *Devereux v Lambton County (R.C. Separate School Board)* 1988 (see 4.3.4), the Court rejected the view that dress codes violated freedom of expression and said that to uphold such an appeal would be to trivialise the right to freedom of expression. The case illustrates the more conservative nature of the Canadian courts compared to the United States Courts but equally, it raises the question of the *real* extent of rights and, in particular, how "*free*" freedom of expression actually is.

Dress Code regulations under freedom of expression appear beyond challenge, *but* under freedom of religion, they have drawn different court rulings. In more than one case Sikh students have claimed that the school dress code violated their Charter rights by discriminating against Sikh religious dress requirements. Courts upheld their claims and ordered the schools to change their policies (see 4.3.4 and 4.5).

These Sikh cases have an implication that freedom of religion implies freedom of religious dress, which Black-Branch (1997:60) described as a reflection of the Canadian ideology of encouraging multi-culturalism. It would seem, according to Black-Branch (1997:60), that students must be dressed in appropriate school uniforms unless such uniforms restrict or deny religious freedom (see 4.3.4).

The Canadian courts have also ruled on freedom of expression in the form of speech. In *Lutes v Board of Education of Proune View Division No. 74* (1992), Chris Lutes, a grade 7 student was given a month long lunch time detention for singing the song "Let's Talk about Sex". At the time he was off school property and he sang the song in front of a school division official, knowing the song was banned at school level. The offended official reported the matter and the school imposed disciplinary action. In applying for an interim injunction preventing the enforcement of punishment Lutes argued that the song was not offensive, promoted safe sex practices at a time of growing concern over AIDS, and that many United States schools promoted the song to convey that very message.

The school's defence was that the song was banned at school and Lutes was thus defying school orders. They argued that because he was bussed to and from school he was subject to school discipline until he got off the bus in the afternoon. Further, he was disciplined, not for expressing himself, but for his 'rude and disrespectful behaviour to a school official'.

The court ruled that there was a *prima facie* case of violation of Lutes' right under Sec. 2 (b) and that no justified reason could be found for limiting those rights in terms of Sec.1.

One of Canada's most famous and drawn out cases is that of *Keegstra*. Keegstra was charged and convicted under s. 281.2 [now s. 319(2)] of the Criminal Code for promoting hatred against Jews. The basis of Keegstra's defence was that s.281 (2) was unconstitutional as it restricted his right to freedom of expression as provided for in s. 2 of the *Charter*. While it is not specifically a freedom of speech case, it relates directly to freedom of speech and academic freedom and their relationship to hate speech (Moses 1996:185–204), specifically because the attacks on the Jews were made in the context of his teaching as a High School Social Studies teacher. Starting in 1983, the case of *Keegstra* went to various courts and continued into the second half of the 1990s [(1983) 25 Alta. L.R. (2d) 370; (1988) 87 A.R. 177;

(1990) 3 S.C.R. 697; (1991) 114 A.R. 288; a retrial in 1992; followed by a series of appeals and counter appeals in 1994, 1995 and a final decision in 1996, upholding Keegstra's conviction and sentence] (see 4.10.4).

In summary, Keegstra, a teacher, held and promoted strongly anti-Semitic views in his classroom including such ideas that the Holocaust was a hoax and that the Jews were responsible for so many of the world's ills. He was a very influential person who could be described as having effectively indoctrinated the minds of his students. Those who expressed views contrary to his anti-Semitic lines received low, or failing grades. The Alberta Court of Appeal, in 1988, stated that section 281.2 [now s. 319 (2)] violated Keegstra's freedom of speech as guaranteed in Sec. 2 (b) of the Charter which protect innocent error and imprudent speech (Dickenson 1989:202-203). The Alberta Court decision was overturned by the Supreme Court in 1990 in a split decision which ruled that while Sec. 281.2 did violate Keegstra's freedom of expression, the limitations of Sec.1 applied, such limits being justified in a free and democratic society.

To quote from the majority decision, at 699-700,

> The large and liberal interpretation given to freedom of expression indicates that the preferable course is to weigh the various contextual values and factors in s. 1 of the Charter. This section both guarantees and limits Charter rights and freedoms by reference to principles fundamental in a free and democratic society. Section 319(2) of the Code constitutes a reasonable limit upon freedom of expression. Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the willful promotion of hatred against identifiable groups... Additionally, the international commitment to eradicate hate propaganda and Canada's commitment to the

values of equality and multiculturalism in ss. 15 and 27 of the Charter strongly buttress the importance of this objective.

Section 319(2) of the Code is an acceptably proportional response to Parliament's valid objective. There is obviously a rational connection between the criminal prohibition of hate propaganda and the objective of protecting target group members and of fostering harmonious social relations in a community dedicated to equality and multiculturalism... [it] is also a means by which the values beneficial to a free and democratic society in particular, the value of equality and the worth and dignity of each human person can be publicized.

Section 319(2) of the Code does not unduly impair freedom of expression. This section does not suffer from overbreadth or vagueness; rather, the terms of the offence indicate that s. 319(2) possesses definitional limits which act as safeguards... [t]he word "wilfully" imports into the offence a stringent standard of *mens rea* which significantly restricts the reach of s. 319(2) by necessitating the proof of either an intent to promote hatred or knowledge of the substantial certainty of such a consequence. The word "hatred" further reduces the scope of the prohibition. This word... must be construed as encompassing only the most severe and deeply felt form of opprobrium. Further, the exclusion of private communications from the scope of s. 319(2), the need for the promotion of hatred to focus upon an identifiable group and the presence of the s. 319(3) defences, which clarify the scope of s. 319(2), all support the view that the impugned section creates a narrowly confined offence.

The 1990 decision is described by McLellan as a landmark case (1998:Internet refer to http://www.canada.justice.gc.ca/news/discours/decla50%5Fen.html) respecting Canadian ability to take measures to combat hateful speech in the light of the guarantee of freedom of expression. The relationship of *Keegstra* and academic freedom is covered elsewhere (see 4.10.4).

Keegstra impacted directly on the classroom but a related case did not. In *Ross v Moncton Board of School Trustees* [(1993)110 DLR 4th at 242], Ross, a teacher with known very anti-Semitic views, became the centre of an issue of

whether one's freedom of expression beyond the classroom could be overridden because of its possible indirect impact on the school and classroom, even when his anti-Semitic views never entered his classroom. After two lower courts had made contradictory findings, the Supreme Court ruled that Ross' freedom of religion and expression could be justifiably limited because he (Ross)

> ... contributed to an invidiously discriminatory or 'poisoned' educational atmosphere ... the respondent's statements are 'highly public' ... the supported view that public school teachers assume a position of influence and trust over their students and must be seen to be impartial and tolerant.

This judgement has far reaching possibilities. It can imply that a teacher has distinctly limited freedom of expression in his private life beyond the school gate and that his public thoughts and writings are open to scrutiny by his employers, even where there is no connection with his teaching job (see 4.11.2 for further comment on the Ross case and 4.10.5 for wider discussion on teacher extra mural speech).

The above overview and the examples of the Canadian picture present a different perspective on freedom of expression from the United States. There is doubtless a more conservative perspective and the limitations clause, which the United States constitution does not have, can and has been used by the Courts to impose such limitations far more easily than might be possible in the United States courts. The differences between the United States and Canada serve as a reminder to all that freedom of expression, despite being regarded as a fundamental right, does not enjoy universally identical interpretation and protection.

3.3.3 Development of Freedom of Expression in Great Britain

Kentridge (1996:253) declared that

> ...the right freely and publicly to criticise the institutions of government, the conduct of public affairs..., indeed, to criticise the performance of the judiciary - that right is one of the glories of the unwritten constitution [of England].

Unlike the United States and Canada, Great Britain does not have a formal constitution (Barendt 1985:29). The issue of a formal human rights bill was widely debated but it was not until 1998 that such a bill was finally adopted (Duffy 1998:10; Nicholson 1998:946-947; Hoffman 1999:162; Fortin 1999:350-351) (see 2.4.2).

Prior to 1998 there was no constitutional protection for freedom of expression. Liberty was at best recognised as a principle of common law and its scope was developed without the guidance of any general principles (Barendt 1985:29). Expanding on this view, Barendt indicates that the British perspective was that freedom exists where statutes and/or common law does not restrict it. Over time the courts came to invoke a common law principle of freedom of speech to limit the scope of other common law rules which inhibited such freedom of speech. Kentridge (1996:253) does not believe freedom of expression is a primary right (a right taking precedence over other rights) in England. Without a formal Bill of Rights there can be no limitation clause but on the issue of hate speech, for instance, he believes the Public Order Act of 1986 covers much of the ground required to deal with such hate speech in its widest form. The above serves to illustrate the way in which statutes and common law have served to both protect and restrict freedom of expression in England, despite the lack of a Constitution and Bill of Rights. However, the protection is probably far less than that offered by a formal Bill of Rights.

In recent times judges have been more influenced by the European Convention on Human Rights but its articles and case law were not binding on them, despite Britain being a signatory to the Convention.

The first major step towards a Bill of Rights came in 1978 with the draft Bill commended by the Select Committee of Parliament. This draft contained a clause which included the following:

> [I]n every case of conflict between any enactment subsequent to the passing of this Act and the provisions of the said Convention, the said Convention shall prevail *unless subsequent enactment shall explicitly state otherwise* (italics added).

While this bill was not passed, a very similar clause was found in the Human Rights and Fundamental Freedoms Bill introduced in 1985 but again not passed (Marshall 1987:9-11).

All of this was part of a process which encompassed the joining of domestic law and an international human rights convention, without having a formal constitution, and with an apparent aim of retaining parliamentary sovereignty. Nicholson (1998:947) saw in this the need for British Courts to synthesize United Kingdom law with the European Convention.

The White Paper which preceded the 1998 Human Rights Act stated that the intention was to "bring rights home" (Miles 2000:133). The Act is not entrenched but Fortin (1999:350) sees it as "a radical change of approach to traditional thinking" while Elliot (2001:30) states that "few, if any, areas of domestic law are likely to be untouched by the Act", and Jacobs (2001:331) indicates that it is difficult to find a law report of an English case which does not refer to the Human Rights Act. While not entrenched, Sec. 6 (1) and (3) of the Act mean that 'public authorities', including the courts have to refrain from acting in a way which is incompatible with the European Convention (Miles 2000:133). However, Hoffmann (1999:159) points out that the courts can only declare specific legislation incompatible. This may then cause the relevant Cabinet Minister to amend the offending legislation. [This is a post-legislation declaration by the Courts and can be compared with New Zealand's pre-legislation declaration where the Attorney-General is required to point out any

feature of a Bill which is not in tune with the Bill of Rights Act, *before* it goes to Parliament.] The British courts cannot declare legislation to be unconstitutional (there is no constitution) nor is there place for judicial review of parliamentary legislation. There is no Constitutional court or other body to which an appeal against any particular legislation can be directed.

In essence the Human Rights Act is uniquely "British" and a major step forward but its lack of entrenchment seems to leave a measure of uncertainty.

It is against this unique background that the freedom of expression in Great Britain must be considered.

Section 1 of the 1998 Human Rights Act reads,

> **1.** (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in-
>
> (a) Articles 2 to 12 and 14 of the Convention;
>
> (b) Articles 1 to 3 of the First Protocol; and
>
> (c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

The issue of freedom of expression is covered in Section 10 of the Convention and by Section 12 of the Human Rights Act of 1998 which deals essentially with its application in Great Britain.

Sec. 12 (4) of the Human Rights Act begins as follows,

> The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary, or artistic material (or to conduct connected with such material)...

As Article 10 of the Convention is included in 1 (1) (a) of the Human Rights Act, it provides the basis for freedom of expression in Britain. Further, the limitations (as contained paragraph 2 of Sec. 10 of the Convention) will then be the basis for Britain's limitations on freedom of expression (see 2.3.2).

The Human Rights Act is binding on all public authorities and includes government schools (Nicholson 1998:954). There is concern, however, over the lack of clarity in the definition of public authorities and, further, whether "non-public authorities" can act outside the Act (Marshall 1998:79; Bamforth 1999:160).

The Human Rights Act would seem set to bring a substantial change to the position so strongly criticized by Jeffs (1986:56,62) which he described as one continual denial of many basic rights in the educational setting. He saw a situation of powerless pupils in the midst of enormous power granted to schools (Schools and Standards Framework Act: Great Britain 1998b; British Council Report: 1999) and reflected in school rules which exceeded the bounds of acceptable interference. Jeffs (quoted by Parker-Jenkins 1999:151), states that the focus on social control rather than education in schools leads to management styles that undermine "the rights, freedoms and dignity of the majority of young people". Partington (1990:106), who described British children as having few rights where education was concerned, supported this view.

The title of the article *Rights Brought Home to Children* (Fortin 1999: 352) tells its own story. Fortin (1999:352) describes the Human Rights Act as introducing for everyone, regardless of age, specific entitlement to all the rights of the European Convention. Government departments and, therefore, schools, will have to ensure that legislation and rules are compatible with the Convention.

The incorporation of the European Convention with the right of everyone to freedom of expression, together with its limitations on that right (see 2.3.2),

brings a sense of fulfilment for some. It allows the defunct Schools Action Union of the 1960s and 1970s, the National Union of School Students, and other bodies who worked for children's rights in schools, including the right to freedom of expression, to now be able to see some of their goals being realised.

Prior to 1998 the law gave schools such powers as to make parental or pupil challenges to school decisions both very difficult and highly unlikely to succeed (Jeffs 1986:62). In contrast, Fortin (1999:370) sees the incorporation of the European Convention as likely to at least produce a different kind of jurisprudence which will see new principles of law applying to children in terms of *their* human rights. This whole process should lead to the boundaries of children's rights being able to be tested in British courts.

It is only a short time since the Human Rights Act came into force in Great Britain. The development of a "rights culture" does not happen overnight and it is too early to expect major case law on freedom of expression in schools to be developing. At best, the door is now open for school related rules and regulations, which are not changed to conform to the European Convention and the Human Rights Act of 1998, to be challenged in the courts.

3.3.4 Development of Freedom of Expression in New Zealand

Unlike two of the three countries previously discussed, New Zealand's Bill of Rights is not entrenched. The closest comparison would be with Great Britain but New Zealand has its own Bill of Rights rather than, as in Britain, the incorporation of an International Treaty into domestic law.

The New Zealand Bill of Rights Act of 1990 and amended by the Human Rights Act of 1993 came about through a long process and ultimately amalgamated the Race Relations Act of 1971 and the Human Rights Commission Act of 1977 (Palmer 1992:54-57).

In 1985 a White Paper on a New Zealand Bill of Rights described the power of government, without the restraint of a second house, as being enormous which "in some senses can be compared to the power of the Stuart Kings before the revolution of the 17th century". Palmer (1992:51), using Lord Acton's dictum "[p]ower tends to corrupt and absolute power corrupts absolutely ...", pointed to the need for limits being placed on the power of the New Zealand government to prevent such corruption.

The White Paper set out a number of very strong arguments in favour of a Bill of Rights.

However, it took a further five years before a vote was taken in Parliament. The concept of entrenching the Bill of Rights with the need for a 75% majority of Parliament or a majority referendum to change any aspect of the Act, was strongly opposed, as was the incorporation of the Treaty of Waitangi (New Zealand 1840), the long standing treaty on Maori rights. Further, the concept of judicial review and the potential of the Courts to declare Acts of Parliament unconstitutional found little support (Palmer 1992:54-57).

Palmer, the Prime Minister at the time of the introduction of the Bill of Rights (and a former professor of law in the United States), in referring to the hearings of the select committee, stated that "[i]t was clear New Zealanders knew little about how government worked and the ordinary New Zealander didn't seem to care much" (Palmer 1992:56).

He went on to describe New Zealanders as people who must be amongst the most constitutionally underdeveloped people in the developed world.

The New Zealand Bill of Rights (New Zealand 1990) was adopted in 1990 without entrenchment or the right of judicial review but with a measure of protection built in (Palmer 1992:58) in the form of the Attorney-General having a 'watch dog' role to play when new legislation is introduced. The New Zealand Bill of Rights might not be considered ideal and Palmer (1992:65) was clearly

disappointed. He believed the Act was beneficial but did not go far enough by failing to secure entrenchment.

However, Palmer believed that New Zealand might later follow the Canadian experience of moving from an unentrenched Bill of Rights (1960) to the entrenched Charter of Rights and Freedoms (1982).

All of the above forms the background to the protection given to freedom of expression, as provided for in terms of Sec. 14 of the Bill of Rights Act (New Zealand 1990) which reads: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".

This is a concise, unelaborated clause. The word "including" is vital as it implies that the clause is wider than the brief list given and it allows the courts to interpret it widely.

Sec. 3 of the Bill of Rights (its application), makes it clear that it is applicable to acts by the State and persons or bodies in the performance of any public function (New Zealand 1990) and thus it applies to New Zealand schools.

The New Zealand Bill of Rights Act has a limitations clause (Sec. 5) related to all rights, such rights being subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The wording is the same as that used in the Canadian Charter of Rights and Freedoms. However, it is important to note again that this is not an entrenched Bill of Rights.

The early implications of the Bill of Rights for New Zealand schools was summed up in an article by Daryl Passmore in the New Sunday Star of 1 March 1992 (quoted in Walsh 1997) (see 4.3.2 for the full quote). Passmore referred to confusion and tension caused by the Act which now allowed pupils to test and challenge previously unchallenged rules.

One of the key issues from the start was that of school uniform, haircuts, jewellery and, further, there was recognition that freedom of expression could become an issue in school debates and magazines (Walsh 1997: 56). See 4.2 for an expansion of these issues.

3.4 SOME CONCLUSIONS

The four countries discussed in the previous sections have both commonalties and differences. The United States Bill of Rights dates back over 200 years, while human rights legislation and freedom of expression, specifically, is part of the recent history of the other three countries, Canada (1960/1982), New Zealand (1990) and Great Britain (1998). The very different legal and social cultures and approaches, and the length of time since the introduction of the legislation has a direct impact on both the variety and often very limited case law.

In the next chapter the focus is on specific issues of freedom of expression which have or can provide the major areas of conflict in schools in the four countries already discussed. Not all aspects have enjoyed equal prominence in all countries. In some places there is strong case law, in others an unsettled debate. Some reference will be made to cases prior to human rights legislation to draw comparisons with the changing effect of freedom of expression or its potential effect in the future.

...oooOooo...

Chapter 4: ASPECTS OF FREEDOM OF EXPRESSION IN SCHOOLS OF SELECTED COUNTRIES

4.1 AN INTRODUCTION

Freedom of expression, as a fundamental right, has wide ranging implications for schools where this right is found in legislation, be it within an entrenched constitution or as regular parliamentary legislation. The former gives greater protection to the exercise of the freedom than the latter, but there are, in either case, issues with which schools must grapple.

This chapter examines the right to freedom of expression, in a variety of forms, and what its effect has been and may be in the future on schools in the United States, New Zealand, Great Britain and Canada. A strong focus is on available judicial decisions about the exercise of the right to freedom of expression in the school context, for students and teachers in these four countries.

The key aspects which have caused controversy and/or judicial intervention in schools are those to do with appearance, in the form of hairstyles, clothing and jewellery, the student press in the form of official and unofficial ('underground') school newspapers and magazines, artistic creativity, academic freedom in various guises, and free speech in other guises. Some issues have had greater impact on teachers while others have impacted more on students, as will become clear. While the United States has the overwhelming number of court cases and case law on these issues, reference to New Zealand, Britain and Canada provide some idea of the changing human rights climate, in general, and freedom of expression in particular.

The way one dresses, wears one's hair or adds jewellery is part of every student and teacher's everyday life. It is appropriate, therefore, to begin by examining these aspects of freedom of expression, within the school context.

4.2 STUDENT'S HAIRSTYLES

In the case of *Richards v Thurston* (1969) 304 F.Supp. 449 (Mass.) Judge Wyzanski said the following with regard to hairstyles:

> Whether hairstyles be regarded as conformity or individuality, they are one of the most visible examples of personality. That is what every woman has always known. And so have many men, without the aid of an anthropologist, behavioural scientist, psychiatrist, or practitioner...
>
> The right claimed... [which the Court upheld] might be described as one of the aspects of personal liberty, that is, liberty of appearance, including the right to wear one's hair as he pleases or, alternatively, as one of the aspects of freedom of expression....

Wellman (1995:92–97) sees the right to dress as one wishes as a very important right. The right may be innocuous but it is often not respected. Students forced to wear school uniforms or be subjected to a rigid dress code, *including the style and length of hair* (italics added), would seem to have their fundamental rights invaded, and would appear to be arbitrarily coerced for no good reason.

Hairstyles have not only been a visible example of personality but a visible source of conflict in schools in different parts of the world. There are issues which come and go in schools but hairstyles would seem to be a recurring theme. Outside the school, hairstyles change but lack of flexibility in school dress regulations too often leads to conflict over such hairstyles. This recurring theme is examined in terms of the four countries under discussion.

4.2.1 Hairstyle issues in the United States of America

The United States' experience of school rules on hairstyles can at times seem to reflect absurdities. At the same time, the Supreme Court has refused to take a stand on hairstyles as a form of freedom of expression (Valente 1980:279; Furtwengler & Konnert 1982:209; Friedman 1986:248; Levin 1990:21).

While the United States Constitution First Amendment refers only to *freedom of speech*, that freedom has long been broadened to a far wider definition of "speech", the non-speech elements sometimes being referred to as "symbolic speech" or "speech plus" (Nimmer 1973:29-61; Collins & Davis 1968:1091).

From the mid 1960s school haircuts emerged as a major issue. *Tinker v Des Moines* (1969) 393 U.S. 503, a landmark case for student freedom of expression and human rights in schools, occurred after the haircut cases had begun. To avoid *Tinker* being used in haircut cases, and thereby confirming the Supreme Court's reluctance on the issue, Justice Fortas, in *Tinker*, at 507-508, stated that "[t]he problem posed by the present case does not relate to the regulation of the length of skirts, or the type of clothing, to hairstyle or deportment ...".

None the less, other parts of the *Tinker* judgement have bearing on wider aspects of freedom of expression than just the wearing of black arm bands to protest against the Vietnam War. Very importantly, Judge Fortas, in *Tinker*, said that it could hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school gate.

Fortas went on to state the following (at 508):

> Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear ... But our Constitution says we must take this risk

> [Terminiello v Chicago 337 U.S. 1]; and our history says that this sort of hazardous freedom ... is the basis of our national strength and of the independence and vigour of Americans who grow up and live in this relatively permissive, often disputatious society.

Do haircuts which 'depart from absolute regimentation', and which may cause some reaction, fall beyond First Amendment protection? Are they not simply an expression of personality or culture, or even a protest against the very regimentation that Judge Fortas referred to?

Government may not seek an unconstitutional objective under another guise (Tribe 1978:591). When a government attempts to do so, the Court may enquire into the *motive* behind the action. The basis of this approach developed from *McCulloch v Maryland* (1819) 17 US 316 at 429, which read as follows:

> [S]hould Congress under the pretext of exercising its powers, pass laws for the accomplishment of objectives not entrusted to the government ... such an [enactment would not be] the law of the land.

This type of enquiry was evident in *Pickering v Board of Education* (1968) 391 U.S. 563. But this approach needs consideration too when an agent of the state, the public school, bans certain hairstyles, motivating the action by reference to the negative effect the hairstyle will have on education when the *real* motive is, "I don't like that form of expression!"

Nimmer (1973:60) refers to the state desire for uniformity and the stifling of the expression of a different 'life style' simply because they are uncomfortable with any challenge to it. He adds, "This, one suspects, is usually the actual if not the stated governmental interest which underlies hair regulation." He argues that if this is so, then one must conclude "...that this is an indefensible anti-speech interest".

By 1971, the Courts in the United States were not of one mind, some Circuit Courts holding hair length regulations invalid, while others refused to interfere in school regulations. Up to 1972 the United States Supreme Court had refused on six occasions to hear appeals on "haircut cases" but in three of the six cases, strong dissenting judgements were offered [see *New Rider v Board of Education* (1973) quoted below].

Four cases are presented below to illustrate a number of key issues in the haircut debate, including the cultural issue. The four also illustrate the apparent inconsistencies from one Court to the next.

Stull v School Board of the Western Beaver Junior-Senior High School (1972) 459 F.2d 339, concerns James Stull, a neat and well groomed boy who had given no previous disciplinary problems. James, whose hair covered his collar and his ears, refused to comply with the hair length regulations contained in the school's new dress code.

James Stull was suspended on several occasions, coming back when his hair was cut according to the dress regulations but after April 1971 he did not return for the remainder of the academic year.

In evidence the Principal said that the hair regulations were "helpful to maintain a proper academic discipline" but conceded that students with long hair gave no disciplinary problems. Further, James' hair had caused no disruptions or disturbances. The Vice President of the School Board supported the hair code "because it was conducive to good education" but the only justification offered was that long hair constituted a danger in workshop classes. Two workshop teachers supported this view but neither had ever requested students, male or female, to tie their hair back.

The Court stated that James had come to court desirous of controlling his own personal appearance and lifestyle and of developing his own individuality. The Board's dress code restricted that right in a manner which extended beyond

school hours "for his hair, long or short, is with him twenty four hours a day, seven days a week, twelve months a year". In support the Court quoted from *Union Pacific Railway v Botsford* (1891) 141 U.S. 250 at 251, as follows:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual citizen to the possession and control of his own person, unless by clear and unquestionable authority of law ... 'The right to one's person may be said to be a right to complete immunity' .

Stull provides support to the remarks in *Holsapple v Woods* (1974) 500 F.2d 49 where the Court stated that,

> ...the defendants [the school] have fallen far short of showing that poor discipline and lower grades are caused by hair length in violation of school standards and are 'so aggravated, so frequent, so general, and so persistent that this invasion of students' freedom by schools is warranted'.

In fact, Stull is a direct contradiction of what the school, in this case, was claiming.

The case of *Stull* came soon after *Gere v Stanley* (1971) 453 F.2d 205 where James Gere had had shoulder length hair which was constantly unkempt and dirty, and was the source of complaints from other students who refused to sit next to him. Gere thus found no support from the Court. The *Stull* case was different and touched on a clear, underlying constitutional issue of whether a school board, without justifying the rule, could regulate the length of hair worn by male students.

In support of the principle question of whether the right in question was sufficiently substantial to deserve constitutional protection, the court quoted from *Bishop v Colaw* (1971) 450 F.2d 1069 at 1078, as follows:

> [A] state's invasion into the personal rights and liberty of an individual, of whatever age or description, should present a justiciable issue worthy of federal review. There is little doubt that this regulation seeks to restrict a young

> person's liberty to mould his own lifestyle through his personal appearance. To say that the issue is not 'substantial' turns a deaf ear to the basic values of individual privacy and the freedom to caricature one's own image. Our institutions do not rely on submerging individual personality in order to create an 'idealised' citizen.

The Court referred to *Tinker* and the requirement of the State to respect the fundamental rights of students in and out of school.

The Court re-emphasised that the right to govern one's personal appearance was a guaranteed right, and concluded that James' hairstyle caused no disruption, was not hazardous to anyone's health, and had not affected the academic performance of James or anyone else. The only concession granted was the right the school had to insist on hair being tied back in workshop classes, for reasons of safety.

The value of *Stull* lies in the *ratio decidendi* developed in support of a student's personal liberty while also addressing the limits of that liberty where rules will be needed and supported.

In contrast to *Stull*, in *Zellar v Donagal School District Board of Education* (1975) 517 F.2d 600, John Zellar lost his case by a 5 – 4 ruling of the Court. John was excluded from the school's soccer team for non-compliance with the athletic code concerning hair length. The Court held that there were areas of state school regulations in which the federal courts should not intrude.

The majority of the Court, conceding that theirs was a value judgement, held that there were limits to "redressable allegations of constitutionally-protected personal liberty by high school students". Further, the majority believed the federal court could not be expected to interpret such "conflicting ideals" or be involved in errors arising from school administrators of school boards' use of discretion "which do not rise to the level of violation of specific constitutional guarantees".

Chief Judge Seitz and three other judges issued a strong dissent, very much in line with and supportive of the *Stull* judgement four years earlier.

> I think it is particularly important for the courts to uphold individual liberties against non-rational state action in an age where judicial vigilance is the price of individual liberty. Every unchallenged invasion of such liberties makes the next one that much easier to rationalise ... If we pick and choose what constitutional aspects of personal liberty we will protect in the federal courts, we shall not only negate the primary function of these courts ... but denigrate the importance of individual rights in American society.
>
> I believe that choice of hair length is within that sphere of personal liberty where the individual has the right ... to assert the supremacy of his own will absent a rational basis for state regulation.

Seitz concluded with a quote from an 1879 judgement by Judge Cooley,

> There is and can be no authority of the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair.

Zeller raises a number of critical issues regarding consistency of judgements and the reference to 'value judgement'. The need for legal certainty regarding a particular human right is critical, not just for students challenging a rule, but for schools formulating and applying rules. The conflicting judgements on boys' school hairstyle issues may have arisen from the courts in several circuits preferring to show deference to school authorities who ran the education system and made the rules. That would certainly appear to be the case when the court states that certain matters of state school regulations should not be intruded on by the courts. The serious implication here is that, in certain respects, schools are outside the reach of the entrenched constitution. The *Zeller* judgement certainly seems to contradict Judge Cooley's words from nearly a hundred years earlier.

Hairstyles and hair length are not just issues of fashion or style or individual liberty, and go beyond the idea of rebellion. The two cases which follow concern deeply held cultural values and pride in being what one is and belonging to a distinct cultural group.

In the case of *New Rider v Board of Education, Pawnee County, Oklahoma* (1973) 414 U.S. 1097, Norman New Rider and others, all Pawnee Indians, unsuccessfully petitioned for their case to be heard by the United States Supreme Court. The refusal brought a strongly worded dissent from Mr Justice Douglas with the concurrence of Mr Justice Marshall. The dissent, which provides the basic details of the case, is quoted in full. It reflects great insight and wide application to any multi-cultural situation where culture and regulations are in sharp conflict.

> Mr. Justice DOUGLAS, with whom Mr. Justice MARSHALL concurs, dissenting. Petitioners are male Pawnee Indians who are students at Pawnee Junior High School, a public school in Oklahoma. They sought to wear their hair parted in the middle with a long braid on each side so that, in their words, they could follow the 'old traditional ways' and because such hairstyle was 'one way of telling people that I am proud [to be an Indian]. 'Others testified that young Indians sought to wear braided hair because of a new-found pride in their heritage, in an attempt to 'regain their tradition, to learn their culture.'
>
> These youth were suspended from school indefinitely on April 24, 1972, for being in violation of a school hair-length regulation, which forbids hair reaching the shirt collar or ears. The Court of Appeals justified the suspension on the ground that the regulation was rational in that it sought to achieve the objective of 'instilling pride and initiative among the students leading to scholarship attainment and high school spirit and morale.' The court stressed testimony from one school superintendent that a school system cannot countenance different groups and still remain one organization.
>
> Petitioners claim, inter alia, that the school hair-length restriction unjustifiably impinges on the freedom of expression guaranteed them by the first and

fourteenth Amendments. This Court has consistently, over my dissents, refused to review lower court decisions passing on the constitutionality of school hair-length regulations, whether such regulations have been upheld or struck down, and regardless of the grounds on which the lower courts have reached their conclusions. I have noted the deep division among the Circuits on this issue, and thought that it is an issue of particular personal interest to many and of considerable constitutional importance. See *Freeman v Flake*, 405 U.S. 1032; *Olff v East Side Union High School District*, 404 U.S. 1042.

Petitioners were not wearing their hair in a desired style simply because it was the fashionable or accepted style, or because they somehow felt the need to register an inchoate discontent with the general malaise they might have perceived in our society. They were in fact attempting to broadcast a clear and specific message to their fellow students and others – their pride in being Indian. This, I believe, should clearly bring this case within the ambit of *Tinker v Des Moines Independent Community School District*, 393 U.S. 503, where we struck down a school policy which refused to allow students to wear black armbands in protest of the Vietnam War. We recognised that such armbands were closely akin to pure speech and were entitled to First Amendment protection, id., at 505-506, at least where, as here, there was no finding that the operation of the school was substantially endangered by the symbolic speech...

There was an opinion voiced by school officials that allowing petitioners to wear their hair in an Indian manner while restricting the hair length of white students would somehow be 'disruptive,' in that an 'integrated school system cannot countenance different groups and remain one organisation.' But as we noted in *Tinker*, this Court long ago recognised that our constitutional system repudiates the idea that a State may conduct its schools 'to foster a homogeneous people.' Id., at 511. In *Meyer v Nebraska*, 262 U.S. 390, 402, the Court said:

> In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such

> measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

And in *Keyishian v Board of Regents*, 385 U.S. 589, 603, we stated that:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. *Shelton v Tucker*, [364 U.S. 479] at 487 [5 L.Ed.2d 231]. The classroom is peculiarly 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 out of a multitude of tongues, [rather] than through any kind of authoritative selection.

The effort to impose uniformity on petitioners is especially repugnant in view of the history of white treatment of the education of the American Indian. In the late 1800's, the Bureau of Indian Affairs (BIA) began operating a system of boarding schools with the express policy of stripping the Indian child of his cultural heritage and identity:

> Such schools were run in a rigid military fashion, with heavy emphasis on rustic vocational education. They were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people.

Again in 1944, a House Select Committee on Indian Affairs offered the same recommendation for achieving the 'final solution of the Indian problem': 'The goal of Indian education should be to make the Indian child a better American rather than to equip him simply to be a better Indian.'

A massive study by the Senate Special Subcommittee on Indian Education, ('*Indian Education: A National Tragedy – A National Challenge*', S. Rep. No

91 – 501, 91st Cong., 1st Sess.), reviewed this policy, which it found rooted in a 'self-righteous intolerance of tribal communities and cultural differences' (Id., at 21). The Subcommittee found that many teachers in BIA schools

> still see their role as that of 'civilising the native... BIA administrators and teachers believe that Indians can choose only between total 'Indianness' – whatever that is – and complete assimilation into the dominant society. There seems to be little if any understanding of acculturation processes or the desirability of 'combining a firm cultural identity with occupational success and consequent self esteem' (Id., at 61-62).

The same study found that similar attitudes often exist in public schools which educate Indian students.

The results of such a policy, mirrored in the policy of the school in this case to force all students into one homogeneous mould even when it impinges on their racial and cultural values, has been disastrous for the young Indian child who is taught in school that the culture in which he has been reared is not important or valid. The Subcommittee recognized that such a coercive assimilation policy, denigrating and seeking to abolish cultural differences, frustrates Indian children and leads 'the community and child [to] retaliate by treating the school as an alien institution' (Id., at 21). At least in part as a result of such alienation, American Indians in both public and Federal schools have a dropout rate twice the national average (Id., at IX). Only 33% of Indians over the age of 25 have completed high school, and the median number of school years completed by this group is only 8.7 Even when an Indian youth nominally remains in school, his achievement level is generally 2 to 3 years below that of white students in the same grade, and the Indian child falls progressively further behind the longer he remains in school.

The issues in this case are far from trivial. I would grant certiorari.

A year earlier Justice Douglas had made a strongly worded dissent in *Olff v East Side Union High School District* (1972) 404 US 1042, pointing out that decisions about hairstyles belong in the realm of family life.

Despite Justice Douglas' wise words, the Courts continued to ignore the pleas of Indian children and their community. This is illustrated by *Hatch v Goerke* (1974) 502 F.2d 1189. Buddy Hatch, an Indian, was expelled for not cutting his hair according to school regulations but wearing braided hair. His parents brought the case on behalf of their son and other Indian children in the school. The Court dismissed the appeal that the haircut regulations violated parental rights to raise their children according to their own religious, cultural and moral values. The only issue on which the court ruled in favour of the parents was that the expulsion or indefinite suspension had been instituted without a hearing.

Haircut cases reached a peak in the early 1970s and then almost disappeared. Longer hair simply became more socially acceptable. However unsatisfactorily inconclusive the total picture is, the rulings provided some guidelines for future generations which have relevance today both in the United States and beyond.

4.2.2 Hairstyle issues in New Zealand

The introduction of the Bill of Rights Act (New Zealand 1990) and the Human Rights Act (New Zealand 1993) has brought changes to New Zealanders' thinking about human rights in the schools. However, the conservative nature of the people (Palmer 1992:70) and the short time these non-entrenched Acts have been in force is reflected in limited case law.

The case of *Edwards v Onehunga High School Board* [1974] NZLR 238, illustrates the power of school principals and the limited protection available to students under the New Zealand Education Act of 1964 (prior to the Bill of Rights Act). Edwards, a third form (Grade 10) student, was on five occasions instructed to comply with a school rule limiting the length of boys' hair. He refused and was suspended in terms of Sec. 130 of the Education Act, and was to remain suspended until he cut his hair. Edwards took his case to the High Court and the Court of Appeals but both courts ruled in favour of the school. Sec. 130 allowed a principal to suspend a pupil if he considered the

pupil to be "an injurious or dangerous example to other pupils" or because of the pupil's "gross misconduct or incorrigible disobedience" (Trainor 2000:241).

Trainor (2000:241) points out that, in the social context of the time, there was a fierce debate on hippies and the threat to conservative society from the new freedoms. In such a climate, with the laws as they were, Edwards had little hope of gaining the court's verdict.

Times have changed. Schools now operate under the Education Act (New Zealand 1989). Further legislation, and rules and actions of agents of the state (which includes state schools) must conform to the general law of New Zealand. While School Boards have broad powers to make rules regulating students' dress and appearance, such rules must conform to the Bill of Rights and the Human Rights Act, and the United Nations Convention on the Rights of the Child, to which New Zealand is a signatory.

The impact of the Bill of Rights Act on schools is succinctly covered by Passmore (quoted by Walsh 1997:56-57) in articles in the *New Zealand Sunday Star,* in which he stated:

> The new Bill of Rights is creating confusion and tension in schools around the country. Pupils are 'testing the limits' of the new law on a range of issues ... a group of students in Masterton have organized a petition opposing a school rule that boys should not grow their hair below their shirt collars.

In an article by Laxon 1995 (in Walsh 1997:49-50), mention is made of a school being told to check the legality of its "clean-shaven" policy. The principal indicated that his school's hairstyle policy had been changed to allow a wide range of styles, as long as hair was clean, tidy and not extreme. This is a far cry from 1991 when a Masterton schoolgirl was expelled for dying her hair blonde.

The following e-mail response was received to a question put to Peter Allen, the principal of Rangiora High School, N.Z. (e-mail : 6 June 2000).

Question : Do New Zealand schools have haircut rules? (boys only? also girls?)

Reply : No! No! No! I hope we've left behind the days when I was at school when teachers used to go around with rulers measuring the length of students' hair. Our rule is that hair must be clean and tidy. Occasionally a student may turn up with some bizarre hair arrangement – we usually suggest gently they're making fools of themselves and should try to rid themselves of this aberration as soon as possible. Usually other students exert sufficient peer pressure to ensure this occurs.

This is not to suggest *all* schools have moved *this* far. However, commenting on the hair policy, Walsh (1997:52) points to the several statements of the New Zealand Human Rights Commission that it believes schools should vary their uniform requirements to allow for genuine expressions of cultural or religious belief. The Commission believes that where dress codes hinder educational achievement, then such codes need to be changed.

Walsh (1997:124) refers to an example of a Niuena (Maori) boy who has long plaited hair which he refuses to cut because he needs to keep it that way for 'a hair cutting ceremony', thus offering a legitimate cultural reason for his actions. Acceptance of this Maori cultural need contrasts sharply with the *New Rider* case (see 4.2.1).

New Zealand experience of hairstyle related problems in schools is far less than that of the United States but it indicates a different approach and there is an apparently greater willingness to allow for cultural diversity visible in hairstyles.

4.2.3 Hairstyle issues in Great Britain

The situation in Great Britain prior to the introduction of the Human Rights Act (1998), which came into force in October 2000, was that principals had enormous powers. The lack of *de facto* freedom of expression in English

schools and the power of teachers and principals to enforce rules with little fear of challenge led to a situation where mountains could be made out of molehills of passing fashion (Alston 1998:28).

In such a situation pupils were almost powerless, passive recipients and obeyers of orders, however unfair they may have been. Jeffs (1986:62-63) described English schools as having an obsession with pupils' dress and appearance. He is severely critical of the translation of this obsession into such things as sending boys home for having hair which was too long or too short. It comes as little surprise that no British case law dealing with haircuts could be traced.

Section 61 of the School Standards and Framework Act of 1998 (Great Britain: 1998b), headed "Discipline: general" makes it clear that the School Governing Body and the Principal hold enormous powers.

Section 61 (4) begins,

> The head teacher shall determine measures (which may include the making of rules and provisions to enforce them) to be taken with a view to (a) promoting, among pupils, self-discipline and proper regard for authority; (b) encouraging good behaviour...., (c) securing that the standard of behaviour is acceptable, and (d) otherwise regulating the conduct of pupils.

These rules must be in line with the policies laid down by the governing body of the school. No reference is made to any form of consultation, either with parents or pupils.

Parker-Jenkins (1999:153) makes reference to children's right to 'freedom in personal appearance' and states that this freedom has direct relevance for schools, the majority of whom stipulate requirements on school dress, hairstyles and jewellery.

It is too early to say whether the incorporation of the European Convention into English law will dramatically change the situation. For now, the immediate

position is that children and parents can challenge rules and practices they believe conflict with the European Convention, but without the previously prohibitive costs of going to the European Court in Strasbourg. How many and what type of challenges there will be, and how successful remains to be seen. (See 3.3.3. and 4.3.3 for expanded comment on applicable English legislation in respect of dress and hairstyles and the possible impact of the 1998 *Human Rights Act.*)

What is clear from Jeffs and Parker-Jenkins is that many things have gone on in schools which, by human rights standards, are infringements of those rights. With almost authoritarian control in the hands of principals (see 4.3.3), there was little reason to stop principals acting in this way. If Sec.12 of the Human Rights Act is read together with Sec. 10 of the European Convention and courts do as instructed (in Sec. 12) that they "must have particular regard to the importance of the Convention right to freedom of expression" then it would seem only one step away from revised education legislation about the powers of principals, and from challenges being launched by pupils and their parents.

4.2.4 Hairstyle issues in Canada

Much of what is written of the potential impact of the Charter of Rights and Freedoms (Canada 1982) draws heavily on United States cases and there is very limited indication from the Supreme Court of Canada as to how cases dealing with student hairstyles are likely to be treated. On the basis of cases available a deduction must be made from a case involving the "dress code".

The Canadian Charter, or entrenched bill of rights, deals with freedom of expression in Section 2. But Section 1 is regarded as a limitations clause which provides ways in which the rights can be limited.

The Oakes test, established in *R v Oakes* [1986] I SCR 103, DLR (4^{th}) 200 S.C.C., requires that where an imposition of a limitation is wanted, the person(s) wishing to limit a particular right must show that

(i) the objective which the restrictive measures serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; and

(ii) the party invoking Section 1 must show that the means chosen to restrict the right are reasonable and demonstrably justified (Beatty 1995:69–70).

Applying the above to limiting the right to freedom of expression in student hairstyles, one must show that the override is of 'sufficient importance', 'reasonable and demonstrably justified'. Is limiting the length of a male student's hair of sufficient importance to limit his freedom of expression?

One line of argument is that such a limitation would uphold the school's authority and discipline. The counter argument is whether long hair can be proved to create or perpetuate ill-discipline, and whether the school's authority is so tenuous as to need to limit the length of male students' hair.

Two other questions need to be dealt with. Firstly, in a Constitution which proclaims gender equality, can the length of a male student's hair be an issue of suspension from school while a female student is entitled to grow her hair as long as she chooses? Secondly, when the length or style of hair becomes a cultural or religious issue (Canadian Indians for example) will the Canadian Courts apply a different standard by not applying Section 1?

In the 1988 case of *Devereux v Lambton County (R.C. Separate School Board)*, quoted by Black-Branch (1997:59), the school dress code was at issue (see 4.3.4 for detailed coverage). Whether *Devereux* referred to clothing only or included hairstyles, is not clear. The court indicated that any violation of the Charter by the School Board in establishing dress code regulations would be saved by Sec. 1 of the Charter. This carries the implication that the School Board could establish a dress code which infringed students' constitutional rights and it would be acceptable to the Court. Given such a ruling, it seems

clear that if the Devereux case *did* involve hairstyle, the Court would not have supported his right to freedom of expression in that respect.

Wellman (1995:94) opines that such compulsion can be trivial and the triviality tells the compelled individual he counts for very little. Justice Douglas states in *New Rider* that "... the issues are far from trivial" (see 4.2.1).

The *Devereux* judgement is hard to assess. Beatty (1995:66) points out that freedom of expression and freedom of religion are two long-standing 'first-generation rights' and belief in equality, pluralism and human dignity demands that these two guarantees be read as broadly as possible. In Beatty's view freedom of expression has been defined to include anything done to convey a meaning.

In the Ontario Provincial Code of Conduct for Schools (Canada 2000:1-4) passed in the Ontario Parliament in June 2000, the only reference to hairstyles and dress is found under the heading, 'Parents'. They are required to "help their child to be neat, appropriately dressed and prepared for school." Under the heading "All school members must ..." is found the sub-section, "... respect differences in people, their ideas and opinions". The question is how this Code of Conduct will translate into the schools when issues of hairstyle arise.

4.2.5 Conclusion

The hairstyle issue would seem to fall squarely into the area of freedom of expression, whether the student be male or female. The experiences of the United States, Canada, Britain and New Zealand do not provide absolute clarity or consistency. Issues of religion and culture have a direct impact on questions of hairstyle. Despite the failure of Supreme Courts to give definitive rulings on hairstyles, the rapidly changing society, the increased focus on human rights and globalisation would seem to suggest that the need for greater flexibility and accommodating of different peoples and their fancies

may lead away from inflexibly trivial rules on hairstyles, to a greater focus on the far greater issues that should be the focus of education.

Hairstyles are but one issue of personal appearance. A second major issue is that of dress and the associated issue of school uniforms. These form the subject of the next section.

4.3 DRESS CODES FOR STUDENTS

While the question of the meaning of the term *'fundamental rights'* can introduce a philosophical and legal debate, at one level such rights are those which actually touch people's lives and life-styles. One such right, states Wellman (1995:92–97), is the right to dress as one wishes. The right may be innocuous but it is often not respected. Students forced to wear school uniforms or be subjected to a rigid dress code... would seem to have their fundamental rights invaded, and would appear to be arbitrarily coerced for no good reason.

Wellman concedes that it is one's right to *choose* to dress as one wishes but there should be only two 'limitations' on dressing as one pleases, namely not to dress in a way which provokes immoral behaviour and, secondly, not to deliberately offend those with whom one associates. Beyond these restrictions, the right of individuals to dress as they please is, according to Wellman (1995:93), 'morally innocent'. This means that other people have no moral justification for compelling any person to refrain from dressing as they please but, rather, a *moral duty* to refrain from compelling others not to dress as he/she chooses. Such compulsion is meddling and intrusive in the private life of another and thereby devalues an individual's very self and freedom. Since it is made on arbitrary and often trivial grounds, the very triviality of the compulsion sends a message to the individual that he counts for very little. This demonstrates not only a lack of respect for an individual's feelings but for that person's autonomy or self-realisation, one of the three often cited core values or purposes of freedom of expression (Redish 1982:591).

What one wears to school is clearly of importance both to students and to their families. School uniforms as such are not an issue in all countries. Where uniforms are imposed, they are often imposed on grounds of tradition, or reducing the visibility of socio-economic differences within the school community or, similarly, displaying other homogeneity of the school.

In countries, or schools, where uniforms are not compulsory, there are rules introduced to restrict students from wearing certain items of clothing for varying reasons, including but not exclusively for reasons of modesty and safety.

Each of these issues has its supporters and opponents and each must be viewed in the light of the right to *freedom of expression.* The issue of uniforms has also triggered a link between freedom of expression and freedom of religion, the latter at times being used as a powerful argument in applications by students and their parents for variations in the school dress code to allow them to wear religious dress.

The issue of dress is now discussed in terms of the four selected countries.

4.3.1 Dress issues in the United States of America

School uniform has, it appears, only once been at issue in the American courts. *Jones v Day* (1921)127 Miss. 136, 89 So.906, 18 A.L.R. 645 (quoted by Edwards 1971:569), concerned a county agricultural school in Mississippi which required its pupils to wear a school uniform, not only "when attending school" but also "when visiting public places within five miles of the school, even on Saturdays and Sundays". Action was brought to have the rule declared *ultra vires* (beyond the authority of the school). The court ruled that the rule could only apply to students living in hostels. Day students could only be required to wear the uniform while attending school and on their way to and from school.

In recent years there has been a swing towards the idea of introducing school uniforms. McCarthy (1998:24) states that "... some future controversies will

likely focus on the increasing number of school boards that are specifying uniforms for students".

Those wanting school uniforms believe it will eliminate gang-related clothing and thereby reduce violence and improve the school climate. Opponents see the move in public schools as compromising the First Amendment rights of students to express themselves through what they wear (McCarthy 1998:24).

The issue of clothing was a key topic in the 1999 tragedy at Columbine High School in Littleton, Colorado. The two students were wearing black trench coats which were the trademark of a small clique of students known as the 'Trench Coat Mafia' [Steel (Internet) 2000:1-20]. Much of the discussion initially focussed on the clothing worn by the two students responsible of the shootings. While the later investigation showed that the students had no connection with the group [Cullen (Internet) 2000:1-24], the connection between dress and radical behaviour and gangs of various kinds was referred to by McCarthy (1998:23) before the Columbine tragedy.

There were calls for closer attention to be given to the outward expression of potentially rebel or isolate groups within a school.

Opponents of uniform may well ask whether insisting on uniforms to overcome potential danger from what might be a small minority of students is not similar to the haircut issues. Further, it may be difficult to prove that a uniform will *per se* reduce the risk of rebel or isolate groups forming and operating in the school.

The American courts apparently had no school 'hair' or 'dress' cases until 1921. Friedman (1986:248) describes Miss Valentine as the 'pioneer' in challenging school dress regulations. For the school graduation an Iowa school provided caps and gowns. Miss Valentine and five other girls refused to wear them because of an 'offensive odour'. As a result they were not

allowed to attend the graduation and the school held back their diplomas. Miss Valentine challenged the ruling and won the support of the Iowa Court.

In *Valentine v Independent School District of Casey* (1921) 191 Iowa 1100, 183 N.W. 436, (quoted by Nolte & Linn 1963:225, and Edwards 1971: 570), the Court ruled as follows:

> [W]e hold that such a rule is unreasonable and a nullity as a condition precedent to receive a diploma. The wearing of a cap and gown ... has no relation to educational values, the discipline of the school, scholastic grades, or intellectual achievement ... The enforcement of such a rule is purely arbitrary, and especially when the offending pupil has been passed for graduation....

The complexity of the dress issue is illustrated by a case two years after *Valentine.* A School Board in Arkansas adopted a rule for students where, "[t]he wearing of transparent hosiery, low-necked dresses, or any style tending towards immodesty of dress, or face paint or cosmetics, is prohibited".

Eighteen year old Pearl Pugsley insisted on using talcum powder on her face and was suspended until she agreed to conform to the rule. She challenged the ruling in the Supreme Court of Arkansas [*Pugsley v Sellmeyer* (1923) 158 Ark. 247, 250 S.W. 538, 30 A.L.R. 1212] and lost her case. The Court believed the School Board was far more familiar with local conditions and, thus, in a better position to decide on the reasonableness of the rule. However, one judge wrote a dissenting opinion (quoted by Edwards 1971:569) and states:

> I think that a rule forbidding a girl of her age [eighteen] from putting talcum powder on her face is so far unreasonable and beyond the exercise of discretion that the court should say that the board of directors acted without authority in making and enforcing it.

The case must be seen in terms of the time when it occurred but the dissent highlights the differing perspectives that have and, doubtless, always will exist.

Religious views on dress have and continue to give rise to challenges to regulations. In *Mitchell v McCall* (1962) 143 So.2d 629, the compulsory wearing of an outfit for physical education classes was challenged by the parents of a high school girl suspended for refusing to wear the outfit. The brief attire offended her religious principles. The parents claimed it was "immodest". The father had requested that his daughter be exempt from all physical education classes as being with other girls who were dressed in "immodest dress" also offended her religious principles. The Court stated, at 608,

> Appellant further complains that unless the school is required to conduct a separate class composed of those who share his and his daughter's belief that she will be made to appear a 'speckled bird', and will be subject to the contumely of her fellow students.
>
> All citizens in so far as they hold views different from the majority of their fellows are subject to such inconveniences. And this is especially true of those who hold religious or moral beliefs which are looked upon with disdain by the majority. It is precisely every citizen's right to be a 'speckled bird' that our constitution... seeks to insure. And solace for the embarrassment that is attendant on holding such beliefs must be found by the individual citizen in his own moral courage and strength of conviction, and not in a court of law.

The Court ruled that the girl could be required to attend the class but could not be required to wear the prescribed clothing, nor could she be forced to engage in exercises which would be immodest in ordinary apparel (Nolte & Linn 1963:222).

This case may be seen as a forerunner to a variety of issues of dress where religious views were seemingly more dominant than the actual clothing. The above case raises a number of queries concerning the wearing of special clothing for particular subjects, such as physical education, home economics or workshop classes. Where religious dress is worn to school will such

students be excused from those classes if they refuse to wear appropriate clothing?

The cases of dress are varied and the following will indicate the variety and differing opinions. McCarthy (1998:23) makes passing reference to two cases where the banning of the wearing of jeans was overturned, namely in *Murphy v Pacatelle* and *Bannister v Parades*, both in 1971. However, courts have upheld School Board decisions to prevent a student wearing a T-shirt which depicted school administrators as drunk [*Gano v School District* (1987) *411 of Twin Falls County*, 674 F.Supp. 796 (D.Idaho)], another for wearing a T-shirt with the words "Drugs Suck" [*Broussard v School Board of Norfolk* (1991) 801 F.Supp. 1526 (E.D.Va.)], and the disciplining of a student for wearing "sagging" pants [*Bivens ex rel Green v Albuquerque Public Schools*, (1995) 899 F.Supp. 556 (D. N.m.)]. Further, the court supported a prohibition on *High* school students wearing clothing which identified any college or professional sports team [*Jeglin v San Jacinto Unified School District* (1993) 827 F.Supp. 1459 (C.D. Cal.)], but the ban specifically does not refer to elementary and middle school students (McCarthy 1998:23).

The above cases came from various American courts but no reference is made to these cases being taken on appeal. It is thus difficult and unwise to attempt to draw broad inferences and conclusions.

The lack of a "limitations clause" in the United States leaves courts to decide on the limitations. However, the United States judiciary have developed limitations (see 3.2.5 and 3.3.1). The decisions on dress codes in the United States are, none the less, seemingly inconsistent and deference to school authorities appears to be a major reason.

That dress is an expression of self and makes a statement of who one is, is probably not in doubt. Equally likely, is that uniforms and dress regulations are likely to continue to be challenged as interfering with First Amendment rights.

Is there a line to be drawn? Henkin (1968:63) comments on the drawing of legal lines:

> Judgement consists of drawing lines, not in following blindly where the inertia of motion leads. But a doctrinal line must have a reason : that a line has to be drawn somewhere does not mean it may be drawn anywhere. Nor ... is there always a line to be drawn.

The lack of a "limitations clause" and the federal nature of the country with its federal and district courts gives rise to different decisions in different states and in the different Circuit Courts. In the midst of the apparent confusion, the differing decisions with their *ratio decidendi* paint a picture of the variety of perspectives which need consideration when issues arise.

Furtwengler and Konnert (1982:201) suggest that two questions must be asked in developing rules and/or deciding on whether particular behaviour (or dress or hairstyles) need to be limited or acted against.

1. Will/Have the actions of the student(s) cause(d) substantial disruption to the educational process and/or normal operation of the school?

2. Will/Has the freedom of expression of the student(s) be(en) an invasion of the rights of others?

Provided the rules are not vague and open to wide interpretation, the above questions provide a base from which to begin making sound decisions about dress in the educational context of the school.

4.3.2 Dress issues in New Zealand

Each New Zealand school's Board of Governors may make any by-laws or rules they think necessary, in terms of Sec. 72 of the 1989 Education Act, but subject to the rules conforming to New Zealand law and the school's charter (Trainor 2000:229). Like any other rules, dress rules must be made known and have legal certainty.

Under Health and Safety Legislation in New Zealand, certain dress in schools can be restricted or imposed *for safety reasons*, such as tying back hair in a workshop class, removal of jewellery while playing sport, or insisting on protective clothing or eye-wear in relevant situations (Trainor 2000:229).

The New Zealand Bill of Rights (New Zealand,1990) is, in terms of Section 3, applicable to state schools and Section 5 sets out the limitations on rights as "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Further, Sections 13 and 14 of the Bill of Rights deal with freedom of thought, conscience and religion, and with freedom of expression. Both clauses contain the word "everyone" and should thus include children at school. Dress and appearance in New Zealand with its cultural and ethnic diversity, is touched by both of these clauses.

The Human Rights Act (New Zealand, 1993) refers to prohibition of discrimination on various grounds including sex, age, religion and ethnicity (Trainor 2000:233–234).

All of the above serves as the legal background in which schools must operate and make decisions regarding dress codes for their students.

Dress codes in New Zealand are sometimes justified as upholding 'standards', but 'standards' is an undefined term and begs the questions, 'whose standards?' and 'what standards?'.

The introduction of a Bill of Rights for the first time in any country can disturb the *status quo*. Passmore (in Walsh 1997:56) said that

> [t]he new Bill of Rights is creating confusion and tension in schools around the country. Pupils are 'testing the limits' ... on a range of issues from school uniforms to disciplinary measures. Solicitor, Robert Ludbrook, ... claims uniform rules which require pupils to wear the same clothes every day breach ... the right to free expression ...

Walsh, a Deputy Principal who is also a qualified lawyer, has taken a strong stand on the uniform debate. Walsh (1997:123) argues that the requirement to wear a school uniform is not a real denial of the right to freedom of expression. While admitting that the wearing of school uniform does limit an aspect of freedom of expression, he argues that most schools do provide ample opportunities for students to express their individuality in other ways.

Walsh's argument is difficult to follow if one sees dress as a means of expressing who one is. Other ways of expressing individuality, such as in a composition or a speech, are simply not compensation for the denial of the right to personal expression of who one is.

To continue Walsh's line of argument would invite the question as to what other 'aspects of freedom of expression' can be arbitrarily limited by a school using the same line of argument about other 'ample opportunities'.

The following two articles, quoted in Walsh (1997:56-58), highlight two different issues of the uniform debate in New Zealand.

UNIFORM TEST CASE GOES TO COURT

By Daryl Passmore

That gripe of generations of pupils – the insistence on them wearing a uniform – will be settled in court.

Haley Bennett (now 13) and Tamzin Reeves (12) sought lawyer Robert Ludbrook's help when the principal of their school – Northcross Intermediate in Browns Bay refused to waive a rule forcing them to wear skirts as part of their uniform.

After successfully bringing a Human Rights Commission complaint against an edict forcing them to wear skirts the two are now considering a High Court bid to have uniform rules declared illegal under the Bill of Rights Act.

'A requirement that you wear exactly the same thing every day is a breach of freedom of expression under the Bill of Rights Act,' says Ludbrook, who helped the girls prepare their Human Rights Commission case.

'I think the matter needs to be clarified. It's a matter of fundamental human rights.'

The girls complained that – unlike boys who were allowed to wear shorts – they could not use playground equipment without their skirts tumbling over their heads, exposing their underwear and attracting remarks from other pupils. Haley also found it difficult to ride her bike to school when wearing a skirt.

"Neither of us liked skirts and we found it difficult to move around in them so we decided to do something about it,' says Haley, who has since moved on to secondary school. "We felt so strongly we thought we should take it as far as we could. We feel it's sex discrimination." The Human Rights Commission agreed.

During the commission's inquiry, the school's Board of Trustees agreed to allow girls to wear culottes. Several, including Tamzin, now do.

Tamzin says she would like to see uniforms done away with altogether.

Ludbrook says the commission's finding stands as a precedent which hundreds of other schools with uniform rules should follow.

And he remains keen to test uniform regulations under the Bill of Rights.

Northcross principal Trevor Rowse and Board of Trustees spokesman Mike Smith refused to comment.

In summary, the Commission agreed the complaint had substance but that no further action was required as the school had amended its uniform code to include "culottes" as a uniform item for girls (Trainor 2000 : 235).

Muslim boy's uniform needs refused by school

A school pupil who is a practising Muslim complained to the Commission after his school refused to allow him to wear long trousers instead of shorts.

His religious belief required him to wear trousers to cover his body between his navel and his knees, a practice known as Satar.

The school refused his request, saying that the Islamic dress code was not mandatory and that the uniform code should be strictly enforced to allow students, regardless of their racial, cultural, economic, and social backgrounds, to be treated equally.

The school also said the boy's parents had signed the enrolment application form agreeing to abide by the school's regulations which included wearing the correct school uniform. The Commission found that the boy was indirectly discriminated against after accepting that his belief in his religion's requirement to wear long trousers was genuine and consistent with his religion.

The Commission said the school's uniform policy, though neutral on its face, effectively treated the boy differently on the basis of his religious belief. Hence, the boy had been admitted to the school on less favourable terms and conditions and this was detrimental to his access to education.

The Commission did not think that it was necessary for the boy to have refused to attend the school, or to have attended in non-regulation uniform, before he could be deemed to have suffered a detriment. Had he not worn the prescribed school uniform, he would have exposed himself to disciplinary measures.

The school had not established good reason for its requirement that everyone, regardless of their religious beliefs, wear the same uniform.

The Commission said all that was required was for the school to let the boy, a third former, wear the long trousers prescribed for senior students. This would not undermine the stated purpose of the uniform policy which was a 'neat, well groomed appearance which fosters pride in the school and in the student'.

It was noted, too, that another student had been given dispensation from wearing school uniform for health reasons, but the school had declined this option for the Muslim boy.

Expanding on the above case, Trainor (2000:236) points out that the Commission had referred to two goals of the school's charter and the stated purpose of the uniform.

Goal A was to

> ... enhance learning by ensuring that the curriculum is non-sexist and non-racist and that any disadvantage experienced at the school by students, parents or staff members because of the gender or religious, ethnic, cultural, social or family background is acknowledged and addressed.

Goal B was to

> ... enhance learning by ensuring that the school's policies and practices seek to achieve equitable outcomes for students from all religious, ethnic, cultural, social, family and class backgrounds.

Trainor (2000:236) describes the purpose of the school uniform as being to achieve " ... a neat, well groomed appearance which fosters pride in the school and in the student".

The initial decision of the school appears to conflict with its stated goals, while the deviation in uniform could not undermine the purpose of the uniform.

The school and the parents reached a settlement and the school agreed to amend its dress code to allow for future variations requested by students on medical or religious grounds.

This case points to the need for a school to meet the requirements of its charter (or mission statement). The charter is not just a set of ideals but a "written charter of aims, purposes and objectives" in terms of Sec. 61 of the

Education Act . It is essentially the contract between the school, its community and the Minister of Education (Trainor 2000:230).

It would appear that New Zealand handles complaints regarding dress, hairstyle and other school related issues through the Human Rights Commission. In this way the majority of cases can be settled without engaging the full judicial process.

Walsh (1997:124) refers too to schools which do not have school uniforms and the limitations such schools can place on what students wear. He suggests just two limitations, namely clothing that is dangerous, e.g. metal studded shoes, and clothing which is socially offensive, e.g. T-shirts with offensive language or pictures.

It would seem that it may be very difficult to draw up a definitive list of all such clothing. A school may need to draft a list of clearly unacceptable clothing and then deal with all other items on a case-by-case basis.

The case law from New Zealand is limited due to the Bill of Rights being in operation for only ten years. The use of the Human Rights Commission (HRC) to resolve issues also means that case law is likely to remain limited. The decisions of the HRC will thus serve as guidelines in these issues. However, their experience suggests that religious and cultural issues need to be taken account of in any policy and its application.

Peter Allen of Rangiora High School, New Zealand (e-mail 6 June 2000), states that almost all secondary schools have compulsory uniforms. His school enforces the dress code "in a low-level way" by focussing on "occasional irritants" and seeks to persuade rather than coerce. Allan indicates that surveys are done with parents and students on the wearing of a uniform and the school enjoys overwhelming support for a compulsory uniform.

The above is not to suggest that all schools enjoy the same support, but it does indicate that in the more conservative society of New Zealand, the

problems of uniform and dress are seemingly less traumatic than they may appear to be in the United States.

4.3.3 Dress issues in Great Britain

In England the wearing of school uniforms, in government schools, cannot be enforced. However, a head-teacher could, at least to up to the time of the Human Rights Act coming into force in October 2000, ban the wearing of almost any item of clothing or jewellery, including jeans, leather jackets, high heeled boots and even trousers for girls (Ireland 1984:45; Adams 1992:122).

The often quoted case of *Spiers v Warrington Corporation* (1954) 1 QB 61 highlights both the powers of head teachers and the problems which can arise from such confrontation. The headmistress banned 13-year old Eva Spiers from wearing slacks to school. Eva had suffered several attacks of rheumatic fever and so the wearing of slacks was for seemingly justifiable health reasons. The headmistress demanded a medical certificate before she would make an exception. The parents refused to get the certificate and every time Eva went to school in slacks she was sent home. The Court ruled in favour of the school by stating:

> The Headmistress obviously has the right to prescribe the discipline for the school, and in saying a girl must come to school not wearing a particular costume, unless there is a compelling reason of health, surely she is acting only in a matter of discipline... There must be someone to keep discipline, and of course that person is the headmistress.

In a very strange judgement Lord Chief Justice Goddard then drew an analogy between the sincere belief the parents had that they were acting in the best interests of their daughter and those who sincerely believed their children should go to school naked and, in so doing, as good as rejected the parents sincere belief as reason for insisting on slacks (Partington 1984:129).

With the European Convention now adopted into English law, it seems doubtful that the headmistress would find support for her actions today.

In contrast to *Spiers*, Adams (1992:122) reflects on the value of common sense and flexibility shown at a private girls' school in Manchester where girls were not allowed to wear trousers. This resulted in the head and the Asian parents coming into conflict because the tradition among Asian girls is to wear trousers. Before a major incident was created the head and School Governors reconsidered and changed the rule subject only to the colour of the trousers fitting in with the uniform.

Some writers on the topic of school apparel adopted a strongly pro-administration attitude. Ireland (1984:46) stated that parents who did not like the idea of school uniform could send their children to a school which did not have a uniform. However, he believed that if parents are given a list of school rules, including uniform rules before enrolling their child then the parent has accepted the rules by accepting a place at the school.

Such a view may sound reasonable where rules do not have to meet criteria established by a Convention on Human Rights. However, under human rights based legislation, such an attitude is far less likely to be tolerated.

Parker-Jenkins (1999:153-154) states that the right to "freedom in personal appearance" has direct relevance for schools. She states that the majority of secondary schools stipulate requirements on school dress (and hair styles and jewellery). She suggests that school policy on this issue would need to incorporate rules which are equitable and based on gender, cultural and religious factors. The request to parents to sign an undertaking that their children will wear school uniform, she believes, is a mild form of blackmail on parents and may be invalid.

The role of religious rights has affected English school dress. In 1979 a Coventry girl decided she had become a Sikh and wore a turban and baggy

pants, in keeping with religious freedom. However, only Sikh *boys* wear turbans! The Local Authority reached a compromise, modifying the principal's rules.

Jeffs (1986:62–63) is severely critical of the lack of freedom of expression in English schools. He describes a school's power to impose rules upon its students as immense. Many of the rules relate to, amongst other things, dress and appearance which, in their application, can go as far as invasion of privacy by marching girls into changing rooms to check that they are wearing regulation underwear.

In a document on Children's Rights, a section headed '*Education*', contained the following statement:

> Examination of this area [education] will reveal that the power base in education remains firmly with adults whether these be parents, teachers or policy makers... children themselves have no recognisable rights and even at the level of classroom teaching, there are few children who would see themselves as having rights in relation to the teacher [British Council 1999 (Internet)].

Further, in terms of the Education Act (Great Britain 1986), children are not allowed to serve on the governing body as anyone under the age of 18 is excluded from serving as a governor [British Council 1999 (Internet)].

English case law on the subject of school dress is limited. However, the multi-cultural nature of the inner city English schools, together with the new Human Rights Act is a recipe for a potential conflict where legal involvement may prove difficult to avoid.

Under the new Human Rights Act (1998) which incorporates the European Convention, Articles 9 and 10 of that Convention are particularly relevant. Article 9 provides "the right to freedom of thought, conscience and religion" and Article 10 refers to the right to "freedom of expression". In a guide paper

for schools entitled "*Human Rights Act 1998 - a brief introduction*" the following is applicable here,

- **Article 10** the right to "freedom of expression" could feature in challenges around uniforms and dress codes...

The "brief introduction" goes no further than the above statement. Article 10 (1) refer to the rights, and 10 (2) to the limitations (see 2.3.2). While stating that "everyone has the right to freedom of expression", Article 10, in line with other international human rights documents and other entrenched constitutions, makes no reference to dress or precisely what "expression" means in this respect. However, the breadth of freedom of expression is the topic of volumes of academic legal writing, and case law from elsewhere, and it seems unlikely that British courts would either exclude or very narrowly define "dress" in terms of expression. Article 10 (2) states that "...freedoms...may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...". Given the very limited case law on school dress codes from the European Court, and the fact that Section 12 of the Human Rights Act of 1998 (the 'freedom of expression' clause) provides no specifics on the issue, early legal challenges will be the only sure way to see how the right to freedom of expression will be applied to British schools and, in this case, particularly with respect to dress codes.

Time alone will tell how far English pupils and parents will challenge such dress codes, and how far the English courts will go in supporting meaningful human rights for English pupils.

4.3.4 Dress issues in Canada

Any reference to dress codes and the Charter of Rights must keep in mind both Sec. 1 of the Charter (the limitations) and Sec. 2 (the rights), previously discussed (see 3.3.2). There are few cases to draw on. In *Devereux v Lambton County (R.C. Separate School Board*) quoted by Black-Branch

(1997:59) school dress was at issue. The Court rejected the claim that the dress code violated Devereux's freedom of expression (Charter Sec.2), his liberty (Sec.7) and his equality (Sec.15). The Court ruled that the School Board had the power to institute a policy regarding "school attire" and any violation of the Charter would be saved by Sec.1 of the Charter. The Court added, "...to hold otherwise would be to trivialise those rights" [compare with *New Rider* (4.2.1)]. The deference to school authorities seems to be a major reason for the decision. What is meant by "trivialising" a right is not clear, nor is it clear what aspects of freedom of expression are not trivial. It raises the question of whether upholding the right would mean it was being trivialised or whether, in not upholding the right, the person claiming the right was being trivialised.

The *Devereux* case had all the signs of putting an end to all challenges to school dress codes. However, in the same year as *Devereux*, 1988, the dress code was again the issue in *Sehdev v Bayview Glen Junior Schools Ltd.* A Sikh student claimed that the school dress code violated his rights under the Charter. The Court ruled in the student's favour stating that the schools dress code discriminated against Sikh religious dress requirements, and ordered the school to adjust its dress code.

Once again freedom of expression and freedom of religion became intertwined in the issue of dress. Again, in 1991, in *Ontario (Human Right Commission) v Peel Board of Education,* the Court ruled against the Peel Board for restricting Khalsa Sikhs from wearing Kirpins (ceremonial daggers) in publicly funded schools. The Kirpins were classified as weapons which could be dangerous but the court ruled that the restriction was an infringement of the Human Rights Code of Ontario. The Board was ordered to withdraw its policy, subject to certain safety restrictions [Black-Branch 1997:59–60 (case numbers not given or traced)].

MacKay and Sutherland (1990:214) refer to the very similar case of *Tuli v St. Albert Protestant Board of Education* where the Court also ordered that a Sikh

boy be allowed to wear his kirpin provided it "was blunted, kept in a sheath and tied down at all times".

Are Kirpins dress or jewellery? In this case the two seem indistinguishable and fall under the broad classification of a dress code.

The three cases above indicate the powerful influence of religious issues in dress code challenges. However, the *Peel* case raises a very serious issue in the light of the Ontario Code of Conduct for Schools (Canada: 2000). This Code of Conduct is binding on *all* Ontario state schools and on all members of the school community when on school premises or on official school activities beyond the school, including students, teachers and parents. Under Physical Safety is found

> All school members must
>
> - not be in possession of any weapon, including but not limited to firearms...

In *Ontario v Peel* leave to appeal to the Ontario Court of Appeal was refused. The above clause in the Code of Conduct would seem to contradict the *Peel* judgement.

Canadian case law on dress appears limited but the above cases suggest that religious issues are seen as an acceptable reason for insisting on dress code variation in Canada.

4.4 SOME CONCLUSIONS

Appearance is both dress and hairstyles. It is clear that both aspects can and have given rise to conflicts between pupils and staff in countries far apart and very different from one another. Both issues relate to more than outward appearance, but relate also to an expression of individual personality, religious or cultural identity, or an attempt to send a message of "this is who I am".

Thus, focussing on the external alone can portray a lack of concern for the individual personality and his dignity.

Dress and hairstyles are often added to and/or enhanced with the wearing of jewellery. This third aspect of appearance is examined in the next section.

4.5 THE WEARING OF JEWELLERY BY STUDENTS

The wearing of jewellery, as a form of freedom of expression, does not enjoy a great deal of attention in the literature. For that reason the issue of jewellery is not sub-divided into different countries but treated as a whole. What follows is a collection of events and comments of a somewhat random nature. However, taken as a whole, they provide ideas for developing a considered approach to the wearing of jewellery in the school.

Jewellery is defined, in the *Oxford English Dictionary* (2001), as gems or ornaments made and sold by jewellers as a form of adornment, or personal adornment such as rings, necklaces or bracelets with jewels. However, today the term is more commonly used to refer to a wide range of items of adornment with or without precious stones.

There appear to be few court cases on the subject. However, as with hairstyles and clothing, religious views play a role. The issue of Sikh boys and the wearing of the kirpin (see 4.3.4) should be seen as both a clothing and jewellery issue.

McCarthy (1998:23) refers to two cases involving jewellery in American schools. In *Oleson v Board of Education School District No. 228*, (1987) 676 F.Supp 820 (N.D.Ill.), the court upheld a ban on boys wearing earrings. The motivation for the ban was to deter the influence of gangs.

Similarly, in *Stephenson v Davenport Community School District* (1997)110 F.3d 1303, a student who had been ordered to have a small tattoo of a cross removed from her hand challenged the ruling in Court. The symbol appeared

to have gang-related significance. This time the Court upheld the girl's suit on grounds of faulty procedure and did not give a ruling on her First Amendment right to have a tattoo.

The above two cases deserve serious attention. It is clear that schools have a duty to protect their students from the negative influences of gangs or other fringe groups whose aims and lifestyles are contrary to the educational purpose of a school. Today, however, the earring stretches deep into the subject of gender equality and, in a sector of the community, is an expression of who one is in terms of sexual orientation. The tattoo rule too may go way beyond the specifics of the above case. Could a school ask for a tattoo to be covered during school hours? Under what circumstances? Does the school have a claim on how a student's body is decorated, twenty four hours a day, every day of the year?

McCarthy (1998:25) concludes that, 'given the current student interest in tattoos, body piercing, and other fads', there is likely to be continued legal controversy over the attire of students.

In New Zealand restrictions on jewellery are legitimate when based on safety (Walsh 1997:124). There are classroom activities where necklaces or bangles, for instance, could be dangerous – anywhere where a student is working with machinery. Such restrictions would be equally applicable to boys and girls. Jewellery would likewise be out of place in contact sports.

Maori culture in New Zealand introduces another aspect of jewellery. The *taonga* has particular cultural and spiritual significance. *One* form of the taonga is 'a significant adornment' (Trainor 2000:237). Trainor refers to a case where a Maori boy wished to wear his taonga at school. The Principal agreed on condition that it was not visible which meant wearing it low away from the neck or having his shirt continuously buttoned up. The child's mother said it needed to be worn in its usual position, at the base of the throat. She said the position was chosen by the *whanan* (extended family) at birth. The New

Zealand Human Rights Commission found in favour of the boy and agreed that "it was important that the *taonga* be able to be worn openly as they were symbolic of cultural identity".

The *taonga* is covered in the Treaty of Waitangi (New Zealand 1840), an international document which sets out the nature of the partnership between the indigenous Maori and the Crown. School councils are required to bear in mind that the Maori retain control over *taonga* under Article Two and they (the school councils) must ensure that dress and appearance regulations are consistent with this.

Bans on jewellery have been a long running debate and Passmore (in Walsh 1997:124) states that

> [s]ome schools allow crosses or other items of religious significance and the Human Rights Commission has upheld claims that bone carvings should be allowed on cultural grounds.

However, Passmore also points to the ban many schools place on other forms of jewellery, especially where such are considered to endanger other people.

In England, without a Bill of Rights, the wearing of jewellery has seemingly been entirely at the discretion of the head-teacher. Ireland (1984:45) puts it simply, "If a head-teacher decides no jewellery shall be worn in school by pupils, then no jewellery shall be worn, and any child wearing jewellery might be sent home to remove it."

Ireland (1984:45) and Adams (1992:122) point to the ban on jewellery for safety reasons but add that it can be banned for any reason. With such an approach, freedom of expression is simply brushed aside, if it is ever considered at all.

With the implementing of the Human Rights Act (Great Britain 1998) from 2 October 2000, the issue of apparently arbitrary bans on jewellery seem likely to be challenged (see 4.3.3 for reference to Human Rights Act).

Religion, culture and safety are three of the factors to be considered in discussing the wearing of jewellery in school. If one considers Wellman's view (1995:92) of the relationship of freedom of expression and self-realization, it seems fair to conclude that jewellery can be an expression of "who one is", as a person, religiously or culturally. Safety factors apart, the denial of the right to wear jewellery can be an infringement of one's right to freely express oneself and who one is. Equally, common sense demands that safety factors must, in specific circumstances, limit that right, for the safety of the wearer and others.

4.6 TEACHERS' FREEDOM OF EXPRESSION : HAIRSTYLES, DRESS AND JEWELLERY

The literature makes almost no mention of teachers or other staff in schools when dealing with hairstyles, dress and jewellery. The lack of comment suggests that the right to freedom of expression may still be seen as strictly an adult right, both to enjoy themselves, and to limit or control the lifestyles of their students.

However, it is necessary to consider whether a school or a School Board or an Education Department could impose a dress code for teachers and/or other school staff. Pretorius, Klinck and Ngwena (2001:8-133 to 137), refer to a selection of North American cases where businesses have attempted to impose such dress codes, with mixed success. Issues of gender equality, religion and culture are issues which can affect an employee's response to an enforced dress code, and, if such a code impinges on any of those three aspects, could lead to legal action by the employee.

In the case of *Canadian Safeway v Steel* (1984) 9 D.L.R. (4th) 330 (Man.QB), the court overturned a "no beard policy". The company attempted to use

customer preference to justify their demand that male staff be clean-shaven. It would seem that any attempt by Canadian education authorities, at whatever level, to impose a similar policy could be challenged on the basis of this employment ruling. The issue of beards might be equally extended to hairstyles or jewellery, including earrings.

In the case of *Croft v Metromedia Inc.* 766 F.2d 1205 (1985), a television presenter was dismissed because of her 'dowdy' appearance, but not before the employer had gone to great lengths to assist the lady to improve her appearance. Teachers may be competing against television for their students attention, but they are not television presenters and should not be required to portray a glamorous image for students or parents.

In *Carroll v Talman Federal S & L Association of Chicago* 604 F.2d 1028 (1979), the company's insistence that ladies wear a prescribed uniform (without male employees being forced to do so) was overturned as being sex discriminatory and based on 'offensive and illogical stereotyping'.

These cases from the corporate world provide no clear guidelines to education employers, but do provide warning of possible actions by employees if dress codes are insisted on.

The key issue in these cases is the job-relatedness or lack of job-relatedness in the dress regulations. The fact that a "no-beard" policy had no bearing on the job was very relevant in *Canadian Safeway.* In the context of teachers' dress codes in the four countries under discussion, no case law was found nor was the issue a focus point in the literature consulted. (See 6.4.4 for further discussion of teacher dress codes.)

The greater difficulty for schools, however, is the possibility of a maverick teacher whose way-out clothing, hairstyle or jewellery brings the ire of parents or distracts his students. The literature provides no guidance.

4.7 FREEDOM OF EXPRESSION, FREEDOM OF RELIGION, CULTURAL IDENTITY, HAIRSTYLES, DRESS AND JEWELLERY

Freedom of belief and opinion is of little value if it cannot be expressed in words, oral or written, or by other means of communication. The linkage of the two freedoms is axiomatic.

The way one dresses, does one's hair and wears any form of jewellery contains a strong element of expression. These are ways of telling others who one is, of expressing one's personality and one's belief about oneself (see 4.2.1 for the Douglas dissent in *New Rider*).

What one believes may be negative to society and that belief too may be expressed externally in the way one presents oneself to the wider society.

The distinction drawn by granting dress code rights to religious or cultural dress is clearly acceptable as a form of expressing one's religious or cultural beliefs. However, to confine such outward expression to organised religious or cultural groups alone may be missing a key element in freedom of religion clauses of Bills of Rights.

The right to freedom of thought, conscience, religion and belief and the expression thereof would seem to extend far beyond allowing for only religious or cultural beliefs to be expressed in hairstyles, dress and jewellery.

The expression of one's belief about oneself through hairstyle, dress and jewellery would seem entitled to certainly as much protection as the right to wear special religious or cultural clothing despite dress codes to the contrary.

All the evidence seems to suggest that case law up to now has not supported this broader perspective. Whether it will in future remains to be seen.

4.8 STUDENT PRESS FREEDOM AS FREEDOM OF EXPRESSION

4.8.1 Introduction

School newspapers come in two broad forms, those published on school property, and the so-called *underground* newspapers prepared off school property but distributed on the property or just outside. Both types focus on student readership.

Valente (1980: 274) suggested that student press in American schools enjoys constitutional protection regardless of its sponsorship, authorship or place of publication. In his view school authorities could exercise time, place and manner restraints on distribution but not on content, other than where the published material could be shown to be very likely to cause substantial disruption. Valente drew on several cases discussed below. In 1988 the case of *Hazlewood* saw a shift in Court thinking although this case appears to have drawn an overreaction on part of schools.

The issue of freedom of the press, closely linked to freedom of expression, goes back at least as far as John Milton in the 1600s. Milton's *Areopigitica* was written as a plea for freedom of written expression, the right to publish without licensing [or prior restraint], (Collins & Davis 1968:1108). In his *Areopigitica*, Milton saw that even "widespread literacy, subject to tyrannical control and manipulation, may more profoundly enslave the human personality than any crude external domination by threat".

Corwin (1978:302-303) refers to Hamilton in *People v Crosswill* [New York Common Law Reports (1804)] who said, "[t]he liberty of the press is the right to publish with impunity, truth, with good intentions, for justifiable ends...".

He (Corwin) describes liberty of the press as being free of any prior restraint, but warns that writers cannot claim freedom from censure for printed criminal matter.

Three issues emerge, the right to publish, prior restraint and broad limitations. Richards (1986:167) refers to speech and writing as making possible "reflection about our ends, reasoning about our beliefs and ... imaginative constructions of reality".

Clearly, in the midst of such freedom not everything published will win approval but Govender (1997:23) refers to *Street v New York* (1969) 394 U.S. 592 where the court stated the following:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited because the ideas themselves are offensive to some of the hearers.

The right to publish is clear. But *prior restraint* invades that right. The term refers to placing restrictions on what may be published, *before* it is published - often referred to as censorship. Hogg (1992:966) refers to the fact that in the United States *prior restraint* is almost always struck down by the courts, whereas in Canada Section 1 of the *Charter* has been used to uphold prior restraint in a number of cases.

Corwin (1978:302) points to post-publication consequences and states that freedom is not licence and to publish state classified secrets, to quote an extreme example, is to invite severe state censure.

All of the above has relevance to student press (school sponsored or underground). The four United States cases that follow provide useful guidelines for student freedom of the press.

4.8.2 Non-School Sponsored (*'Underground'*) Newspapers

Scoville v Board of Education of Joliet TP H.S. District (1970) 425 F. 2d 10 dealt with two school students who were expelled after writing, off school property, and publishing in school an article which was a reply to *The Principal's Report to Parents*. Scoville and Breen were editors of "*Grass High*",

a student paper of poetry, essays, and movie reviews. The Court overruled the expulsion and pointed to the need for a school to show a reasonable forecast of substantial disruption to justify acting against students; further the law requires that school rules must be related to state interest in the producing of students with well trained intellects which will not be unduly stifled or chilled.

Eisner v Stamford Board of Education (1971) 440 F.2d 803 concerned the school's limitations on written freedom of expression. This was in the form of a rule which stated that

> [n]o person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration.

The guidelines for approval or refusal included the following phrase:

> No material shall be distributed which, either by content or by manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school...

These rules were challenged and were found to be "fatally defective for lack of *procedural safeguards*" failing to specify to whom material was to be submitted, how it was to be submitted and how long a decision would take. The Court made positive suggestions to the Board of Education to avoid further litigation and added the following:

> The greater the generosity of the Board in fostering - not merely tolerating - students' free exercise of their constitutional rights, the less likely it will be that ... rulings [will be] subjected to unwieldy constitutional litigation.

Quarterman v Byrd, (1971) 453 F.2d 55, has similar basics and similar results to *Eisner*. The requirement of the principal's permission in order to publish was invalid *prior restraint* because no details of the process were given to students.

Shanley v N.E. Independent School District Bexar County (1972) 462 F.2d 960 also concerned restrictions on student newspaper distribution but far more severe. Students were not permitted to distribute underground papers *off* school property, *before* and/or *after* school hours. As a result of a publication, five students were suspended.

Circuit Judge Goldberg began his judgement as follows:

> It should have come as a shock to the parents of five high school students ... that their elected school board has assumed suzerainty over their children before and after school, off school grounds, and with regards to their children's rights of expressing their thoughts. We trust it will come as no shock to their school board that their assumption of authority is an unconstitutional usurpation of the First Amendment.

The suspension was for a publication described by the judge as "probably one of the most vanilla-flavoured ever to reach a federal court". The judge provided a stinging judgement on the school board's actions in suspending five excellent students by acting outside the Constitution. He described the case as a "sort of judicial believe-it-or-not".

The school board had claimed that their ruling was outside of Constitutional action, a point rejected by the judge with reference to numerous court decisions to the contrary. He went on to point out that when the constitutionality of a school rule was challenged, it is settled law that the burden of justifying the regulation falls on the school board.

The judge referred to the regulation as "facially overbroad", for failure to indicate standards by which the principal may accept or reject material for student publications; further (at 977) he called the regulation "unconstitutionally vague" since what is intended by the word 'distribution'

> ...is such that reasonable men not only can differ and have differed, but *should* differ substantially as to its meaning.

The judge referred to the evidence of the assistant-principal "that one student handing *Time* magazine to another student without the permission of the principal was presumptively in violation of "policy".

The judge also referred to the regulation as "unconstitutional as a matter of due process" as there was no appeal process in place, nor time limits on the principal or administration to decide on whether to permit distribution or not. He added,

> Imprecision and delay serve only to underscore the fact that the constitutional ideal can be thwarted in petty ways, a frustrating experience in a democracy.

The Court, at 977-978, provided four basic guidelines for the school board,

> Any regulation that proposes to screen and sift out publications distributable to high school students under a regulation purporting to prevent substantial and material school disruption must: (1) state clearly the means by which students are to submit proposed materials to the principal or school administration; (2) state a brief and reasonable period of time during which the principal or administration must make their decisions; (3) state clearly a reasonable appellate mechanism and its methodology; and (4) state a brief and reasonable time during which the appeal must be decided.

The judge pointed out that controversy is never sufficient in and of itself to stifle anyone's views.

In conclusion, the judge said:

> Perhaps it would be well if those entrusted to administer the teaching of American history and government to our students began their efforts by practising the document on which that history and government are based. Our eighteen-year-olds can vote, serve on juries and be drafted; yet the board fears the awakening of their intellects without reasoned concern for its effect upon school discipline. The First Amendment will not tolerate such intolerance.

Shanley puts student rights to freedom-of-the-press in a strong light. It also highlights the importance of not defining school as a little box but rather as a part of a continuum of children to teenagers to young adults.

4.8.3 A New Dimension : From Underground to Internet

The emergence of the Internet (see 3.3.1) has brought an entirely new issue. Bell (2001:4) suggests that, from a legal perspective, United States First Amendment analysis applies to web sites in the same manner as it applied to school newspapers, with a distinction between school sponsored web sites housed on school computers or those created at school as part of a co-curricular activity, and those web sites independent of the school housed on home computers.

The internet allows students to easily engage in critical comment on individual teachers, school policy and a host of other school issues.

Bell (2001:4) refers to a Missouri court having ruled in favour of a student who was disciplined for what he put on his home web site. Unless the school can prove substantial disruption to the school, such disciplinary action against a student will be overturned, and even with such disruption, Bell suggests the school's case will be weak.

The advent of cyberspace communication may offer schools a whole new educational tool but that same tool, the internet, poses a growing challenge to the school.

4.8.4 School Sponsored Newspapers

Up to 1987 the matter of student freedom of the press seemed well settled, that is until *Hazlewood v Kuhlmeier et al.* 484 US 260 (1987), a widely quoted case of the subject. The essence of the case concerned a High School principal's removal of pages of a school sponsored newspaper (which was part of a school's journalism course) because of articles he considered to be

objectionable. The Court ruled 4 - 3 that the principal's actions did not violate the students' First Amendment rights. Three judges dissented, stating that the principal's action violated the First Amendment's prohibition against censorship on any material that neither disrupts classwork nor invades the rights of others, and that in the particular case the material concerned neither disrupted classwork nor invaded the rights of others.

There were a number of key issues in this case which need to be taken note of. First, the school newspaper was produced by, and was part of, a journalism class as part of their course and in which the skills learnt in class were put to use. Secondly, according to School Board policy, the school could not restrict free expression or diverse view points within the rules of responsible journalism. Thirdly, the journalism teacher was the final authority with respect to almost every aspect of the production and publication, including its content. Fourthly, every issue had to be reviewed by the principal before publication and, finally, the paper carried a declaration that "all rights implied by the First Amendment" were accepted.

The principal regarded an article on pregnancy and student experiences of pregnancy as unacceptable, as was the article on the impact of divorce on students.

Two issues were central to the case, namely whether the paper was a public forum or not, and the question of '*legitimate pedagogical concerns*'. The Supreme Court ruled the paper was not a public forum and, while conceding the constitutional rights of students as set out in *Tinker*, stated as follows:

> We have nonetheless recognized that the First Amendment rights of students in the public schools 'are not automatically co-extensive with the rights of adults in other settings, and must be applied in the light of the special characteristics of the school environment' ... We have thus recognized that '[t]he determination of what manner of speech in the classroom or in school

> assembly is inappropriate properly rest with the school board rather than with the federal courts' ....

The Court quoted three times from *Bethel v Fraser* (1986) 478 U.S. 675, a case where the circumstances were totally different from the *Hazlewood* case. Fraser had made a speech in the school hall to a captive audience. His speech contained a continuous stream of blatant sexual innuendo (see 4.11).

In accepting the school's right to exclude the two articles, the court gave tacit approval to content censorship and prior restraint.

Justice Brennan's dissent declared the principal's actions a breaking of a basic promise and violation of the First Amendment's prohibitions on censorship of any student expression which neither disrupts the class activity nor invades the rights of others. Brennan opined that if

> ... the mere incompatibility with a school's pedagogical message was sufficient to suppress student expression, schools would become 'enclaves of totalitarianism' .

He concluded by saying that

> [t]he young men and women of Hazlewood East expected a civics lesson, but not the one the Court teaches them today.

Much has been written about *Hazlewood* over the past twelve years. Hoover (1998:49) sums up the case as giving school administrators the right to exercise editorial control over school sponsored student publications that are not public forums.

According to the Student Press Law Centre (SPLC) an open forum refers to a publication "for unrestricted use by students". 'School sponsored' refers to publications using the school's name, or supervised by a teacher, or is designed for teaching skills to participants (quoted by Hoover 1998:50).

Legitimate pedagogical concerns is a very broad term but, in the context of a school newspaper, would include such things as badly written articles, articles advocating illegal activities or material unsuitable for 'immature' readers.

Prior review and prior restraint are not the same but, if wrongly applied, the first can easily merge into the second. The first refers to just reading through the paper. For a principal it is a legitimate action so as to be aware of articles which might give rise to parental queries. Prior restraint refers to the right to censor before publication.

Mark Goodman of SPLC (quoted by Hoover 1998:50), warns that when a principal exercises editorial control he also accepts full responsibility for the content. Without such editorial control it would be easy to brush aside controversy as mistakes of students. The principal will not enjoy the same understanding from his community as they might give to students!

McCarthy (1998:20-21) suggests that *Hazlewood* did not give principals *carte blanche* to engage in viewpoint censorship. Perhaps *Hazlewood* resulted in an over reaction from some principals. The immediate impact was strong control by principals over publications, the judgement having a 'chilling' effect on freedom of the student press. Over time schools have developed policies to ensure that teachers and administrators work together to avoid a *Hazlewood* situation and ensure quality publications.

Where trust existed in schools, together with a recognition of students' needs to be critical and outspoken at times, there would be no need to censor. What *Hazlewood* did provide was the clout for those who wanted to exercise control.

Ironically, *Hazlewood* had no impact on underground papers, which now possibly enjoy greater protection than school sponsored publications.

Whatever the various court rulings, none gave anyone licence to engage in defamation, slander, libel or other malicious abuse. Against such there is no protection.

Hazlewood stopped short of overriding *Tinker* but it seemed to have come very close to doing so with the reference to rights of students not being automatically co-extensive with adults. Clarick (1990:708) refers to *Hazlewood* as "a perplexing decision".

The decision is perplexing in the sense that nowhere does the American constitution refer to the First Amendment as being "for adults only" and *Tinker* specifically referred to *students and teachers* not leaving their rights at the school house gate. It is clear that some differentiation is necessary in certain contexts. The age of students is relevant when the type of material being distributed is considered. However, Hazlewood concerned High school students. Without having read the articles considered unacceptable, it is difficult to make any judgement. However, pregnancy is an issue which affects all High Schools and the topic, *per se,* should not be one to be excluded. Likewise. an article on divorce, *per se,* deals with a major social issue which many High School students have to personally deal with. If the articles infringed on individual students privacy, then restrictions would seem merited.

The issue of *legitimate pedagogical concern* can be a grey area. The fact that the newspaper was clearly a school produced paper carrying the school's name is not contested. Of concern is the potential for principals to use *legitimate pedagogical concern* as a valid reason for a host of other restrictions.

Justice Brennan's dissent seems to carry strong merit. The following line from the majority view

> [t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rest with the school board rather than with the federal courts...

suggests the Courts deference to education authorities.

The First Amendment remains but *Hazlewood* has "chilled" student press. Only time will tell how long it will take to thaw.

4.8.5 Freedom of the Student Press in other Countries

Examining student publication freedom of press in Canada, McConnell and Ryan (1990:30) describe the critical issues as whether students have unlimited rights to writing, coverage, distribution and ownership, and whether the Charter of Rights and Freedoms (Canada 1982) allows school authorities to censor and suppress material they believe to be unacceptable. Referring to a 1986 study by Watkinson, McConnell and Ryan point to the Supreme Court's strong aversion to prior restraint on freedom of expression when it comes to the general public, but their treatment of school publications lacks consistency.

The only reference found to student publications in New Zealand is the view of Walsh (1997:57) that freedom of expression could become an issue in the context of material submitted for publication in school magazines.

No reference could be found to this topic in British schools. However, given the power and authority school principals enjoyed in British schools until recently, it may be fair to assume that the exercise of prior restraint, and action against those who published 'unacceptable' material would have been purely within the authority of the school principal.

The overwhelming English language literature on student press appears to be focussed on the United States which must, therefore, serve as a guide to the handling of similar issues elsewhere.

4.8.6 Some conclusions

Student press will doubtless always carry an element of risk, including risk of errors of judgement and errors of fact, and the risk of engaging in, or stirring up controversy. To engage in risk, to make mistakes and to learn from them is part of the educational process.

To censor is to destroy a valuable learning experience and to send a message that the Constitutional provision of freedom of the press, as a form of freedom of expression, is really not important enough to uphold in the school. What the student press needs is not censorship but professional guidance from an empathetic teacher and support from the principal. All of this touches at the heart of, and provides the experience for young people to get to grips with the meaning of responsible freedom of expression.

4.9 ARTISTIC CREATIVITY

4.9.1 Introduction

Heins, in his book, *Sex, Sin and Blasphemy: A Guide to America's Censorship Wars*, (quoted by Marcus & Spitz 1996:20-23), states:

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

The very title of Heins' book is a pointer to the battle waged in American courts over censorship. Over the past thirty years it would seem that there has been a great shift in the American courts toward accepting the previously unacceptable. The definition of pornography appears to have become sufficiently blurred to let almost anything pass.

Heins offers a very broad definition of artistic creativity, but the key is whether such a definition is acceptable in the school context.

In the various countries under discussion there is a paucity of case law and what has been traced comes from the United States. There is a temptation to draw on freedom of expression cases involving *speech* and then extrapolate the findings to issues of art and artistic creativity in whatever narrow or broad

forms they may take. To do this would mean a failure to acknowledge the unique peculiarities of fine art, drama, poetry and poetic license, of photography and other media. It would also fail to acknowledge the unique contribution of human creativity.

However, the value of wider case law is to decide where the lines are drawn in terms of protection of young minds in the school setting, in terms of where the activity causes disturbance (in a broad sense of the word) to the school and its students, and where it runs counter to the function and purpose of such educational institutions.

It is essential to see the possible overlap this topic has with academic freedom, as set out in the sec. 4.10.

4.9.2 Art in the International Conventions

In the international context Article 19 of the UDHR states:

> (19) Everyone has the right to freedom of opinion and expression... and to *seek, receive, and impart* information *and ideas, through any media* and regardless of frontiers" (italics added).

Three other international conventions, the American Convention on Human Rights (see 2.3.3), the International Covenant on Civil and Political Rights (see 2.3.4) and the United Nations Convention on the Rights of the Child (see 2.3.7) make reference to freedom of expression "in the form of art".

The freedom of expression Article is very similar in each case and contains the same UDHR statement, "...freedom to seek, receive, impart information and ideas...", but all three conventions add, "...of all kinds...in writing or in print, in the form of art, or through other media..", and the Convention on the Rights of the Child adds, "...of the child's choice."

In effect the child has the right to freely "seek, receive, impart information and ideas in the form of art, or through other media of his [the child's] choice."

At face value such a statement could be read as giving licence to every form of artistic creativity, no matter how depraved it may be. This has to raise serious questions about the protection of children from harmful material. It also raises the question of what action the courts of signatory countries to the *Convention on the Rights of the Child* would feel able to take against a child/teenager engaging in 'undesirable' art which a community might see as 'pornographic'.

No freedom is unlimited. The *Convention on the Rights of the Child,* in Article 3, states that "in all actions concerning children...the best interests of the child will be a primary consideration". In the same Article, States are instructed to "ensure the child such protection and care as is necessary for his or her well being...". Further, in Article 13 (2) (b) one of the reasons for restrictions on freedom of expression is "the protection...of public health and morals".

Art and artistic creativity are open to very wide definitions and subjectivity is likely to play a big part in how any form of art is assessed. The term "other media" may, and probably does, include other artistic media beyond fine art, such as dance, drama, music, and photography.

4.9.3 Search for principles and guidelines

The lack of foreign case law in respect of art and artistic creativity in the school context makes it necessary to look beyond the school for principles and guidelines in other related cases.

The United States case of *Miller v California* (1973) 413 US 15 involved minors but not within the school setting. The court ruled that vulgarity and obscene expression was not protected and provided the following test,

(a) whether the average person, applying contemporary community

standards, would find the work, taken as a whole, appeals to prurient interests [indulgence of lewd ideas (Oxford Dictionary)];

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The use of the term *contemporary community standards* allows for changing standards and acceptability of the previously unacceptable.

The European Court of Human Rights in *Muller and others* 25/1986/123/174 (quoted by Oosthuizen & Russo 2001:262) stated:

> Any item is obscene which offends, in a manner that is difficult to accept, the sense of sexual propriety; the effect of the obscenity may be to arouse a normal person sexually or to disgust or repel him. The test of obscenity to be applied by the Court is whether the overall impression of the item or work causes moral offence to a person of ordinary sensitivity.

The above definition is problematic because of its broadness and ill defined terms such as "difficult to accept", "a normal person" and "person of ordinary sensitivity".

All of the above serves to highlight the great difficulty created by work which may be claimed to be art or artistic creativity. The imposing of limitations within the school context opens the door to possible legal challenges. The failure to limit and exercise control opens the school to legal challenges from another sector of the school community.

Two more recent United States cases have attracted attention. In *Boring v Buncombe Country Board of Education* (1998) 136 F.3d 364, the Court confirmed the action of a school board in transferring a high school drama teacher for her selection and use of a controversial play with her students. The

school administrators later decided the material was inappropriate for such students. In a similar case, *Lacks v Ferguson Reorganized School District R-2*, (1998) 147 F.3d 718, the court upheld the dismissal of a teacher for allowing students to use vulgar language in the context of creative, expressive assignments in her class (see 4.10.3.2 and 4.10.3.4 for further discussion of these two cases).

Judged on the differing rulings given by the various Circuit Courts in other types of cases, it is not possible to conclude that these cases are the bench mark for all United States schools.

4.9.4 Conclusions

Art and artistic creativity is likely to remain controversial, particularly if a school fails to have a clear, written policy and structures to which teachers must conform. But such policies may themselves interfere with the very freedom that needs to be protected and may equally infringe on the individual's academic freedom.

4.10 ACADEMIC FREEDOM

4.10.1 Defining the Right

What is academic freedom? In attempting to answer this question, Yudof (1987:858) refers to a quote by Berlin from Archilochus, namely that "[t]he fox knows many things, but the hedgehog knows one big thing".

Explaining the quote from the Greek poet, Berlin (1953:1) suggests that there are those who relate everything to a single vision, while others pursue many often seemingly unrelated and contradictory ends. Yudof (1987:858) suggests that "... in the case of academic freedom we must learn to tolerate a ... complex reality. We must learn to be foxes, striving to understand and identify the multiple strands of the concept".

There is no one definition of academic freedom but rather 'multiple strands' which include universities and schools, professors and lecturers, principals and teachers, university students and school pupils, university councils and school governors, lecturing and teaching.

Attempts to focus on a single strand is simplistic while the multiple focus leads to much blurring. What follows will touch on many of the strands but focus specifically on those related to schools.

Academic writers and commentators and the United States Supreme Court have tended to focus on one or a few strands. Even when the same strands are dealt with, there is disagreement. Metzgter (1988:1289) believes the United States Supreme Court has constitutionalized academic freedom without defining it. In contrast Rabban, quoted by Metzger (1988:1289), believes the Supreme Court has never made it clear whether academic freedom is a distinctive liberty or an extension of First Amendment rights. The same disagreement is found between Van Alstyne (1990:81) and Tribe (1988:812–813).

The problem is made more complicated by the fact that the phrase "academic freedom " appears in only one of the constitutions investigated, namely in the 1996 Constitution of South Africa (RSA 1996a). In certain other legal documents the two words are not used, but the wording used could legitimately be used to describe the particular phrase.

Article 19 of the UDHR states,

> Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

Section 5 (3) of German *Basic Law* states that "[a]rt and science, research and teaching shall be free. Freedom of teaching shall not absolve loyalty to the Constitution."

In the United States, academic freedom has been linked to First Amendment (freedom of speech) rights. It is, however, much more than freedom of speech but includes also freedom of thought, belief and opinion, and freedom to receive information and ideas and freedom to impart information, ideas, beliefs and opinions.

Many have tried to explain the term in many different ways. A few examples must suffice. Byrne (1989:261-262) describes academic speech as "the most important model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational." Byrne holds that the term has application only to universities, particularly the goals of 'disinterested scholarship and teaching'.

Pavela (quoted by Clarke 1999b:349) regarded the *pursuit of truth* as the critical element of academic freedom . The implication is one of research but also extended to teaching. Pavela's comment is critical for if the pursuit of truth is the essence, it assists in overcoming the view that such a right can easily become academic licence. The pursuit of truth would demand justification for findings, implying a considered, reasoned analysis done with utmost integrity, rather than personal but unsupported ideas being expressed as academic truth.

Milton, in *Areopigitica*, wrote as follows:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

Chafee (1956:102) wrote something similar.

> Those of us who believe that no idea is so sacred as to be immune from inquiry ought not to shrink from trying in the fire of discussion our cherished faith in the inestimable value of discussion.

Chafee describes here the oldest attack on open discussion, the assumption that such discussions are unnecessary because those in authority already know the truth.

Milton and Chafee, from different contexts and different centuries, both write of *free and open encounter* or *discussion*, words which have synonyms in research, inquiry and questioning, all key aspects of the concept of academic freedom.

Three terms widely used in referring to the value of freedom of expression are the *pursuit of truth, the political process* and *self-realisation.* The last mentioned has a special place in the value of academic freedom. Self-realisation would be a contradiction of a person whose views, opinions and beliefs are those imposed on him by others and not those arrived by personal decision on assessment of all the available evidence. Put differently, there must be a close relationship of self-realisation and academic freedom.

What follows is an overview of some of the history of academic freedom, specifically in the United States and, less so, in Canada. References to case law will reflect a continuum from agreement to diametrically opposite perspectives.

4.10.2 Academic Freedom : For Universities only, or also for Schools?

This is an ongoing debate and, for some, an unresolved debate. It is a fair generalisation that for most of the last century, academic freedom was perceived of as being relevant to and operative only in the universities. One of the reasons was the constant reference to words such as research and scholarship. It is conceded that a school does not have research as a prime focus nor can related scholarship of a high academic nature be closely linked to the school.

The American Association of University Professors (AAUP) believes that academic freedom belongs to "every academic and no one but an academic"

(Metzger 1988:1295). Byrne (1989:255) defines his reference to academic freedom as "a non-legal term referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching and governance". Schools have no place in his definition.

The AAUP defined the right as one "claimed by the accredited academic, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference ... " (Stuller 1998: 309).

Stuller is an academic who is strongly opposed to the idea of academic freedom having any place in a high school. He comments on the Court's reference in *Keyishian* that the classroom is 'peculiarly the market place of ideas' by saying that the court did not address the question of who gets to stock the shelves of the market (Stuller 1998:332). He states that the school is clearly not an open market as only licensed teachers may teach and their speech is an exercise of state power.

There are a range of academics and university personnel who side with Stuller, with the AAUP, and others in dismissing the schools' claim to academic freedom. Even certain court cases have supported their views. In *Miles v Denver Public School* (1991) 944 F.2d 773, 779, the court stated that "... case law does not support [the] position that a secondary school teacher has a constitutional right to academic freedom".

The perceived sharp dichotomy needs to be closely examined. The University is a place of young and not so young adult students and staffed by, generally, highly qualified academics. The staff have a dual function to lecture (teach) students *en route* to those students obtaining a tertiary qualification, and to deliver quality graduates. At the same time the staff must engage in research (the pursuit of truth) and publish their findings. Such research, by its very nature, can bring the researcher into conflict with established opinion. Any

restraint on research or publication of findings would have a 'chilling' effect. However, in reality, course content is not uncontrolled either by the university or by the demands of the society into which their graduates will be going.

Within the core content framework, the university staff member is not purely a transmitter of knowledge but responsible to produce students capable of applying their minds to thinking, reasoning and the pursuit of truth. But, there are course realities. In some fields of study (e.g. medicine) the knowledge base may form a higher percentage of the course than in other fields (e.g. philosophy).

The school displays a number of differences. Firstly, the student population covers a wide age and maturity range. Secondly, teaching staff are generally paid by the state and serve as state employees. Thirdly, schools have long been perceived of as places where knowledge is transmitted and where individuals are prepared for "participation as citizens'" and receive inculcation in "the fundamental values necessary to the maintenance of a democratic political system" [*Ambach v Norwick* (1979) 441 US 68,76-77]. The inculcation of community values is also referred to in *Pico* (see 4.10.5.3).

In *Moulleux v Kiley* (1971) 323 F. Supp. 1387,1392 a very harsh picture was drawn of the difference between schools and universities, as illustrated by the following extracts:

> Among secondary school teachers there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity ... [schools] concentrate on transmitting basic information ... and, to some extent, indoctrinating in the *mores* of the surrounding society ...

Silberman, (in Nahmod 1971:1062), provides a picture of the classroom. It is may be a picture of *some* classrooms but it would be most unfair to describe all school classrooms as such.

> [S]tudents at present are hardly permitted, let alone encouraged, to confront either their teachers or themselves. They are given little opportunity, and no reason, to develop resolute ideas of their own about what they should learn, and in most schools they are actively discouraged from trying to test those ideas against their teachers'. By and large they are expected to learn what the faculty wants them to learn, in the way the faculty wants them to learn it, and no nonsense, please. Freedom to explore, to test one's ideas as a means of finding out who one is and what one believes - these are luxuries a well-run school cannot afford. As one student summed it up, "It's all a question of what they want to produce, not what we want to become." The result, at best, is to persuade students that knowledge has no relation to them, no relevance for the kinds of lives they will lead; at worst, it produces the kind of alienation, the rejection of authority, the rejection of the whole notion of culture, of discipline and learning, with which we are contending.

It is essential to critically examine this perceived dichotomy between universities and schools. The sharp dichotomy is flawed in the drawing of a definitive line between the school and university. It is easy to understand the public perception of education as a set of boxes labelled 'elementary', 'middle' and 'high' school and then the box labelled 'university'. However, education is a continuum in which the physical division of students places them in different facilities. The age differences and years along the continuum gives rise to the need for different curricula, materials and methodology. The differing curricula, materials and methodology extends from Grade One in the elementary school to the end of the continuum at university post doctorate level.

In developing a continuum view, the problems arising from confining academic freedom to a single box in the system are highlighted. Every year further along the continuum is dependent on the development which occurs in the previous year. The final year high school student is not one person in that year and transformed into another person in the next year as a first year student at university. The university itself has 'sub-boxes' from First Year to Doctorate level.

Where school teachers are confined to the transmission of knowledge, restricted to a single text book, and forbidden to venture outside the prescribed curriculum or into anything controversial in content or methodology, their academic freedom has little or no meaning. Likewise, where high school students are, as Silberman suggests, denied the opportunity to develop critical thinking and to be exposed to the market place of ideas, or to raise pertinent, if controversial, issues, or write essays or articles which conflict with school policy or the establishment, then their academic freedom, likewise, has little or no meaning. Reasoning and debate in the 'search for truth', for both teacher and student, is thus deeply 'chilled' if not frozen.

While the function of a school has traditionally been viewed in terms of transmission rather than discovery, Lessin (1969:818) points out that the academic freedom of teachers and students to inquire, study and evaluate has been defended by the Courts. In support of this view, Lessin referred to the Court decision in *Sweezy v New Hampshire* (1957) 354 US 234, 250 where the court referred to the statement on academic freedom by leading South African academics (see 6.4.7.1).

Academic freedom is not a safe haven from controversy but a ship on a journey in often stormy seas. But, academic freedom is equally not licence (see 4.10.4). It will always have limitations.

Academic freedom is also not a protection for incompetent teachers. Clarke (1999a:90-91) quotes Brooks as observing that "academic freedom, as a theory and a right, assumes that the scholar is both competent and active". The issue is well illustrated by *McDonald v Red Deer (County No. 23)* (1986) 44 Alta. L.R. (2d) 134 (Alta Arb.Bd.). McDonald was evaluated by the Board 26 times in four years, and the Board indicated that he failed to plan his lessons, failed to teach effectively, failed to differentiate between groups of students with differing abilities, and used teaching practices contrary to the Board's policy. McDonald used worksheets as a primary teaching method and used too much teaching time reviewing worksheets, while there was no

evidence of his looking at students' books. Despite warnings and opportunities to improve, he failed to improve and his contract was terminated.

Clarke suggests that teachers' academic freedom will not be threatened when asked to comply with *bona fide* terms and conditions of their employment, but academic freedom cannot be advanced as a defence for incompetent teaching.

Academic freedom in the school is "a complex reality ... with multiple strands" (Yudof 1987:858). These multiple strands concern what is taught and learnt, its relevance and relation to prescribed curriculum and the right to go beyond the prescriptions. Further it concerns access to materials, including a range of texts, and the right of a teacher to use various methodologies and student to be exposed to these differing methodologies.

Still further, the concept of academic freedom raises the issue of the right of teachers to publicly criticise their employers and the educational system and the right of students to publicly criticise teachers, teaching, the system and the school. And with all of this, is a question of the right of teachers to strongly disagree with one another in terms of intramural speech.

Section 4.10.5 examines the possible extent and boundaries and limitations on the claim to academic freedom in terms of the right to make public criticism of employers or the education system, or the right to openly disagree with colleagues in an intra-mural situation.

4.10.3 Academic Freedom in the Schools

History is filled with incidents of the persecution of great thinkers and teachers who shared and taught that which conflicted with accepted societal values of the time. Stuller (1998:307) refers to Socrates being put to death for raising difficult questions, and Galileo who was brought before the Inquisition for accurately reporting what he saw through a telescope. Torrance (1985:5-11), describing the most essential common characteristics of great teachers from

history, says that such teachers "... are continually in danger of 'crucifixion'. This, in fact, was the fate of two of history's greatest teachers – Socrates and Jesus Christ".

Lack of conformity and resultant harassment is not confined to ancient history. The past century too has had its share of victims, at times consisting simply of direct restrictions on teacher rights in the classroom while, at other times it involved dismissal for non-conformity to rules which reflected a very narrow perspective on certain beliefs.

4.10.3.1 ACADEMIC FREEDOM AND THE SUBJECT MATTER

The following three American cases dating from 1927, 1968 and 1987, all relating to the teaching of creation, serve to illustrate both the lack of academic freedom and the handling of non-conformists:

In 1927 John Scopes was tried in Tennessee for teaching "any theory that denied the story of divine creation of man as taught in the Bible". The Court stated that "[t]he Statute before us ... is a declaration of a master as to the character of the work the master's servant shall, or rather shall not, perform".

Scopes had dared to present Darwinian theory to his high school class and, as a result, was dismissed. The judgement was reminiscent of an 1892 judgement in Missouri (*McAuliff v Mayor of New Bedford* (1892) 29 NE 517, 518) where the Court stated the following:

> There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech. The servant cannot complain, as he takes the employment on the terms that are offered him.

Scopes' appealed [*Scopes v State* (1927) 154 Tenn. 105, 289 SW 363] and his conviction was set aside on a technicality. He clearly enjoyed no freedom of speech in the classroom, let alone a fragment of academic freedom.

In 1968 Susan Epperson faced an almost identical charge to that of Scopes, based on 1928 Arkansas legislation. Epperson held a Masters Degree in Zoology and taught 10th Grade Biology. At the start of 1965 the new text book, approved by the school administration contained a chapter on "the theory about the origin ... of man from a lower form of animal". She was supposed to use the new book, but to do so would mean teaching the statutorily condemned chapter and facing a criminal prosecution and dismissal.

Miss Epperson taught the chapter and was dismissed. Her dismissal was first overturned by the State Chancery and then reinstated by the Arkansas Supreme Court before going on appeal to the United States Supreme Court in 1968 [*Epperson v Arkansas* (1968) 393 US 97]. This was an opportunity for the Supreme Court to give a clear ruling on a teacher's academic freedom and freedom of speech but it chose instead to overturn the dismissal on the grounds of the establishment clause (the State would be imposing a particular religious teaching by refusing to allow the particular chapter to be taught) (Van Alstyne 1990:28).

The "creationist versus evolution" saga reappeared again in 1982 when the Louisiana legislature insisted that if "evolution science" was taught, the teacher would have to also teach "creation science" with the same vigour and attention. It was an instruction to 'teach both or teach neither'. Louisiana defended the approach as supporting academic freedom because students would hear both sides evenly presented. The legislation was challenged and overturned and then went on appeal to the United States Supreme Court [*Edwards v Aguillard* (1987) 482 US 578].

The Supreme Court rejected the legislation on the grounds of the establishment clause (as in Epperson). The Court accepted that "the Act's stated purpose (was) to protect academic freedom" (at 586) but the term might, in common terms, be understood to enhance teachers' freedom to teach what they will, which the Act did not in fact do.

There are conflicting issues in the full judgement. There is no doubt that religious views played a role in the legislation.

However, it is difficult to know how academic freedom is enhanced by allowing a teacher to teach only one theory. If students are to be encouraged to "search for truth", exposure to different perspectives, instead of being a captive audience to one perspective, would seem essential if students' academic freedom is to be enhanced. In essence, if the original legislation had merely insisted that students be presented with 'differing theories of creation', the same purpose might have been achieved.

A 60 year battle over one particular approach to one aspect of biology indicates something of the difficulty of ensuring the ideal of academic freedom in the school classroom. Is any teacher totally neutral in controversial issues? Should he/she be neutral? Is there not always an element of bias? More critical is the need for teachers to both be open to different perspectives and to ensure that their students are exposed to and grapple with those differences.

The term "academic freedom" was first used in the United States Supreme Court in *Adler v Board of Education* (1952) 342 US 485. Justice Douglas used the term in his dissent over the court upholding the dismissal of a teacher under New York's Feinberg Law. (The Feinberg Law, a response to fear of communism and its teaching after the 2nd World War, allowed for any person in public employment, including teachers, to be disqualified and removed for being members of a subversive organisation or for not taking a 'loyalty oath').

In his dissent, Justice Douglas said:

> The Constitution guarantees freedom of thought and expression to everyone in our society ... none needs it more than the teacher.
>
> The public school is in most respects the cradle of our democracy ... New York's Feinberg Law ... proceeds on a principle repugnant by our society – guilty by association (at 508).

> The very threat of such a procedure is certain to raise havoc with academic freedom ... turns the school into a spying project (at 509).
>
> A pall is cast over the classroom. There can be no real academic freedom in that environment ... no exercise of free intellect. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A descending dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin (at 510).
>
> A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction (at 511).

This dissent gives pointers to some of the meaning of academic freedom in the school – freedom of thought, the exercise of free intellect, stimulating adventurous thinking, free of deadening dogma, free inquiry, the pursuit of knowledge, in-depth discussion, and versatility. Such academic freedom for students requires the same freedom for the students' teachers.

Between *Scopes* and *Aguillard* there were many other judgements with relevance to academic freedom. Some were strongly pro-academic freedom and others far less enthusiastic.

One of the most strongly pro-academic freedom judgements comes from *Keyishian v Board of Regents* (1967) 385 US 589. The judgement, which overturned the Feinberg Law, has application to both university and school teachers and the following quotation from it (at 603) has been quoted in many subsequent cases over the years.

> Our nation is deeply committed to safeguarding academic freedom and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'

> [*Shelton v Tucker* (1960) 364 U.S. 479, 487]. The classroom is peculiarly 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 'out of a multitude of tongues (rather) than through any kind of authoritative selection (*U.S. v Associated Press* 52 F. Supp. 362, 372).

Beyond the 'content' there is the question of the right of a teacher to introduce other materials to support his teaching of a prescribed topic. This issue is focussed on in the next section.

4.10.3.2 EXPOSURE TO DIFFERENT MATERIALS IN THE CLASSROOM

The following two cases provide an insight into the teacher's right to select material he/she believes to be suitable for the particular class.

The case of *Keefe v Geanakos* (1969) 418 F.2d 359, concerned a teacher of a senior high school class who selected an article *The Young and the Old* for his students to study. The article was described as concerning 'dissent, protest, radicalism and revolt' and as containing 'a vulgar term for an incestuous son'. The teacher had also offered an alternative assignment for anyone who was unhappy with the article. Further, he had commented on the article, the use of the vulgar term and the reasons for its use in the article. He was instructed by his superiors not to discuss the term again, refused, and was suspended. The Court ruled in favour of the teacher because the article was related to a curriculum assignment, he explained the vulgar term, and noted that the term was to be found in several books freely available in the school library.

The judgement points to several key issues. The article was related to curriculum work and handled with sensitivity. This was a class of senior high school students whom one cannot protect from every offending word. The school can surely not be seen as a sterile hospital ward when preparing young people for the world outside - and to which the television is more forcibly exposing them everyday.

In a similar case of *Parducci v Rutland* (1970) 316 F. Supp 352 (M.D. Ala.) Parducci used the short story *Welcome to the Monkey House* by Kurt Vonnegut, a prominent contemporary writer, with her junior English classes at Jeffersen Davis High School, as an example of the short story in Western literature. Several disgruntled parents had phoned the school. Ms Parducci's principal and the associate superintendent of the school system ordered her not to teach the story again, describing the story as "literary garbage" and as condoning killing off the elderly and free sex. They had received complaints from parents. Ms Parducci refused, stating that she was bewildered by their interpretation of, and attitude to the story. She indicated that she still considered it a good literary work and that she had a professional obligation to teach the story.

Two weeks later she was dismissed by the school board for "insubordination" and for assigning material which had a "disruptive" effect on the school.

At no point was Ms Parducci's teaching ability in question. The Court examined the literary merit of the story and compared some of the supposed offending sections with Shakespeare's work and Pope's *Rape of the Lock* and found it no more vivid than either. Further, none of the published reviews of the short story had found it offensive.

The court stated the following:

> Plaintiff asserts in her complaint that ... her dismissal violated for First Amendment right to academic freedom.
>
> That teachers are entitled to First Amendment freedoms is an issue no longer in dispute ...
>
> Although academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court has on numerous occasions emphasised that the right to teach, to inquire, to evaluate and to study is fundamental to democratic society... .

> Furthermore, the safeguards of the First Amendment will quickly be brought into play to protect the right of academic freedom because any unwarranted invasion of this right will tend to have a chilling effect on the exercise of the right by other teachers.

The Court drew on a number of other cases in supporting its judgement. At the same time it stated as follows:

> The right to academic freedom ... is not absolute but must be balanced against the competing interests of society. This court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from *any* form of extreme propagandism in the classroom.

The Court then examined the guidelines for balancing of interests, referring to *Shelton* and *Tinker,* and also *Ginsberg v New York* (1968) 390 US 629.

Referring to *Shelton,* the court noted that,

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds towards the society in which they live. In this the state has a vital interest.

The court, referred to an observation by the *Tinker* court that in order for the State to restrict the First Amendment right of a student, it must demonstrate that the forbidden conduct would

> *materially* and *substantially* interfere with the requirements of appropriate discipline in the operation of the school... [and warned the students that] conduct... which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunised by the constitutional guarantee of freedom of speech.

The court then examined the issue of whether *Welcome to the Monkey House* was appropriate reading for High School juniors and commented as follows,

> While the story contains several vulgar terms and a reference to an involuntary act of sexual intercourse, the Court, having read the story very carefully, can

> find nothing that would render it obscene, either under the standards of *Roth v United States* (1957) 354 US 476, or under the stricter standards for minors set forth in *Ginsberg v New York* (1968) 390 US 629.

The court used the above to question whether (1) the story was inappropriate for the age of the students, and (2) the assignment created a significant disruption to the educational processes of the school.

The Court concluded that the authorities had failed to prove either of these two tests.

In *Parducci* the Court quoted the following from *Keefe v Geanakos* (1969) 418 F.2d 359, at 362: "With the greatest respect to such parents, their sensibilities are not the full measure of what is proper education".

Suffice to say that if the professional teacher must bow to every whim and fancy or objection of parents, administrators or board members, the claim to be a professional will be negated and *academic freedom* will be meaningless words.

The Court also heard that the school had no enunciated policy governing the selection and assignment of outside material but only vague standards or an absence of standards. The school's recommended reading list includes *Catcher in the Rye* which has far more descriptive and offensive language, *Brave New World* and *1984,* all with provocative and sophisticated themes.

Ms Parducci's dismissal was described as arbitrary and grossly unfair. She was reinstated with full pay for her period of "illegal suspension" and all benefits, rights and privileges attached to her status before the suspension.

Nahmod (1971:1039) and Kirp and Yudof (1974:206) raised questions about parents complaints about the literature studied. Can a minority of parents who object, force a teacher to comply with their requests? What of the vast

majority who are happy? What if parents question the relevance of, for example, the work of Dickens or Shakespeare?

Parent complaints about books used in class are highlighted in other cases which include *Harris v Mechanicville Central School District* (1978) 408 N.Y.S. 2d 384 where the book was *Catcher in the Rye,* in *Mozert v Hawkins County Public Schools* (1984) 579 F.Supp 1051 where a parent objected to the use of the *Holt Basic Readers* because some ideas conflicted with religious beliefs, and in *Grove v Mead School District No. 354* (1985) 753 F.2d 1528, the book concerned being *The Learning Tree.* As in *Keefe,* the student was immediately given an alternative assignment and permitted to avoid the discussions on the particular book.

Parental objections highlight the clash of parental views, coming from a particular role in the life of a child, and the professional opinion of teachers, who deal with the same child from a different perspective.

In examining *Parducci* it is worth considering what the impact of a decision *against* Ms Parducci would have meant. A *reversed* decision would have meant a message to teachers that

- they have no right to make strictly academic decisions;
- the principal and school boards members are the best judges of literature even if they are not English teachers;
- views of parents on academic matters, must be seen as more important than views of highly trained teachers;
- the school board alone controls what occurs in the classroom; teachers are servants (or pawns) in the system;
- the school is *not* a place for preparing high school students for a world of multiple opinions on multiple issues.

The Court had no need to answer such questions because their finding was in favour of Ms Parducci. She had defended her actions on sound academic merits.

It is not just books that have earned the wrath of principals, School Boards and/or parents. *Fowler v Board of Education of Lincoln County, Kentucky No. 84 - 224* Slip op. (D.Ky July 25 1985) concerned the dismissal of a teacher with 14 years experience and an excellent record including winning Kentucky's 'Teacher of the Year' on several occasions. Her offence was to show, at the students' request, the video *Pink Floyd - The Wall* on the last day of the school year. There was no school policy, regulation or directive to teachers on procedures to be followed in showing such videos, such as prior approval or previewing before showing.

The Court ruled in the teacher's favour and awarded substantial damages because the School Board's only reason for dismissal was their personal dislike of some of the ideas in the video (Bosmajian 1999:196).

Zirkel (1999:16-19) refers to a similar case of *Board of Education v Wilder* (1998) 960 F.2d 695 (Colo.), Wilder showed his 12th Grade logic and debate class the film *1900* which deals with the rise of fascism from 1900 through to the 2nd World War. It is "R" rated, not for showing to children under 17 years. The class were all 17 or 18 years old. He also offered students an alternative assignment if they felt uncomfortable with the video and topic. The School District had a "controversial learning resources" policy but the Principal had not provided the teacher with a copy or discussed the matter with his staff. Mr Wilder was dismissed for showing the "R" rated movie in contravention of the controversial resources policy, and appealed. The appeal was upheld, but the School Board appealed the lower court's decision and the Colorado Supreme Court upheld the dismissal with a 4 - 3 split decision.

The above cases again reveal the uncertainty of legal decision making. This very uncertainty would seem to be a recipe for 'chilling' teacher's professional activities beyond the prescribed curriculum and texts.

Webb v Lake Miles Community School District (1972) 344 F.Supp 791 saw the Court overturn the dismissal of a drama teacher who had for produced a slightly controversial play. The Court stated that,

> all the evidence before the Court indicates that Miss Webb was fired in direct reprisal to her proper exercise of her academic freedom to employ methods of teaching related to the subject mater she was employed to teach.

United States literature and law reports abound with similar cases but lack consistency. However there appear to be lessons to be learnt for any education system.

If the school is not to be a place of sterility and conformity to norms prescribed by officials then various forms of censorship must be resisted. The interference by parents, fellow teachers, officials and others, unless it is for proven substantive reasons which are for the legitimate protection of school students, must not be tolerated. Likewise, the selection of text books with a deliberate bias is anathema and diametrically opposed to the exercise of academic freedom.

To censor, allow unwarranted outside interference, and select texts with deliberate bias is to give the lie to proclaimed democracy, constitutional rights and values. To teach one thing and experience the opposite is to undermine the very fundamentals of a liberal education.

Strope (1999:14-16), with special reference to *Lacks v Ferguson Reorganised District R-2* (1998) 147 F.3d 718, examines the changed perspective courts have developed to academic freedom in schools in more recent years. Lacks was a highly regarded teacher who later was accused of allowing profanity in plays written by her students, most of whom were students labelled "at risk" (or

'problem students'). Ignoring *Keyishian* (1967) and *Keefe* (1969), and *Molleaux v Kiley* (1971) where Mailloux's dismissal was overturned on grounds of "his right to some measure of academic freedom in his classroom", the Court upheld the dismissal of Lacks, using *Bethel v Fraser* (1986) and *Hazlewood* (1988) as the basis for their decision. Strope believes Courts have shifted their views from support of teacher's academic freedom to support of school administrator's decisions. Strope concludes "...if academic freedom is not dead today, then it is at death's door."

At best, the United States court decisions remain confusing.

4.10.3.3 ADDITIONAL MATERIALS AND THEIR CURRICULUM RELEVANCE

Academic freedom has limitations. Teachers cannot simply introduce any material into any classroom and do as they please. It is clear that a broad curriculum is a fundamental part of any educational institution, although the extent of flexibility may vary. When additional material or discussion takes place, two questions are often asked. Was the 'extra' relevant to the prescribed curriculum? Was the presentation 'balanced' or 'one-sided'?

The first question carries a dangerous overtone. In judging relevance there is the danger of an assumption that educational offerings can all be put in neat little packages with labels and if the extra material used in the classroom or the informal discussion pursued does not fit into the neat package, it cannot be accepted. Nahmod (1971:1046) states that

> A strict application of relevance would seem to assume that there are separate fields or bodies of knowledge which can be taught independently.

The reality is that it is in the informal discussion and extras that some of the most important learning takes place. For someone from outside to judge the "relevance" of what occurs would be exceedingly difficult.

Students in high schools know that adults, including their teachers, have differing opinions on many matters. To prevent them hearing their teachers' opinions, even on controversial issues, will inhibit a classroom and make discussion sterile. Further, the lack of openness from a teacher may inhibit students from expressing their own views.

To stifle classroom discussion by imposing a strict application of a 'relevance' rule is to stifle the academic freedom of both teacher and student, imposing from outside not only a broad curriculum but imposing what may be said formally and informally. The classroom as a "market place of ideas" gives way to pre-selected academic prescriptions in exact dosages with no access to generics or supplements. In such an atmosphere students may well perceive the classroom as far removed from their real world. In *Wiemann v Updegraff* (1952) 344 US 183, at 195, the court stated the following:

> Unwarranted inhibition on the free spirit of teachers... has an unmistakable tendency to dull that free play of spirit which all teachers ought especially to cultivate and practice.

The concept of balance is an essential element. *Keegstra* (see 4.10.4) is an example of extreme one-sidedness. In presenting both the prescribed curriculum and 'extras', balance is important and needs to be encouraged. Students need to engage in open discussion, questioning and assessment. This is to ensure that 'extras' do not become the imposition of a teacher's pet theories, biases, or intimidation to which students must unthinkingly conform.

4.10.3.4 ACADEMIC FREEDOM AND TEACHING METHODOLOGY

In 1971 Cooper, a high school teacher was dismissed because she used unique in-class discussions, known as "Sunshine stimulation" which elicited strong emotional responses from her students on racial issues. She was later told "not to discuss Blacks in American history" and that "nothing controversial should be discussed in the classroom". Her teaching contract was not renewed at the end of that year. A long legal battle began, concluding in

Kingsville Independent School District v Cooper (1980) 611 F.2d 1109, where the court upheld the rights of teachers to choose their method of presentation unless the method could clearly be shown to have caused substantial disruption which outweighed the teaching value of that methodological approach. Ms Cooper was reinstated, with full pay for the intervening years and legal costs paid by the School District.

Academic freedom and methodology of presentation would seem to be very closely linked. For professional teachers, in presenting academic material, their academic integrity is at stake if they are not allowed to decide how best particular material should be presented. Prescription of one method of approach denies a teacher the freedom to decide on the most suitable method related to the particular material.

Reflecting again the inconsistency of the treatment given to teachers, in a more recent California case, a teacher's appeal against her forced transfer to another school was turned down [*Boring v Buncombe Community School District*] (1998) US CA. (4th Circuit) No. 95- 2593]. The Buncombe County Board of Education had a "controversial materials policy." She had failed to follow the policy in producing a play with four of her advanced acting class. Circuit Judge Mortz (quoted by Clarke 1999b: 334) offered a strong dissent in stating that as a teacher

> ... [h]er speech is neither ordinary employee work place speech nor common debate. Any attempt to force into either ... ignores the essence of teaching - to educate, enlighten, inspire.

Russo and Delon (1999:25) comment on *Lacks* (4.10.3.2) and *Boring* as follows:

> It may be that in no time in U.S. history has greater confusion existed over proper standards of human conduct and values. Children today are bombarded with movies, television shows, and music and even news broadcasts that depict and sometimes seen to advocate behaviour that only a

> generation ago would have been considered shocking and unacceptable. In fact, the language used by television and parroted by teenagers and younger children in everyday conversation often goes far beyond their parents in vulgarity and obscenity.

This comment presents the dilemma faced by schools over ethical standards. There is a *real world* from which young people come. Ms Boring was faced with a senior class of advanced drama students. The play was about a dysfunctional family consisting of a divorced mother and three daughters, one a lesbian and another pregnant. Does a teacher go ahead with a *real world* play or an artificial *peaches and cream* production? The dilemma remains whether to prepare adolescents for their real world or attempt to teach in a way which attempts to deny the harshness of the world from which they come. Ms Boring chose the former... and paid a heavy price of being transferred.

In British and New Zealand literature there appears to be little or no reference to academic freedom in the school. However, Walsh (1997:57) points to a potential academic freedom issue of what can and can't be taught or openly discussed in New Zealand schools. He simply says, "...some schools...might not wish pupils to debate subjects such as homosexuality but they don't know how they stand in law now".

The issue of academic freedom, as Yudof (1987:858) stated, is made up of many strands. Within those strands there have been court decisions and writings of academics which point to the widely differing perspectives on the extent and the place of the right. Questions of materials and methodology in the classroom illustrate again those differing perspectives.

4.10.3.5 THE LIBRARY AS A SOURCE OF EXTRA MATERIALS

In terms of academic freedom for both teachers and students, the library is a critical source of information, ideas and opinions. The selection of books and the right of an outside authority to order the removal of books from library shelves thus becomes an issue of great importance.

The American case of *Board of Education v Pico* (1982) 457 US 853 concerns an order given by the Board to remove certain books from high school and junior high school libraries. A conservative organisation, "Parents of New York United", had supplied the Board with a list of books which they regarded as objectionable and improper for school students.

The Board gave an unofficial order to remove ten such titles and appointed a Book Review Committee. The Committee reported that only two of the ten should be removed but the Board rejected the findings, without reason, and returned only one of the ten to the shelves.

In the judgement the court stated, (at 862) that "... the only books at issue in this case are library books, books that by their nature are optional rather than required reading.".

Citing *Barnette, Tinker* and *Terminiello,* the Court pointed to the requirement that the Board act within the Bill of Rights and that "the Constitution demands that risks be taken in avoiding regimentation" [*Terminiello v Chicago* (1949) 337 US 1]. Further the Court expressed (at 866) the view that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library". Citing *First National Bank v Bellotti*, the court described the First Amendment as not only having a role in "fostering individual self-expression but also ... a role in affording the public access to discussion, debate, and the dissemination of information and ideas".

Drawing on a wide range of cases the Court showed the crucial importance of school libraries as a place of knowledge and where students can "remain free to inquire, to study, to evaluate, to gain new maturity and understanding" (from *Keyishian)* and, further quoted from *Right to Read Defense Committee v School Committee* (1978) 454 F. Supp. 703,715 (Mass.), that a school library is a place where

> ...a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum ... [T]he student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.

The Court ruled against the Board of Education's right to remove books from school libraries in view of their failure to apply acceptable criteria or legitimate reasons in reaching such a decision.

Board of Education v Pico (1982) provides a clear statement on the value of the school library and provides a great measure of protection against arbitrary removal of books.

It is not only conservative organisations that object to library books. Individual parents have put pressures on schools and some schools have given way to pacify those parents. In *Sheck v Bowleyville School Committee* (1982) 530 F.Supp. 679 the school committee removed *365 Days* from the school library and banned students from possessing a copy of the book, a compilation of non-fictional Vietnam war accounts. The ban extended to having a copy anywhere on the school property or on school buses. The book had already been borrowed from the school library on 32 occasions before a parent lodged a complaint about the language in the book.

The Court ruled against the school committee who failed to explain why the book was considered harmful. Their action was declared overbroad and unconstitutional.

The library plays a vital role in ensuring the availability of and access to materials and other resources which allow the student the opportunity to exercise his academic freedom in the High School. Where schools have a wide age range of students it is very difficult to "age restrict" what students read in the library. Such books are just as likely to be available in community libraries. The banning or forced removal of books, as a result of a specific complaint by an individual or small group of parents who may be offended,

seems to fly in the face of academic freedom and freedom of expression in the sense of "the right to freely receive information".

4.10.3.6 ACADEMIC FREEDOM AND THE RIGHT NOT TO EXPRESS WHAT ONE DOES NOT BELIEVE

A different aspect of academic freedom is found in a case which deals with 'freedom not to express what one does not believe' (Kirp & Yudof 1974: 113). Early in the 2nd World War period, the West Virginia Board of Education ordered that teachers and students should regularly be

> ...required to participate in honouring the nation represented by the flag; provided, however, that refusal to salute the flag be regarded as an act of insubordination, and shall be dealt with accordingly.

Effectively, to "be dealt with" meant dismissal or expulsion.

While saluting the flag, teachers and students were required to pledge an oath of allegiance.

West Virginia Board of Education v Barnette (1943) 319 U.S. 624, concerns an appeal by a Jehovah's Witness family whose religious views, based on the Biblical passage from Exodus 20 v 4-5, saw the flag ceremony as bowing down to a graven image. Refusal to salute the flag or recite the oath of allegiance did not interfere with any other person's rights. The pupil simply stood silently while others carried out the ceremony.

The Court pointed out that the case concerned a state demand on a pupil to declare a belief whether such belief was held or not. The Constitution, it said, was to protect citizens "against the state itself and all of its creatures – boards of education not excepted". The Court stated further,

> that they [the school authorities] are educating the young for citizenship [requires] scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount

> important principles of our government as mere platitudes... we apply the limits of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization ...
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion ... the action of the local authorities transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Barnette is a freedom of expression case extended to freedom not to express what one does not believe. But the case raises a number of questions related to academic freedom. "Belief" and academic freedom are intertwined. To be forced to teach as truth what one does not believe, or forced to give back in exam what one does not believe, has similarities to the action required of *Barnette* (see also *Keegstra,* 4.10.4).

However, the teacher is not a free agent. He is employed to teach a curriculum prescribed by an external authority. Likewise the student has examinations to pass. Equally the student needs protection from dominant fanatics who use their classrooms to portray their views as "truth" (see *Keegstra,* 4.10.4) and from state authorities who assign single text books to be taught as "truth" but which contain one sided and often unsubstantiated opinions.

Barnette chose to stand silent and not to express what he did not believe. But one must ask what Barnette's position would have been if in an exam he was required to answer the following: "Explain the positive value of the flag salute and pledge in developing national unity in the United States".

Such a task is loaded and suggests the regurgitation of a particular, expected response. Genuine academic freedom must entitle the student to present his

own reasoned beliefs without fear of being penalised for views not in tune with the teacher or textbook.

The above would be equally problematic for a teacher whose beliefs differed but was forced to set such a task and mark according to a pre-set memorandum.

Barnette was both a freedom of expression and freedom of religion issue but the judgement extends the issue. Real academic freedom is the antithesis of imposed belief which borders on indoctrination. Barnette was told to conform to a ceremony with no option and to express a belief which he not only did not hold but was contrary and the opposite of his religious beliefs. Justice Jackson, in *Barnette* remarked that, "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard".

Academic freedom relates strongly both to content and methodology, the latter being the subject of a different court judgement discussed below.

4.10.3.7 WHAT IS TAUGHT AND HOW IT IS TAUGHT IN CLASSROOMS - A SUMMARY

The *Epperson* case (see 4.10.3.1) is a fine example of the right of a teacher to teach a theory held too contentious by administrators and beyond the prescribed curriculum. But it was equally the right of Susan Epperson's students to be exposed to alternative theories and apply their intellect to the differences. In contrast *Keegstra* (see 4.10.4) provides an example of abuse of a teaching position to present one view and refuse to expose students to other views or allow others to be raised. In *Kingsville Independent School District v Cooper* (see 4.10.3.4) the right of using different, if controversial methodologies is supported. These methodologies caused and allowed students to engage in sharp reactions. Instead of passive recipients of transmitted knowledge, Cooper had engaged and emotionally involved students. By not engaging in the said methodology Miss Cooper's classroom

would "perhaps [have been] a peaceful place, ... but also a sterile one" (a line from an unrelated 1961 AAUP report). However, *Lacks* and *Boring* (see 4.10.3.2 and 4.10.3.4) provides a sharply different picture of lack of responsible professional choice.

However, uncontrolled choice can lead to abuse of professional freedom, as is demonstrated in the next section.

4.10.4 Academic Freedom Abused

Teaching can play an extremely positive role in the lives of a teacher's students but it can also be a vehicle for both subtle and blatant indoctrination. The very nature of a teacher's position and his power to influence for good, can be abused to achieve other ends as he takes advantage of that position of trust. The Canadian case of *Keegstra* serves to best illustrate such abuse of position and of students by a process of "unification of opinion" as a form of indoctrination (see also 3.3.2).

Keegstra clearly illustrated the statement by Yudof (1987: 865) that "[t]he power to teach, inform and lead is also the power to indoctrinate, distort judgement ...". He did not expose his students to other theories of history (Clarke 1995:6).

Keegstra refused to abide by curriculum guidelines, including one from the Superintendent of Education which included the following (quoted by Clarke 1999a: 94),

> I am not giving you this directive to muzzle your academic freedom or to limit your intellectual integrity, but simply to insist that all sides of an historical question must be presented in as unbiased a way as possible, so that students can judge contradictory points for themselves.

Over the next thirteen years Keegstra was the focus of legal battles at various levels of the judicial system, starting with his appeal against dismissal in

Keegstra v Lacombe County Board of Education [(1983) 25 Alta. L.R. (2d) 370].

In the judgement, the judge (quoted by Clarke 1999a:94) stated,

> While the appellant may have prefaced his presentation of the material with a general statement that these were only theories ... students did not have ... any contrary views or contrary source material which may have led them to conclude that the theories ... were in error. Lack of opposing views ... the appellant's assertion of his personal belief based on research of the accuracy ... of the information, led to acceptance by students of the information as historically accurate and as fact. This is clear from evidence of Paul Maddox ... that he and his fellow students believed the appellant and did not question the accuracy or truth of the information and facts presented to them.

The key element according to Hare [quoted by Clarke (1999a:95)] is that "Keegstra cut the ground from under the feet of any opposition by making his theory immune to counter evidence".

Given the above, students who raised an objection or presented a reasoned alternative felt the scorn of a powerful and influential teacher, and, at times, even their own class mates. In addition they received a failing mark if they expressed in an exam views which differed from those of Keegstra.

While Keegstra was convicted under the Canadian Criminal Code Sec. 319 (2), for wilfully promoting hatred against an identifiable group, here the value of *Keegstra* lies in the issues it raises about a teacher and students' academic freedom.

What Keegstra displayed was a failure in his responsibility to employ a critical approach to material and to develop in his students a critical thinking skill. It is not necessarily the controversial theories which were the problem but his failure to present them as theory and to offer alternative theories. The case raised issues of drawing lines between challenging students to think about alternatives and blatant indoctrination. Keegstra engaged in 'academic licence'

and indoctrination. It seems clear that by using low grades to show his displeasure with those who held other points of view, Keegstra displayed the antithesis of academic freedom. His case helps in both defining academic freedom and in defining its limits.

While Keegstra displayed a blatant disregard for alternatives, similar, less obvious indoctrination is possible under a state system of education. As reviewed earlier, *Scopes* and *Epperson* concerned the state's refusal to allow alternative scientific theories to be presented. The prescribing of a single text book with a one-sided view differs from *Keegstra* only in degree.

Keegstra also raises the issue of students' academic freedom. As a captive audience they had a right to protection from indoctrination. Their right to debate and challenge with alternative viewpoints was squashed and they were denied the right to develop and exercise critical thinking and engage in the 'search for truth' by being exposed to the 'market place of ideas'. Moshman, (in Clarick 1990:725), suggests that research on intellectual development reveals the crucial importance of "exposure to diverse points of view and encouragement to form, express and discuss one's opinions".

Restriction of a teacher's academic freedom or a teacher's abuse of his position to indoctrinate, both offend and deprive the student of his academic freedom and intellectual development.

Keegstra focussed heavily on the content of his teaching and he failed to use a critical approach to the material or allow his students to use a critical approach to what they were hearing and learning.

4.10.5 Academic Freedom and Extra- and Intramural Speech

Does a teacher have a right to publicly criticise an employer (extra-mural speech) and engage in heated debate and criticism of administration or of teaching colleagues in a staff meeting (intra-mural speech)? Or, is the teaching profession one of a subservient "master-servant" relationship?

The American courts ruled in the much quoted *Pickering v Board of Education* (1968) 391 U.S. 563 that where the issue was of public interest and not a personal vendetta, the teacher as a citizen, tax-payer [or no doubt as parent] had the right to express views critical of employers. Marvin Pickering had been dismissed for a letter to a newspaper critical of School Board funding proposals and decision, an issue which directly affected tax payers.

The Supreme Court (at 568) overturned Pickering's dismissal and its decision resulted in what became known as the "Pickering-Test", a test

> ...to balance between the interests of a teacher, as a citizen, in commenting on matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The case raises issues which are closer to academic freedom. If Pickering and/or other teachers chose, in the public interest, to reveal serious curriculum or teaching methodology flaws, would they enjoy protection? If the criticism concerned the use of public funds for non-curricula issues which deprived teachers and students of materials needed in the classroom or of library facilities, would such criticism be justified?

One of the problems is that a teacher is likely to have access to "inside information". In *Pickering* such access was seen by the Court as a reason for protecting his right to speak out.

Free debate is not unbridled speech. The issue of protection for extra-mural speech is complex. It is clear that personal grudges and vendettas will enjoy no protection. Thus a teacher engaging in public criticism must be certain that the issue is of genuine public concern and a matter which directly affects the functioning of the school as an educational institution.

Extra-mural speech and the "good name of the school" was at issue in *Buckley v Meng* (1962) 230 N.Y.S. 2d. 924. The Court ruled that as state elementary

and high schools are *not* in competition with each other, a teacher's publicly expressed views, however controversial, cannot be used as grounds for disciplinary action because of damage to the school's good name.

When intra-mural expression arises it is essential again to first distinguish between personal confrontation and vendettas, and heated debates over matters concerning the running of the school and its academic programme (see *Cramer* 3.3.2). Finkin (1988:1341) suggests that intra-mural speech concerning purely administrative matters is likely to enjoy less protection than criticism concerned with academics and quality of education.

The academic world of both universities and schools is made up, not of all-knowing people teaching established truth only, but people engaged in areas where real differences exist, differences on viewpoints, methodologies, reference books and library resources. Where such differences are buried for the sake of peace in the staff, sterility replaces academic freedom and the pursuit of greater knowledge and understanding.

When principals or management are threatened by any criticism or see criticism as "disloyalty", real academic freedom and progress is threatened. Such was the issue in *Cox v Dardanelle Public School* (1986) 790 F. 2d 668. Here the court described the principal-teacher relationship as important but that certain forms of criticism of the superior by the subordinate would undermine the effectiveness of the working relationship between them.

Intramural speech, staff room frankness, criticism and even open disagreement needs to exist and enjoy protection. The alternative is silent apparent conformity. Such a situation can be seen as one *of public concern* because the negative impact of conformity can affect the classroom and the children of taxpayers.

What then are the limits or a teacher's intra-mural speech? Provided the speech concerns professional matters (and is not deliberate obstruction) and is

not an attack on personalities, such speech should enjoy full protection. In the school staff meeting an undertaking to abide by a majority decision or a willingness to allow different approaches may diffuse the potential negative of heated academic debates. Rather than having a chilling effect, there can come a positive willingness to work together within differing perspectives.

4.10.6 Student Academic Freedom in Public Education

If academic freedom and freedom of expression are sometimes difficult to separate at university level or in regard to teachers in the school system, it is even more difficult when dealing with the rights of school students.

Tinker (see 3.3.1) often quoted in academic freedom cases, never involved an academic issue but it involved the right of students to engage in silent protest against the Vietnam War. On the other hand *Pico* (see 4.10.3.5) is a matter of academic freedom when a school board removes library books, thus denying a student access to information and wider learning opportunities.

Academic freedom for students would seem to hinge around three issues. The first is the right of the student to express his views without fear of reprisals or discrimination, on academic issues which may even directly conflict with those of teachers, or text books or the wider community. The student must be able to express such views orally or in writing, the latter in a school essay or school publication. The second is the right of a student to raise issues not of direct relevance to the curriculum topic being discussed, but which may have bearing. The third is the right of access to information via the library or other sources.

Academic freedom for students is possibly as closely linked to teachers' academic freedom. The greater the academic freedom a teacher has, the greater the openness for student intellectual development. Denial of teachers' academic freedom denies students access to differing opinions, discussion, information and methodologies so critical to intellectual development, and

instead cast "a pall of orthodoxy over the classroom" [*Keyishian v Board of Regents* (see 4.10.3.1)] and prevents access to " the market place of ideas" [*Abrams v United States* (see 4.7.2)].

Protecting teachers' rights to speak freely in the classroom, says Clarick (1990:726), also shields students from indoctrination. The very nature of compulsory public education translates into a captive audience. When a teacher of a captive audience is the 'captive presenter' of only what the school board approves, the academic freedom of both presenter and student audience become unrecognisable.

4.10.7 Some conclusions

The survey of academic freedom is not as conclusive as one would like. Firstly it is largely based on United States experience and, to a small extent, on Canadian experience. Secondly, court judgements are not consistent. Thirdly, it is essential to separate issues specific to academic freedom from those which are broader freedom of expression issues. Fourthly, in the lack of consistent judgements, there is a lack of clearly defining the limitations.

Everett Public Schools (1995) provides an example of an attempt to provide clarity to schools on matters of academic freedom. It reads as follows:

> Education is fostered in an atmosphere in which academic freedom for staff is encouraged and promoted, with due consideration for the rights of students and the community. Teachers are entitled to exercise academic freedom subject to accepted standards of professional responsibility. These responsibilities are defined as commitment to democratic tradition; a concern for the rights, welfare, growth and development of children; an insistence upon objective scholarship; and recognition of the maturity levels of students. The rights herein must be exercised consistent with any prescribed course of study determined by the Board and as allowed by law.

The Everett statement focuses on academic freedom for teachers but lacks

clarity on the same right for students.

Despite all of the above, the world of academics is not a world of established truth only, but one of a continuum in which the players are seeking new knowledge and new insights on existing knowledge using a variety of methodologies in their teaching and/or learning. To limit academic freedom to universities is to draw a line between schools and universities which is artificial. Rather, one needs to see an increasing degree of academic freedom, for teachers and students, matched by a declining level of limitation as one moves from Grade 1 schooling to University doctoral studies.

4.11 FREEDOM OF EXPRESSION - SOME FURTHER ISSUES

Freedom of expression is a very wide term and embraces many aspects of life. It is clearly impossible to examine every possibility in every circumstance. However, two further aspects which relate to the school community are covered below.

The *Tinker* decision stated that neither students nor teachers shed their constitutional rights at the school house gate. But how extensive is a students freedom to say what he likes in school? How free is a teacher to believe and write about views contrary to school beliefs when what he does is totally outside the 'school house gate'?

4.11.1 The Student's Speech to a Captive Audience

Bethel School District No. 403 v Fraser 478 US 675 (1986) concerned a speech made by a school student in support of another student's candidature in a school election. Approximately 600 members of the student body were present at a 'voluntary' assembly when the speeches were made. (The assembly took place during class time and students could choose to go to the assembly or report to the study hall). During his entire speech Matthew Fraser spoke "in terms of an elaborate, graphic and explicit sexual metaphor" (at 678).

Two teachers, with whom he had discussed the speech prior to delivery, had warned him it was inappropriate and that severe consequences might follow.

The morning after he had delivered his speech, he was informed that he had violated the school rule which stated that, "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profaned language or gestures".

Fraser admitted having given the speech and deliberately using sexual innuendo. He was then informed of his three day suspension and the removal of his name from a list of candidates for graduation speaker.

Fraser's appeal through the School District's grievance procedures failed, his speech being described as "indecent, lewd and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly" (at 678 -679).

The District Court overturned the finding, concluding that the school's action violated Fraser's right to freedom of speech. The Ninth Circuit Court of Appeals upheld the District Court finding and the Bethel School District appealed in the United States Supreme Court. The Supreme Court, while upholding the right to free speech and the tolerance of divergent and even unpopular and controversial views expressed in schools and classrooms, overturned the lower courts decision. The Supreme Court stated (at 681) that such speech

> ...must be balanced against society's countervailing interests in teaching students the boundaries of socially appropriate behaviour ... [and] consideration for the personal sensibilities of the other participants and audiences.

The Court then referred to the restraints required in Parliamentary Practice and asked, "Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?" (at 682). Specific reference was made to

FCC v Pacifica Foundation (1978) 438 US 726 where a radio broadcast, made at a time when children were in the listening audience, was considered by the court to be "obscene, indecent or profane".

Justice Brennan concurred in the *Fraser* judgement but essentially because of the circumstances in which the speech was given rather than because of what was said.

Fraser raises issues related to the outer boundaries of freedom of expression and the role of circumstances (or *time, manner and place* limitations) in determining those outer boundaries. The Court confirmed that certain language or innuendo is inappropriate in certain social circumstances. By implication one is thus not simply free to say what one likes, where and when one likes. The circumstances, the audience, the captive nature or otherwise of that audience are factors which must be taken into account. The specifics cannot be precisely defined but it clearly points to freedom of speech entailing responsibility for what one says, how it is said and to whom it is said.

Much is made of the *Tinker* statement, referred to at the start of this section. There are clear distinctions which must be drawn. *Tinker* concerned the passive expression of a political viewpoint while Fraser's speech was actively defying school rules. Tinker's silent protest in no way offended the rights of other students. Fraser had a captive audience of ages ranging from 13 or 14 upwards. He engaged in a monologue marked by sexual innuendo to an unsuspecting audience and thereby clearly ran the risk of offending the rights of his fellow students.

Fraser provides an example of limitations on speech in a specific school situation. However, this cannot be taken to imply that a captive audience automatically limits discussion of controversial topics. The issue here was not as much the election speech but the choice of words and manner of presentation.

In a similar case, without the vulgarity, *Poling v Murphy* (1989) 872 F.2d 757, Dean Poling was disqualified as a candidate for the student council presidential election. He had used an election speech to make discourteous and rude remarks about the deputy principal and to attack the school administration, in order to win votes. Poling took his case to court where the judge chose to refer to *Hazlewood* in support of the contention that teachers had the right of editorial control over style and content of student speech in school sponsored expressive activities (the speech having been given in a regular school assembly), and stated that "civility is a legitimate pedagogical concern". Judge Merritt dissented, describing Poling's speech as pure 'political speech' and therefore protected.

The merits of the school's actions and Poling's reaction can be debated at length. As the judge suggested, the entire matter could have been handled differently with less drastic action. However, it serves to highlight the extent of and need for careful handling of possible problems that can arise over freedom of expression.

Fraser and Poling offer some guidelines on some possible limitation on the 'free' speech of students. Such cases may well need to be handled on a case-by-case basis.

4.11.2 The Teacher's Speech and Writing, off the School Campus

The second issue is found in *Ross v New Brunswick School District No. 15,* (1993) 110 DLR (4th) 1 (S.C.C.). This concerns a Canadian teacher, Malcolm Ross, with reference to speech and writing which was entirely off the school campus. Ross was a teacher who held strong anti-Semitic views about which he spoke and wrote (Green & Correia 1994:361-362; Green 1996:289-299). The New Brunswick Board of Inquiry found no evidence to suggest any direct connection between Ross' views and activities in Ross' classroom (Black-Branch 1997:63). However, the Board found that Ross' extra-mural activities violated the New Brunswick *Human Rights Act.* He was suspended from

classroom teaching for eighteen months without pay but the School Board could offer him a non-teaching job in that period. Further, his employment would be terminated if he wrote or published anti-Semitic materials or sold his previous publications in that period.

The New Brunswick Court of Appeals overturned the Board of Inquiry's decision on the ground that it infringed his right to freedom of expression. However, that decision was in turn overturned by the Supreme Court, a decision summed up in the court judgement as follows:

> The continued employment of the respondent [Ross] contributed to an individually discriminating or 'poisoned' environment ... the respondent's statements are 'highly public' and ... he is a notorious anti-Semitic ... public school teachers assume a position of influence and trust over their students and must be seen to be impartial and tolerant. ... Where a 'poisoned' environment within a school system is traceable to the off duty conduct of a teacher that is likely to produce a corresponding lack of confidence in the teacher, and in the system as a whole, then the off duty conduct of the teacher is relevant.

The problem for Ross was that Jewish parents felt that their children could not be safely accommodated in his class or that school atmosphere.

The Supreme Court upheld Ross' Section 2 right to freedom of speech but used Section 1 to uphold his suspension thereby removing his possible negative influence from the school. However, Ross' total freedom of expression could only be maintained if his employment was terminated or he would have to curtail his writing and publishing.

The case raises several issues. Why was Ross not charged under the Criminal Code Sec. 319 (2), the "hate speech" clause as had happened in *Keegstra*? What other non-criminal activities beyond the school gate could be used to have a teacher suspended and/or gagged? Where is limit on limits to be set?

The Canadian Court has set a precedent which could have a chilling impact on the 'private' or 'outside-of-school' lives of teachers. What, in the light of this judgement, would the position be of a lady teacher who was also a well known strip dancer in a local night club, or a male sportsman who was renowned for his violent behaviour on the sports field? There are many possible situations where parents might raise complaints and teachers could find themselves accused of being a 'bad influence' or of 'compromising the teaching profession'.

The *Ross* decision does not provide answers to these potentially problematic cases. It simply raises the possibility that action could be taken against teachers who could be both highly qualified and doing an excellent job, simply for activities that do not directly affect their classroom competence.

4.11.3 Offensive language - appropriate or inappropriate?

Kenneth Hardy, a college lecturer, sued the college and its senior management for what he claimed was retaliation against him for exercising his right to freedom of speech and academic freedom (*Hardy v Jefferson Community College* 2001 _F.3d_(2001). In the context of a course on interpersonal communication, Hardy asked his students to identify words which could be used to 'marginalize' minorities (Fossey & Roberts 2002:329). Students suggested words such as 'nigger' and 'bitch'. One African-American student lodged a complaint. Hardy, who highly rated by his students, and received strong reviews from his superiors, was never re-appointed to lecture.

The federal district court ruled that Hardy's speech touched on "matters of public concern" and was constitutionally protected. Further the Court ruled that the defendants' were not immune from being sued. The defendant's arguments, in their appeal to the Sixth Circuit Court of Appeals, were rejected. A variety of cases concerning lecture room and university personnel speech were referred to by both sides, including *Pickering* and *Keyishian.* Offensive speech aimed at students had not been upheld by the courts (*Bonnell v*

Lorenzo _F.3d_(2001) and *Dambrot v Central Michigan University* 55 F.3d 1177 (1995). This case, however, was about speech germane to the subject being taught, and, as such, the offending words were regarded by the court as acceptable.

Whether at school or university, the value of *Hardy* is the court's drawing of a distinction between speech used in a strictly academic context, and speech used in a way which is degrading to a particular individual or sector of society. *Hardy* makes the point that those who teach or lecture should not be punished for the use of educationally defensible approaches which may be controversial (Fossey & Roberts 2002:335). An opposite ruling would have removed the possibility of discussing issues of crucial concern to students (of all ages) and being able to guide them in the direction of appropriate contextual use of language, as well as their need to distinguish between offensive and non-offensive language.

4.12 CONCLUSIONS

The application of the right to freedom of expression raises many issues. The overwhelming case law comes from the United States. But why is there such limited case law in Canada, Great Britain and New Zealand? The probability is that human rights legislation is relatively 'new' in those countries and, secondly, all three countries could be described as 'more conservative' than the United States.

It is true that case law of one country does not always have immediate applicability to cases in other countries. However, the increasing globalisation rapidly decreases both the geographical and legal isolation of one country from another. Foreign case law is now more readily available and can provide valuable lessons and guidelines. It allows judges in other countries to draw on the experience of judges elsewhere.

Freedom of expression and the extent of limitations in any country must be seen in context of both the particular case and the country concerned. This is not to deny the universal declaration of the right to freedom of expression or the very high level of importance given to the right in countries where human rights enjoy a high priority.

That freedom of expression extends beyond 'pure speech' is widely recognised and both 'pure speech' and 'non-speech' freedom of expression impact on the school.

The public school is state funded and this has been used in the past to claim a right to limit freedom of expression of both students and teachers. However, a school is not an isolated entity but a vital part of the wider community. It exercises a powerful influence on the upcoming generation. As was aptly put in *Barnette* (see 4.10.3.6), a school cannot teach about government, constitutions and democracy, and then deny students the experience of the principles of such government in the school context.

No right is unlimited, as Bleckmann and Bothe (1986:107) point out, but nor are limitations unlimited. Further, limitations may be applied to protect some competing right, but there must be a relationship between the right and the competing interest. Nowak and Rotunda (1995:1008-1111) point out various tests which can be used for applying limitations.

When are there legitimate grounds for applying limitations to student and teacher freedom of expression in the areas discussed in this chapter?

The right to an education in a school which offers an atmosphere conducive to the promotion of such an education is a competing interest when claims are made for the exercise of individual freedom of expression within the school. *Tinker* points to the unconstitutional nature of behaviour which materially disrupts the school. Likewise expression, in the form of behaviour or "fighting words" which creates a clear and immediately present danger can likewise be

regarded as unprotected. As previously indicated expression can also be inappropriate in terms of time, manner or place and, as a result, unprotected. Certainly time, manner and place restrictions may at times be decidedly relevant in a school context and, connected to place, may be the need for limitation on expressive activities which are age inappropriate.

The extent of the limitation should be the least restrictive to achieve the required purpose or protect the competing right (in this case the school's educational purpose and the rights of its students to benefit). *Fraser* (4.11.1) provides a case for limitations to protect a captive, unwarned, unsuspecting audience from an abuse of their personal dignity. However, limitations are not unlimited. It is crucial that unsubstantiated grounds are not allowed to be used to limit freedom of expression because an education official, parent or other person simply doesn't like what is said or done, or uses illegitimate grounds such as "the good name of the school" to apply limitations. The apparent deference to educational authorities by the courts seems to provide inadequate protection for students in the rightful exercise of legitimate rights, and is open to providing education authorities too much leeway to impose limitations that should be tested.

Teachers intra- and extra-mural speech is not a place for unlimited exercise of freedom of expression. Personal and vindictive attacks on other individuals, or on education authorities, remain unprotected and open to claims for libel. However, the right to speak out, extra-murally, in "the public interest" may be crucial, particularly where it involves the misuse or inappropriate use of funds. Likewise, teacher criticism of proposed curriculum changes can be healthy for education. One of the difficult questions is whether education authorities can or should be able to gag a teacher's writing in the press, and whether the same teachers comments would be protected if made in a professional education journal.

In the area of intra-mural, discussion of academic or school administration matters may become very heated. Committed people can be very passionate

about their roles as teachers and about their subjects. The line for limitations needs to be drawn when discussion moves from the tasks, the subjects, the needed changes, to personal attacks on individuals. To place unnecessary limitations on the speech in intra- and extra-mural contexts may result in declining commitment.

There are questions to use to test the legitimacy of limitations or potential limitations. In the end a school, or education authorities making such limitations must be ready and willing to defend their action, if and when challenged by those whose freedom of expression is restricted.

Schools must make choices in how they handle the right to freedom of expression. The Postville High School Handbook (1998) provides just one example. The Handbook states:

> Your school has no wish to violate your freedom of expression - for freedom of expression, properly exercised, is necessary to the welfare of a democratic state. Each student is strongly urged to accept the responsibility in exercising their freedom of choice... All students possess the right to express their ideas and points of view. They will not be allowed to force others to join their ways of expression, however, nor will students have the right to intrude upon the rights of others.

Postville High School Handbook (1998) describes the right to freedom of expression as a right balanced with responsibility and certain limitations.

This chapter has examined evidence of freedom of expression and its impact on schools in the United States, Canada, Great Britain and New Zealand. The next chapter examines the legal context in South Africa in which the right to freedom of expression is exercised, including issues of application, interpretation and limitations, with particular reference to schools.

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Chapter 5: THE RIGHT TO FREEDOM OF EXPRESSION IN THE SOUTH AFRICAN LEGAL CONTEXT

5.1 DEVELOPMENTS TOWARDS A BILL OF RIGHTS IN SOUTH AFRICA

In order to place the South African Bill of Rights and the right to freedom of expression in context, a brief background leading from parliamentary sovereignty to constitutional democracy and the 1996 Constitution (RSA 1996a), is set out below.

The Constitutional history of a unified South Africa began in 1909 with the constitution whereby the Union of South Africa was established in 1910. Over the next 75 years two further constitutions were introduced. The 1961 constitution established the Republic of South Africa while in 1983 the third constitution introduced a tri-cameral system with three Houses of Parliament based on racial lines.

The British Westminster system of government was the basis of each of the first three constitutions with the emphasis on parliamentary sovereignty (see 5.2) (Klug 1996: 2-2-3), a fact emphasised by Judge Hlophe in *De Lille v Speaker of National Assembly* 1998 (3) SA 430 (C), at 452 where he declared that, "[t]he new Constitution shows a clear intention to break away from the history of Parliamentary supremacy". One of the major features of the constitutional development from 1910 onwards was the increasing *exclusion* of the vast majority of citizens from Black and Coloured communities who had had voting rights in 1910. Such voters were removed in stages, leaving total power in the hands of the White minority. The introduction of the Tricameral Parliament in the 1983 Constitution returned the vote to Coloured and Indian voters but the three Houses of Parliament were arranged on a ratio of 4:2:1 of White, Coloured and Indian so that power effectively remained with Whites.

Attempts to establish a Bill of Rights in South Africa goes back a long way before the formation of the Union in 1910. In 1854 the drafters of the Orange Free State Constitution turned to the United States constitution for guidance and adopted rigid rules for the amending of the Constitution and provided certain guaranteed rights, including equality before the law (Klug 1996:2-1). The 1854 Constitution did not explicitly provide for judicial review. Dugard (quoted by Klug 1996:2-1) refers to the fact that, by 1876, a court was established in the Orange Free State and its power of judicial review was "accepted as an inherent feature of the Constitution".

Attempts to establish a judicial review process in the South African Republic (later the Transvaal, from 1910 to 1994) were made by the Chief Justice, J.G. Kotze. He made repeated references to the reasoning given in the 1803 United States case of *Marbury v Madison* (5 US 137) (see 2.2.2), the case which established the United States Supreme Court's power of judicial review. Kotze argued that, as power was vested in the people and not in the *Volksraad*, it was the court's duty to strike down legislation incompatible with the law of the *Grondwet* (Dugard 1978: 21). Unfortunately this attempt to ensure the right of *judicial review* led to the dismissal of the Chief Justice. President Kruger of the then Zuid-Afrikaansche Republiek described *judicial review* as the work of the devil introduced into paradise to test God's word [Hahlo & Kahn, quoted by Cockrell (1997:517); Dugard (1978:23)].

In the lead up to the Union Constitution a strong plea was made by Judge J.G.Kotze for a strong Constitution and a Bill of Rights; such pleas were rejected by the National Convention responsible for the drafting of the South Africa Act of 1909 (the Union Constitution)(Klug 1996:2-6).

5.2 THE CONSTITUTIONAL DEMOCRACY

Klug (1996:2-1) described the constitutional history of South Africa from 1910 to 1993 as 'the rise and fall of parliamentary sovereignty'. The power of

parliamentary sovereignty is perhaps no better illustrated than by the following quote from *Sachs v Minister of Justice* 1934 AD 11,37

> ... arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty and property of any individual subject to its sway, and that it is the function of the courts of law to enforce [Parliament's] will.

The demise of parliamentary sovereignty came with the introduction of the Interim Constitution of 1993 (RSA 1993a). This Constitution became the supreme law against which all other laws were to be tested, and the principles it established were to be used to test the final constitution in 1996.

The supremacy of the 1993 Interim Constitution and the final Constitution of 1996 meant that Parliament was no longer free to do as it pleased and demand that the courts uphold its actions. In contrast to *Sachs v Minister of Justice* in 5.2 above, Judge Hlope (in *De Lille v Speaker of House of Assembly* (see 5.1), stated: "Ours is no longer a parliamentary state. It is a constitutional state founded on the supremacy of the Constitution and the rule of law". The unfettered powers of parliamentary sovereignty led to a sad history of violation of human rights, extremes of legalised, forced racial division, the disempowerment of the majority of the peoples of South Africa, and endless repressive laws.

Against that background, the constitutional changes of the 1990s were of such a dramatic nature that Cockrell (1997:521) described the then National Party's change as a "road-to-Damascus conversion of near miraculous proportions".

The details of the history of the Bill of Rights debate is well documented over a long period (see Klug 1996:2-1-19). General Jan Smuts, Prime Minister of South Africa from 1939 to 1948, was involved in the development of the UDHR. The new government of South Africa in 1948 refused to sign the document. Nearly fifty years were to pass before the principles of the UDHR

took root in South African legislation with the passing of the Interim Constitution (RSA 1993a).

At the end of the 20th century South Africa, in the space of just seven years, moved from a repressive form of government under parliamentary sovereignty, to a most liberal form of constitutional democracy. It is this dramatic change, with all its potential consequences, that will increasingly impact on all sectors of South Africa, including the South African school community.

For the purposes of what follows, reference is made chiefly to the 1996 Constitution (RSA:1996a), the Constitution under which schools now operate.

But what were the legal implications for schools prior to the (1993) interim and (1996) final constitutions with their Bills of Rights?

5.3 SOUTH AFRICAN SCHOOLS BEFORE THE INTRODUCTION OF A BILL OF RIGHTS

In many respects the rights of learners and teachers in South African schools, prior to the introduction of the Bill of Rights, can be compared to the rights of learners in England (see 3.3.3). The idea of learners having "rights" was not an issue. Principals exercised great power and, with their teachers, were almost beyond questioning, at least *de facto* if not *de jure.* The concept of *due process* was largely ignored, and conformity was unquestioned. Schools extended their tentacles of power way beyond the school gates, and often demanded unquestioning and unthinking obedience within those gates.

The above description fits the vast majority of the schools previously reserved for children of the White community. Prior to the 1976 Sowetan uprising, the description was probably also true of many Black, Coloured and Indian schools.

The post 1976 period brought a discipline revolution, particularly to Black schools. Schools became a political tool as young people were encouraged, even incited to challenge authority. Only very strong principals were able to maintain order, discipline and a measure of academic success. De Villiers (1990), in her biographical account of teaching in Soweto in 1985, reflects on the fact that at the same time discipline applied by teachers was often harsh in the extreme without respect for the dignity of young people. Corporal punishment was applied at a level at times equivalent to vicious assault. For many Black schools, the years from 1976 to 1993 could be described as years of turbulence, rebellion and cruelty.

A careful examination of law reports prior to 1993 indicate that, *de jure,* school powers were *not* unlimited. Failure of schools to follow laid down procedures resulted in occasional legal challenges, and court rulings going against such schools. Specifically, the failure of schools to observe the principle of *audi alteram partem,* meaning "let the other side be heard" (Hiemstra & Gonin 1981:163), resulted in schools losing cases in the courts. Cases which serve as examples include *Netto v Clarkson* 1974 (2) SA 66 (N), *Naidoo v Director of Indian Education* 1982 (4) SA 267 (N), and *Minister of Education and Training and Others v Ndlovu* 1993 (1) SA 89 (A), to refer to but a few.

Relatively speaking, there were few such cases and these did not touch on issues of freedom of expression in the form of school uniforms, hairstyles, jewellery, student press, artistic creativity and academic freedom.

The imposition of the Bill of Rights on the above scenario thus poses distinct challenges for the South African school community of today.

While it is not the purpose of this study to examine the Bill of Rights in detail, the next section provides a critical look at key aspects for understanding the Bill of Rights. This is essential if Section 16, dealing with *freedom of*

expression is to be comprehensible. Thus the next section examines aspects of application, interpretation, an understanding of the conflict between the constitution and majority views, and how aspects of the Bill of Rights may be limited.

5.4 UNDERSTANDING THE BILL OF RIGHTS

5.4.1 Application of the Bill of Rights

In dealing with any Constitution and Bill of Rights two questions need answering. To whom does the constitution apply? When and against whom can constitutional rights be enforced?

In the case of the South African school community, the two questions can be put as follows.

i) Does the South African Constitution and Bill of Rights apply to the school and all who make up the school community?

ii) If a person in a school community believes his/her rights have been violated, when and against whom can that person enforce his/her rights?

In answering these questions Sec. 8(1) and Sec. 239 of the South African Constitution are critical.

> **Sec. 8(1)** states: "The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and *all organs of state"* (italics added).

The reference to 'all law' is of special significance in respect of schools where school rules are to be regarded as subordinate legislation [Alston 1998:48-56; Van Wyk 1987:146; Oosthuizen 1998:29; and paragraph 1.3 of the *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* (RSA:1998b)]. Subordinate legislation is referred to by Du Plessis (2000:205) as *delegated legislation* (italics added).

Who are 'all [other] organs of state'? Section 239 of the Constitution (RSA: 1996a) provides the definition as follows:

> **"239 Definitions**
>
> In the Constitution, unless the context indicates otherwise **'organ of state'** means
>
> a) any department of state or administration in the national, provincial or local sphere of government; and any other functionary or institution
>
> i) exercising a public power or performing a public function in terms of the Constitution or a provincial constitution; or
>
> ii) exercising a public power or performing a public function in terms of any legislation but does not include a court or judicial officer.

It is clear from the above definition that the public school is an *organ of state* in terms of Sec. 239 (a) (ii) by exercising a public function in terms of the South African Schools Act (RSA 1996b) and is, therefore, bound by the Bill of Rights in terms of Sec. 8(1).

Is an independent or private school covered by the above definition? The position of such schools is not as clear as that of public schools. One view is that they are regulated by statute in terms of Chapter 5 of the South African Schools Act (RSA:1996b) but are not 'organs of state'.

To the extent that the Bill of Rights is applicable to *everyone,* those attending or teaching at private schools do not forfeit their constitutional rights.

The power of the Constitution, and of the Constitutional Court to enforce the Constitution in matters affecting organs of state is clearly illustrated in *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (CC) where the Constitutional Court stated:

> ...The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore bound by the Bill of Rights.

It is reasonable to conclude that if the National Assembly can have its rules subjected to constitutional scrutiny, as in the *De Lille* case in terms of sections 16, 33 and 34, schools, as organs of state, cannot expect any lesser scrutiny of their rules if and when such rules give rise to legal disputes.

Woolman (1996a:10-62A-63), Cheadle and Davis (1997a:44-45) and De Waal, Currie and Erasmus (1999:38-39) elaborate in pointing out that the final (1996) Constitution provides that those who exercise 'public power' or engage in a public function in terms of legislation or a constitutional provision, are bound by the Constitution.

Woolman further states:

> These institutions and individuals neither need to be an '*intrinsic* part' of what we have commonly or historically considered to be the 'government' nor need they be subject to the effective control of the elected legislature or executive bodies ... if the state has created the conditions of the exercise of some power of function, then the institutions so provided and the individuals so empowered are going to have to answer for their actions in the same manner as those institutions and officials to whom we have no trouble ascribing the appellation 'government'.

Bray (1996:150) adds a further dimension to the applicability of the Constitution to schools when she refers to the need for all stakeholders in education to be familiar with their basic rights, how these rights function and when they can be limited. She adds:

> Educators are vital functionaries in the education system ... they are individuals whose individual rights have to be promoted, ... they are [also] the most important and influential protectors of human rights in the education ... community (Bray 1996:157).

Majola (1990:36) describes constitutional law as a field of law which affects both the state and the individual twenty four hours a day, everyday of the year. By extension, there is no time when the school can be exempt from the provisions and impact of the constitution.

Having considered the application of the Constitution to both public and private schools, a third question remains. Does the Constitution and, specifically, the Bill of Rights, apply to everyone, regardless of age? This is a key question for the education community. It is clear that certain rights do not apply to everyone. Section 28, dealing with children's rights does not apply to those 18 years of age and older. Equally other rights such as voting rights are not applicable to those under 18 years of age.

Section 9(5) makes reference to certain discrimination being established as 'fair', but Woolman (1996a:10-7) suggests that it is unlikely that courts will deny children *prima facie* entitlement to the basic rights to life, privacy, security of person, fair trial, expression, or freedoms from servitude and forced labour.

Whether the Constitutional Court might use being under the age of 18 as a reason to a justify a limitation of a particular right for that child must, for now, remain speculation. Most important here is that schools cannot assume that because they are dealing with children, such children can be treated as though the Bill of Rights does not apply to them.

5.4.2 Interpretation of the Bill of Rights

There are, at times, difficulties in distinguishing between the terms *application* and *interpretation* in constitutional terms. Rautenbach (1995:18) describes the words as almost synonymous but distinguishes 'application' as referring to the way the Constitution is applied in specific circumstances, a view with which Beatty (1992:408) concurs. However, Rautenbach and Malherbe (1996:288) refer to 'bearers of rights' as the 'who' of application.

What then is meant by interpretation? De Waal *et al.* (1999:122) describe constitutional interpretation as "the process of determining the meaning of a constitutional provision". The 1996 Constitution had to meet certain constitutional principles set out in the 1993 Constitution in order to be certified by the Constitutional Court. Kentridge and Spitz (1996:11-36) suggest that in certifying the 1996 Constitution, the Constitutional Court certified that every provision met the required principles. The inference can be drawn that when interpreting the Constitution one cannot give a clause a meaning which conflicts with the principles applied in the certification process.

Section 39 of the Constitution (RSA 1996a) deals specifically with the interpretation of the Bill of Rights, as follows,

> **Sec. 39 (1)** When interpreting the Bill of Rights, a court, tribunal or forum -
>
> a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> b) must consider international law; and
>
> c) may consider foreign law.

Sec. 39 is not for the courts alone. Sec. 39 (1) refers to '*a court, tribunal or forum*' (italics added), and Sec. 39 (2) refers to '*every court, tribunal or forum* (italics added) must promote the spirit, purport and objects of the Bill of Rights'.

Kentridge and Spitz (1996:11-41) suggest that, far from being the exclusive domain of the courts, this clause points to interpretation and application of the Bill of Rights at every level. Rautenbach (1995:18) supports this view when he suggests that all organs of state and all concerned individuals are occupied with interpreting and applying the Constitution. Rautenbach's choice of words '*are* occupied with...' places this in the present continuous tense. This seems directly applicable to the management of a school, highlighting the need for such management to be familiar and up to date with the content of, and the most recent rulings on constitutional issues which have any bearing on schools. This would seem to be supported by the judgement in *S v Blom* 1977 (3) SA 513 (A), 514 (translated) where the court stated:

> In this stage of the development of our law it must be accepted that the cliché that 'every person is presumed to know the law' has no basis for existence and that the maxim 'ignorance of the law is no excuse' cannot be justifiably be applied in the light of the present day theory of fault in our law. *But the approach can be endorsed to the extent that a person in a modern state who is employed in a specific area can be expected to familiarise himself with the legal prescriptions which are relevant to that specific field* (italics added).

Taken as a whole, the above points to schools needing to know their Constitutional responsibilities and to interpret the Bill of Rights in the way described in Sec. 39 (1)(a) and (2).

The word '*tribunal* ' is not commonly used with reference to schools but in Sec. 13 (2) of the *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* (RSA 1998b), issued in terms of Sec. 8 (3) of the South African Schools Act 84 of 1996 (RSA 1996b), reference is made to the fact that the Principal must, "...arrange a fair hearing by a small disciplinary hearing (tribunal) consisting of...".

The use of the word '*tribunal*' as a synonym for a disciplinary committee points strongly to that committee being bound by Sec.39 (1)(a) and (2) of the Constitution.

The words 'must promote' in Sec. 39 (1)(a) adds a further dimension with the implication that the school must not only comply with the Bill of Rights but must actively promote the principles of the Bill of Rights. Schools must, therefore, promote, as Sec 39 (1) (a) states, "...the values that underlie an open and democratic society based on human dignity, equality and freedom".

The implications for schools of the previous sentence are enormous. In any discussion of the right of learners and educators to *freedom of expression,* as provided for in Sec. 16, those fundamental values must be taken account of and applied. Enshrined rights are not open to or at the mercy of just any interpretation. This is a point made strongly by Justice Jackson in *Barnette* (see 4.10.3.6).

In considering the interpretation of the Bill of Rights, the Constitutional Court and High Courts must make further reference to Sec. 39 (1) (b) and (c), namely that international law *must* be considered, and foreign law *may* be considered (italics added).

5.4.2.1 CONSIDERATION OF INTERNATIONAL AND FOREIGN LAW

As South Africa is a signatory to an array of international treaties and conventions, including the UDHR and the Convention on the Rights of the Child, the South African courts are bound to consider the ratified conventions in any case where they have or may have relevance. Priso-Essawe (2001:553) offers the view that the South African Bill of Rights can be considered as a way of incorporation [of international law on human rights or human rights conventions] that may be referred to as "constitutional incorporation" and thereby make international conventions directly available to

judges. This does not imply a slavish obedience to every detail of such conventions and treaties. However, any major deviation would need to be justified.

The issue of foreign law (domestic law of other countries) is more problematic. Foreign case law is a reflection of both law and circumstances. Thus South African courts are not bound to consider such foreign law, some of which may be inappropriate to South Africa's historical circumstances and aspirations (Kentridge & Spitz 1996:11-25,26).

Chaskalson P, in *S v Makwanyane* 1995 (3) SA 391 (CC), 415 provided clarity on the South African Constitutional Court's approach to international law and foreign case law as follows:

> Our Constitution... prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right. In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

Chaskalson's words have a similar ring to the view expressed in *S v Rudman* 1992 (1) SA 343 (A), 353 where the Court stated:

> [I]t is trite that foreign authority is non-binding on a South African court and is of persuasive value only. The degree of persuasion depends, *inter alia*, upon the similarities and differences between the South African legal system and the foreign legal system in question.

Gutto (1998:103) expresses a similar line of reasoning that in using foreign jurisprudence, it is important for the 'importers' of such jurisprudence to

understand and appreciate "...the prevailing social and material conditions, the dominant tradition or historical and cultural context..." in the country from which the judicial decisions are drawn. This warning has a similar ring to that of Justice La Forest of Canada (see 3.1).

However, despite the problems of foreign law, in a new constitutional dispensation when indigenous case law is in the process of being developed, case law from foreign countries can be very useful where such judgements are both relevant and contextually applicable [Kentridge & Spitz (1996:11-26), with reference to Justice Kruger in *Bernstein v Bester* 1996 (2) SA 751 (CC)].

Priso-Essawe (2001:562) states that reference to external judicial sources tends to moor the country to the "emerging consensus of values in the civilised international community" [quoting from *S v Williams* 1995 (7) BCLR 861 (CC)].

There are those who would dismiss reference to foreign law. Blake (1999: 192) refers to the "...frequent irrelevance of United States judicial decisions in South Africa". Referring to the Constitutional Court's decision to ignore the decision of *Bowers v Hardwick* (1986) 478 US 186 in a gay rights case, Blake states, "This result - that US constitutional law offers no assistance in interpreting and applying the 1996 Constitution - has been a frequent one since the Constitutional court first sat". Blake's opinion is a misleading overgeneralization from one specific example.

The tendency to dismiss United States case law with the words "this is not America" is unhelpful. What is crucial is the contextualizing of foreign decisions and legal principles, and to use them appropriately.

South African schools are faced with new situations and are being forced, for the first time, to make decisions on which the constitution impinges. Foreign experience of such matters, especially where cases have ended in law courts

can, at least, provide useful pointers for consideration and understanding. The special difficulty facing South African schools whose school rules are challenged, is the paucity of relevant South African case law.

There is another question about constitutional interpretation which is often misunderstood, namely the fact that the Constitution can override the will of the majority. The next section examines the foundations and implications of this dilemma.

5.4.3 Constitutional Interpretation and the Countermajoritarian Dilemma

One of the aspects about interpretation of an entrenched constitution is that it is at times seen as running against the views of the majority.

In a Primary School staff workshop in November 2000, a teacher posed the following question:

> Why can't parents in a school make a set of rules, sign them to signify their approval, and then demand that every learner in the school abide by these rules?

Phrased differently, the teacher was asking why a school should be bound by the Constitution and all its implications and interpretations. It further asks why parents, who know the school and what they believe is best for the school, cannot simply interpret the Constitution as they (the majority) see best for their school.

Section 2 of the Constitution (RSA 1996a) provides the following answer:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The dilemma flows from a view of democracy that the majority can make decisions and enforce them on everyone.

In legal and constitutional terms this issue revolves around the key difference between a parliamentary democracy and a constitutional democracy. In the former the elected representatives of the majority are entitled and expected to make laws to which everyone must conform. Dicey (quoted by Limbach 2001:1) defined parliamentary sovereignty as being when Parliament "has... the right to make or unmake any law whatever, and further, that no person or body is recognised... as having a right to override or set aside the legislation of Parliament". Dicey, referring to England, added, "Parliament can do everything but make a woman into a man, and a man into a woman" [see 5.1 and compare *Sachs v Minister of Justice* (1934) (5.2)].

In the constitutional democracy there is still an elected majority who make laws but that majority is subject to a supreme constitution and cannot make laws which do not conform to the supreme, entrenched constitution. There is an appointed but independent judiciary whose task is to ensure the upholding of the constitution. Neely (1981:5), with reference to the United States, describes the actions of courts in constitutional matters, as being almost entirely outside the control of the legislative branch. If the courts overturn a law, the only route law makers have is to change the Constitution to make the overturned law acceptable, or to accept the decision of the courts.

The dilemma of a majority government, elected by the people, making laws which can, in extreme cases, be overturned by an unelected but appointed judiciary is sometimes referred to as 'the countermajoritarian dilemma', a term first used by Professor Bickel in 1962 (Stone 1986:174). Such a judicial process is designed specifically to give the judiciary the powers to ensure that the law makers operate within the framework of the Constitution and its values and principles (Davis 1994:103). Hamilton, (quoted by Limbach 2001:2) stated that no legislative act which was contrary to the Constitution could be valid. If that were not so the law makers, acting by virtue of their powers, would not

only be doing what their powers did not authorise them to do, but doing what their powers actually forbade them to do.

The contermajoritarian approach has strong critics. Buckingham (2000:133-139) believes that the courts should defer to the legislature as that body, elected by the majority, represents the essence of democracy.

Having moved from parliamentary sovereignty to a constitutional democracy, it will be crucial for South Africans to comprehend and accept this fundamental shift, the implications of which will play themselves out in a variety of situations, including in the schools.

Constitutional interpretation and the countermajoritarian dilemma may play itself out in the school environment on a number of issues, including freedom of religion and expression. The school, with the support of educators and parents, establishes clear school rules, including a rigid dress code (the majority decision). In contrast, the learner, possibly with the support of parents, or a religious or cultural community, chooses to dress differently from the established dress code. The majority view is confronted by a constitutional right which clearly is contrary to their own view. The case involving Ladysmith High School, KwaZulu Natal (see 6.4.2) provides an example of the majority view being overruled by the Constitutional requirement.

The anti- or countermajoritarian dilemma is a tension common to a constitutional democracy. The position and reasoning of the South African Constitutional Court is clearly illustrated by Chaskalson P. in *S v Makwanyane* 1995 (3) SA 391 (CC) where the Constitutional Court considered the constitutionality of the death penalty and the question of public opinion. Chaskalson stated:

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to

> uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament ... but this would mean a return to parliamentary sovereignty.

In response to the idea of a referendum on capital punishment, Chaskalson concluded that

> [I]t is only if there is a willingness to protect the worst of us and the weakest amongst us, that all amongst us can be secure that our own rights will be protected.

In the same case Justice Didcott drew on two American cases to illustrate the same issue. Quoting from *Furman v State of Georgia* (1972) 408 US 238, he said: "The assessment of popular opinion is essentially a legislative, not a judicial function".

Further, Didcott quoted from *Barnette,* a school related case, (see 4.10.3.6) a part of the Justice Jackson statement given below:

> [T]he very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to [the] vote; they depend on the outcomes of no elections.

Nothing in the school context is ever likely to be of such contentious proportions as *Makwanyane.* What Chaskalson highlights and Didcott reinforces is the most critical principle, namely, that constitutionally protected rights are so fundamental that they cannot and must not be at the mercy of majority views. They are enshrined and limited only in accordance with constitutional provisions for such limitations.

That principle is as applicable to the right to freedom of expression in the school (even if it is opposed by the majority of the school community) as it is to the right to life (even if the majority want the death penalty reinstated).

Rights are enshrined and they can be limited only in accordance with constitutional provisions. The next section examines the issue of limitations in detail.

5.4.4 Limitations to individuals' rights

Rautenbach and Malherbe (1996:308) suggest that there can be no peace and order in a community when individuals can simply exercise their rights at all times in an unlimited way. At the same time, if the state has an unlimited right to limit individual rights, such rights would become meaningless.

Any bill of rights raises questions. Is there any right which has no limitations? If not, where does the right end and the limitation begin? How are limitations to be determined? Is there a limit to limitations?

The question of limitations is dealt with in greater detail because an understanding of the issues is crucial to a deeper understanding of human rights, and because of the many interrelated issues that go to make up the broad topic. Further, a lack of understanding of limitations and the limit to limitations results in schools and other organs of state applying limitations which cannot be constitutionally upheld

Woolman (1994: 60) begins an article by stating that

> ... everyone in the world knows what a freedom of speech clause is all about ... most people ... also know what a freedom of religion clause guarantees. But how many people know what a limitation clause is, or what it is good for? My guess - almost no one.

What then is a limitation? De Waal *et al.* (1999:14) describes the word *limitation* as a synonym for *infringement* or, possibly, a *justifiable infringement.*

Carpenter (1996:109), discussing the importance of the limitation clause in the South African Constitution, refers to the rationale for the clause given by Woolman (1996b:12-1). Carpenter sees the rationale as reminding citizens that rights are not absolute, but limitations are valid only if they reinforce constitutional values. She further sees the limitation clause as providing for consideration of competing interests. Fourthly, she sees the clause residing in the counter-majoritarian dilemma by demarcating, within reasonable parameters, the limits of majoritarianism and limits on powers of unelected judges.

It is likely that, for most people, the very inclusion of a limitations clause is indicative of the recognition that in society no person is a totally 'free agent' able to do as he pleases, regardless of the impact on any other person(s).

The French Constitution of 1789, in Article 11 (see 2.2.3.3), provides a clear pointer to the most basic reasons for limitations. The right to freedom of expression is so precious that the abuse of the liberty which hinders others use of 'this one of the most precious rights of man' must be dealt with in law and the abuser held accountable for his abuse of his freedom.

The German Constitution of 1949 does not have a general limitation clause. Instead specific limitations are attached to specific clauses, similar to the way Sec. 16 of the South African Constitution (RSA 1996a) has specific limitations attached.

The United States has neither a limitation clause nor the attachment of limitations to specific clauses. Instead it is left to the courts to interpret and

rule on limitations or, according to Kentridge and Spitz (1996:11-31), limitations must be read into the very definition of the right (see 3.3.1).

5.4.4.1 THE LIMITATION CLAUSE IN THE S. A. CONSTITUTION

In contrast to constitutions without a limitation clause, Sec. 36 of the South African Constitution (RSA 1996a) provides a clearly defined limitation clause.

> **Sec. 36 (1)** The right in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors including -
>
> a) the nature of the right;
> b) the importance of the purpose of the limitation;
> c) the nature and extent of the limitation;
> d) the relation between the limitation and its purpose; and
> e) less restrictive means to achieve its purpose;
>
> **(2)** Except as provided for in subsection (1) or in any other provision in the constitution, no law may limit any right entrenched in the Bill of Rights.

Section 36 has been the source of much academic writing but it is far more than an issue of academic debate since the section is fundamental to an understanding of the reasoning in Constitutional Court decisions. As important, if the school as an organ of state is to apply and promote human rights, is that those involved in school governance and management need to have a clear understanding of the principles of limitation.

What follows is an examination of specific words and terms in the limitation clause in order to gain greater comprehension of this clause.

a) The 'law of general application'

Section 36 begins with reference to 'the law of general application'. This term is summarised by De Waal *et al.* (1999:144) as those laws which are equally applicable to all, and are not arbitrary. Woolman (1996b:12-28) refers to laws of general application being publicly promulgated laws only, that is, laws accessible to all persons affected by such laws. This is designed to exclude arbitrary and discriminatory action and weed out *ex post facto* punishments as well as imprecise, non-general, *ad hoc*, and non-public, non-ascertainable edicts. It is all to ensure that citizens can know, in precise terms, what the law expects of them. The Constitutional Court in *Larbi-Odam v M.E.C. for Education (North West Province)* 1998 (1) SA 745 (CC), held that subordinate legislation applying to all educators in South Africa is 'law of general application'.

For South African schools the implication is that the school rules must be 'publicly promulgated' or in written form, made available to all. Unwritten rules, or so-called 'traditions' as used in the school context (rather than in the *common law* sense) have no legal basis, and do not meet the requirements of *laws of general application.* An example of the misuse of tradition, is a tradition in a school that all Grade 8 learners are meant to attend a "singing practice" before the First Rugby Team match against their arch rivals. Nowhere does the school have this in writing and available for all Grade 8 learners to consult. It might just be a verbal message, or threat, given by Prefects.

Extending the above, school rules, as subordinate legislation applicable to *all* learners, which are not arbitrary, qualify as 'law of general application'. The word *all* (in respect of learners) needs clarification. In a school with learners from Grade R to Grade 12 school rules may contain sections of rules applicable only to a specific phase. None the less, they remain 'of general

application' by being applicable to all learners in that particular grade or phase of the school.

b) What is 'reasonable' and 'justifiable'?

Mureinck (1994:40) suggests that a decision cannot be justifiable unless a plausible reason is given for why a particular decision was preferred in place of an arguably superior alternative, and unless there is a rational connection between the reasoning behind the decision and the decision itself. Carpenter (1996:113) suggests that what follows the word 'reasonable' provides the guide to what is reasonable and justifiable.

O'Regan (in Meyerson 1997:vii-viii) emphasises the requirement that any limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

What is reasonable and justifiable introduces what is referred to as the principle of proportionality. In *S v Makwanyane* 1995 (3) SA 391 (CC), Chaskalson P stated, at 435:

> Our Constitution deals with the limitation of rights through a general limitation clause... this calls for a 'two-stage' approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in chap. 3 [chapter 2 in the 1996 Constitution], and limitations must be justified through the application of sec 33 [sec 36 of the 1996 Constitution]... Under our Constitution... it is not whether the decision of the state has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by sec 33 [sec 36 (1996)]... It is for the Legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show it was not justified.

Chaskalson referred to the weighing of competing values when limiting constitutional rights for a purpose which is reasonable and justifiable, and making an assessment based on *proportionality* (italics added). Such

proportionality requires the balancing of different interests. Sec 36 [1996 Constitution] sets out a list of *relevant factors* (italics added) to be considered in weighing these different interests [a list which does not exist in the Canadian Constitution (1982)]. While drawing on the Canadian approach to limitations to assist the South African court, Chaskalson made it clear that the differences between the Canadian and South African limitation clause had to be taken in mind when interpreting sec. 33 [sec 36 of 1996 Constitution].

Briefly put, the first stage (or requirement) is for the person whose rights have been 'offended' to show that this is so. The Court, or any party relying on legislation to limit the individual's right must then show that the limiting of that person's right(s) was justified in terms of sec 36 of the Constitution (RSA 1996a) for such limitation to be upheld.

These relevant factors need careful consideration when a Principal or Governing Body attempts to impose limitations on a learner or teacher's right to freedom of expression.

c) 'The relevant factors, including ...'

These factors have been the source of much debate including the order in which they are given (Woolman 1997:111; Cheadle and Davis 1997b:319). One would not expect school management, educators or learners to have a grasp of the detail, but, certainly for school management, some broad understanding may be of value even if it is only to understand why schools are not free to simply impose whatever limitations they choose on learners' and educators' rights. Thus a brief examination of the five factors follows:

(i) *The nature of the right*

Cheadle and Davis (1997b:319) suggests that the closer the relationship of the particular right to the objective of a democracy based on human dignity, equality and freedom, the more stringently any limitation should be restricted.

De Waal *et al.* (1999:152) suggests that some rights weigh more heavily than others and limitations on such weightier rights will be far more difficult to justify. Given the views expressed in court cases and literature, freedom of expression would seem to fall into the bracket of 'weightier rights'. That being so, the attempt by schools to limit learners and educators exercising of that right may be difficult to justify.

(ii) *The importance of the purpose of the limitation*

Does the limitation serve the purpose of openness, democracy and other values that underpin the Constitution? No right is unlimited. Certain limitations may be necessary for the smooth functioning of a school to fulfil its purpose. Freedom of expression cannot be allowed to become a licence for chaos. Likewise, it may be essential to restrict the choice of teaching material to fit with the age and/or ability of the learners. It may also be necessary to restrict learner press freedom to prevent the publication of material which undermines the educational purpose of the school or could incite resistance. At a different level safety of learners may need to be protected by, for example, imposing restrictions on the wearing of some forms of jewellery. But, when a school seeks to impose a limitation on, for example, freedom of expression, management must be able to provide a justifiable purpose for the limitation which is in terms of the principles of the South African Constitution. Limitations which are imposed because management does not like a particular style of hair, or under the guise of 'concern for the image of the school', will be very difficult to justify and will thus be unlikely to win support [see Meyerson's reference to "impermissible purpose" in (iii) below].

(iii) *The nature and extent of the limitation*

The concern is to ensure that the cost of the limitation imposed on the 'rights holder', for example, the learner in the school, is not greater than the benefit gained by the wider society, for example, the school, when the limitation is imposed. Again, with reference to freedom of expression, a question can be

asked whether benefit gained by the school in insisting that boys have 'short back and sides' haircuts is greater than the offence to the dignity of the learner whose personal hairstyle is in line with deep cultural norms? De Waal *et al.* (1999:157) uses an Afrikaans proverb to explain, namely (translated) 'one should not use a hammer to kill a fly'. Meyerson (1997: 41) suggests that the greater the incursion on the right made by the limitation, the greater the burden of the state [or organ of state] to justify such limitation. Insistence on a particular form of appearance such as a particular hairstyle, or a 'no-sideburns' rule not only invades the learner's six hours a day at school but all the hours of the week when he is far away from school under the care and supervision of his parents. Such limitations invade not only the learner's right to freedom of expression but parental responsibility for deciding how their child dresses.

Meyerson further suggests that judges must ensure that the reasons given for the limitations are not an 'impermissible purpose behind permissible-sounding language' [see *McCulloch* (4.2.1)]. To return to conformity in hairstyles, the reasons given by schools such as 'the maintenance of discipline' or 'the good name of the school' may *sound* to some like noble motives but are, constitutionally, attempts to serve impermissible purposes.

(iv) *The relationship between the limitation and its purpose*

The limitation and its purpose must be rationally related, or 'a causal connection between the law and its purpose' (De Waal *et al.* 1999:157). In the school context school rules must have a causal connection with their purpose. Rules which limit learners' rights but have no causal connection with their purpose provide an unjustified limitation. The haircut issue above provides a useful example. If the short back and sides *(the rule)* was done away with, would discipline (*the purpose)* fall apart? To prove a causal relationship between one particular hairstyle and school discipline would seem somewhat out of reach.

(v) *Less restrictive means to achieve its purpose*

Is there a less restrictive way, for the purpose of the limitation to be achieved? In the school context, for example, is there a less restrictive way for a school to maintain good discipline than by forcing everyone to have the same hairstyle? If so, the less restrictive means must be applied.

5.4.4.2 EXPANDING ON THE LIMITATIONS

There are issues which are debated at length and others that need further clarity. What follows is to provide a broader explanation of the issues involved in limitations.

To explain the above factors in a school context, they are applied here, using as an example the United States case of *Bethel School District No. 403 v Fraser* 478 US 675 (1986) (see. 4.11.1). In brief, Fraser, a high school student, was suspended for what was deemed to be an offensive speech to the school, a speech filled with sexual innuendo which caused severe embarrassment to many younger students in his audience. Fraser challenged his suspension on grounds that his right to freedom of expression was violated. In terms of the above five factors, the following questions arise ...

a) Is *freedom of expression* a crucial right?
b) In terms of the importance of the purpose of the limitation, was the school's purpose to protect the dignity of the young audience and ensure that students know that the school does not uphold such abuse of privilege?
c) Was the cost of the limitation greater to Fraser than the benefit to the wider school audience, in terms of their dignity, and in terms of ensuring that sound educational values are upheld?
d) Was there a rational relationship between the purpose of the limitation and Fraser's suspension?
e) Was there a less restrictive means available?

There is no way of knowing if these are exactly the questions a South African court might ask. However, they highlight some of the difficulty schools face in imposing limitations on a learner's exercise of a fundamental right. The value of the questions to schools lies in them being used *before* limitations are imposed as an initial 'test' of whether such limitations might be upheld or rejected.

The issue of limitations is not confined to these five questions. Such limitations must meet the key requirement of being *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom* (italics added).

Woolman (1997:102) provides a key. In his view the quality of the inquiry depends on the nature of the questions asked, not on how many or in what order.

The *Fraser* case, in a South African context, would have been far easier to handle before the introduction of the Constitution. Fraser might have been called in by the Principal and told his behaviour was offensive and unacceptable. He may well have then been caned or punished in some other way. But, the case equally highlights the role of the South African Bill of Rights as well as the new dimension it brings to disciplinary actions, and the question of justifying limits placed on learners.

The example of *Fraser* also introduces the problem of what happens when the rights of one person e.g. Fraser's right to freedom of expression, clashes with the rights of another person or persons e.g. his fellow students' right to dignity.

The case of *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W) is another example of conflicting rights, the plaintiff's right to dignity and the press' right to freedom of expression in the form of freedom of the press.

Can rights be perfectly balanced? Woolman (1997:114) believes that *balancing* is often an impossible task. He suggests that one can compare boxes of cereal in a supermarket on the basis of grams per rand spent, a purely quantitative balancing. However, in attempting to balance rights the focus shifts far more to the realm of quality where the spectrum can be almost limitless. As a result, Woolman (1996b:12-61) suggests that such balancing of rights is often no more than 'linguistic alchemy'.

Two further cases illustrate the almost impossible task of balancing. *Barnette* (see. 4.10.3.6) involved the school board's right to develop loyalty and devotion amongst pupils in a country at war, with the Barnette family's devotion and loyalty to their deeply held religious convictions.

In another South African context Ladysmith High School's view of school uniform as a unifying factor in developing loyalty and commitment to the school came into conflict with the Adams' family commitment to their Moslem beliefs about the kind of dress a daughter should wear to school, having reached puberty (Liversage 1998:1-8). See 6.4.2 for a more complete discussion of this case.

Meyerson (1997:37-38), conceding that few rights are absolute, believes that rights may not be restricted merely on the grounds that such restrictions would, *on balance* (italics added), be desirable for neutral reasons. She argues that any restriction will not be justifiable in the normal course of life but only as an exception. She suggests, instead, that in the normal course of events we are required to tolerate harmful consequences that might be avoided by their restriction or limitation.

The reality is that most rights are incommensurable with one another. To illustrate, Woolman (1996b:12-59; 1997:118) refers to a number of different

issues which present dilemmas. One such dilemma, *expression v equality,* is of special concern to this study.

Freedom of expression, in whatever form it may take, comes with the possibility of offending someone. Teachers and learners need to be able to express themselves freely in order to fully participate in the educational process. To illustrate the *expression v equality* dilemma, consider the debating of a controversial issue in a secondary school guidance class, for example, the topic of *abortion.* One group of learners seize the opportunity to express strongly pro-abortion views. In such a debate it is likely that some person(s) may be offended. For example, a group of learners, in the same class, may have deeply held spiritual values and may feel attacked and ridiculed for their pro-life views. In offending members of the second group, a barrier may be built against their freedom to participate equally in the debate. However, if limitations are placed on free speech in the classroom, the first group will be denied *their* freedom to participate equally, freely and fully. The teacher has the important role of ensuring both rights for all learners. However, in such sensitive areas limitations cannot be used with justification merely to protect against oversensitive reactions from some.

Woolman (1996b:12-20) puts the issue of 'balancing' differently when he states that the Constitutional Court's role is not one of balancing but one of definition or demarcation of what kind of activity merits protection under a given right.

The so-called two stage limitation analysis is described by Woolman (1996b:12- 47-64) as having two primary concerns, (a) to provide a vehicle for subjecting infringement of fundamental rights to vigorous review, and (b) to provide a mechanism which permits government or some other party to undertake actions which, though *prima facie* unconstitutional, serve pressing public interests.

The upholding of the infringement of a constitutional right can occur only when the objective to be achieved is so *overwhelmingly important* that it justifies the infringement of such right(s). Meyerson (1997:40) believes such exceptional factors which would justify a limitation must be factors which carry *substantial* weight for all reasonable citizens and be restricting a *great evil* (italics added). Further the restrictions must meet points (c) and (e) of the relevant factors of Section 36b (I) (a) to (e) of the Constitution.

Given all of the above, it appears fair to believe that any restriction on freedom of expression, including academic freedom, in the school context, will need to be tested in the ways suggested above. With Meyerson, one can concur that any restriction will not be justifiable in the normal course of events but only as an exception in exceptional circumstances. This line of reasoning is strongly opposed by Buckingham (2000:133-148) who believes Meyerson's proposals require courts to maximise freedom. She suggests, instead, that courts must respect the democratic process in limiting rights. In essence Buckingham's arguments appear to be in conflict with Chaskalson P in *Makwanyane*, for example the rejection by the Constitutional Court of a referendum over the death penalty.

Any discussion of limitations would be inadequate without considering Meyerson's argument that the most basic and overriding test of any limitation is that it must be reasonable and justifiable "*in an open and democratic society based on human dignity, equality and freedom*" (italics added). She argues that this is not a one-off phrase in the Constitution but is found in Sections 1 (a), 7 (1), 36 (1) and 39 (1) (a), evidence that this is the basic premise of the Constitution of South Africa. Adding weight is Sec. 7 (2) which states that the state must "respect, protect, promote and fulfil the rights in the Bill of Rights".

Meyerson (1997: xxviii) argues that this critical phrase subjects the state to 'a threshold test' which has to be passed before the inquiry into the relevant factors in Sec. 36 (1) can take place.

It is not the purpose of this study to explore Meyerson's arguments in detail. She does, however, provide a crucial line of reasoning which is applicable to schools in terms of freedom of expression issues and her work is thus dealt with in some detail.

O'Regan (in *S v Makwanyane* at 328) argues that "[r]ecognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings".

'Dignity' makes clear, as 'equality', and 'freedom' on their own do not, that any limitation of a constitutionally protected right must respect the inherent moral status of the individual. Human dignity and equality under the Constitution (RSA 1996a) are treated as values underlying the whole of the Bill of Rights, but they are also concrete rights and freedoms (Gutto 1998:109). Chaskalson (2000:195,196) refers to the "foundational value of respect for human dignity" and describes human dignity as an attitude of life itself and not a privilege granted by the state. These lines of argument force one to question to what extent schools respect the dignity of learners when restrictions on personal expression are imposed.

In terms of hairstyles, the Pawnee Indian case of *New Rider* (see 4.2.1) highlights the lack of respect for culture and individual dignity. But what respect for individual dignity is reflected by rules of the following kind,

(i) boys' hair must be short, off the ears and collar;
(ii) no middle parting will be tolerated; and
(iii) stepped hairstyles will not be tolerated in this school?

Are such rules for the good of the school, or no more than expressions of personal prejudice by those in authority?

Meyerson (1997:15) suggests that no one should be able to propose for acceptance of

> ...a limitation which it would be reasonable to propose only if they were allowed to appeal to a morally irrelevant consideration, such as superior force ... unfair differences in *de facto* bargaining power must not be allowed to distort the outcome.

In the haircut rules listed above one can see an example of what might be described as resorting to appeals to a superior force ... "We are the Governing Body/Staff and you are a learner. We have authority to tell you how to cut your hair." By implication the learners' right to freedom of expression is curtailed or violated without those doing so giving any justifiable reasons or showing respect for the learners' personal dignity.

In a different "superior force" approach Meyerson (1997: 39) cites the Canadian case of *Singh v Minister of Employment and Immigration* [(1985) 1 SCR 177, 218i - 219a] where Justice Wilson stated:

> ...Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money could be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument ... misses the point.

Something of the "administratively convenient to do" approach can easily slip into schools and be reflected in such statements as "We don't have time to go through all the procedures", or "It's in our rules and we don't have time to debate such issues with children/teenagers", even where such issues concern the constitutionally protected rights of learners (which may be in the process of being violated by school management).

Sometimes the school attempts to restrict or limit an aggregation of quite small neutral harms. Can the state's purpose be negated by such aggregations? Clearly it cannot.

The issue of Moslem dress for girls in schools provides an example of such potential aggregation to justify a limitation. One child in Moslem dress presents no real problem but 'soon there will be 50 or more'. The school sees the aggregation, or potential aggregation, as a threat to its school uniform and rules on dress. To avoid any possible aggregation, the school applies a limitation from the very first case.

This line of argument may be used in similar ways in other freedom of expression instances. The reality is that if a limitation cannot be supported in a single case, it cannot be constitutionally supported in an aggregation of cases, or by reference to a possible aggregation of cases.

Meyerson (1997:55-56) argues that in seeking to limit any constitutionally protected right, a majority may not rely on an argument which asserts that any particular conception of what is good is intrinsically inferior or superior to another. While many people will, on firmly held religious convictions and spiritual values, disagree with Meyerson's line of reasoning, one is forced to agree that in terms of the broad spectrum of society, both religious beliefs, and beliefs about ultimate moral values, do not enjoy unanimity. If one agrees on that point, Meyerson argues that respect for dignity, equality and freedom demand that the Constitutional Court does not side with one or other particular religious belief or set of values.

This issue is well illustrated in the case of *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC). In the High Court Case preceding the appeal to the Constitutional Court the presiding judge posed the problem that if

the court were to uphold corporal punishment because of Christian Education's belief that it is a Biblical principle, the court might be forced to uphold a request from Moslem schools to chop off a hand of a learner who was caught stealing, in line with Moslem beliefs.

In the school context, if one replaces beliefs/moral positions with the word 'traditions' one has a set of 'intractably disputed beliefs'. Tradition is defined in the Oxford English Dictionary (2001), as a particular set of values or beliefs. In a school context traditions are values or beliefs about what is of value to the particular school (an organ of state or an independent school). But traditions do not enjoy unanimity.

A line of argument in a particular school may be that learners who come to that school are expected to conform to the rules and traditions of the school. Those who don't like such traditions should go somewhere else. A school may see this as a powerful argument and may even enjoy the support of by far the majority of the parent body. But, can such support be used by the school to justify limiting, for instance freedom of expression which conflicts with the "traditions", or freedom of religion which conflicts with the religious ethos of that school? Clearly the school is using a mixture of "superior force" and beliefs which do not enjoy unanimity. The limitations are flawed.

When a public school (as an organ of state) attempts to impose such limitations, the 'state' (in the form of the particular organ) is seeking to impose on certain learners a set of 'intractably disputed beliefs' and demand compliance or departure (see 6.4.2 for the Ladysmith High School example). Based on such 'intractably disputed beliefs' the school, as an organ of state, seeks to impose limitations on an individual learner's, and/or staff member's right to freedom of expression in various forms and/or freedom of religion.

This line of argument is critical if schools are to conform to the constitutional requirement of respect for human dignity, equality and freedom.

Meyerson (1997:62) believes that institutions which respect the values of dignity, equality and freedom, respond to intractable disputes about what is good, not by favouring one conception of what is good over any other, but by constituting a framework within which everyone has the same opportunities to define their own values, provided that in the process they do not infringe on others' opportunities to do the same.

How can one ask a majority to accept something they may strongly disagree with or even condemn? This is still more problematic if such people believe that their beliefs, and their actions that flow from their beliefs, are for everyone's good.

To quote Meyerson (1997:63), it is "a disagreeable pill to swallow".

The real issue is, however, *not* one of asking the majority to accept that all conceptions of good, or that all religious beliefs, are equally valid. The claim is rather that even though some conceptions of good may be objectively superior, their superiority cannot be publicly demonstrated. Neutrality about *good* is not first and foremost about another's perception of good. It is rather about respecting others' rights to genuinely differ from oneself, and respecting their dignity, equality and freedom to do so.

The issue of limitations is vital to any understanding of human rights. Equally important is an understanding of the limits of imposing limitations, together with some understanding of constitutional application and interpretation. But, in order to understand such issues, they must, together with the whole Constitution, be linguistically accessible and comprehensible for those who

must use them in the course of managing educational institutions. The next section examines this issue.

5.4.5 Comprehensibility and accessibility of the Bill of Rights

Application, interpretation and limitations have been expanded on to assist in the understanding of the Bill of Rights. But, in a country of many languages and, in places, low levels of literacy, if the Bill of Rights is either not accessible to the ordinary person, or school going learner, or if it is not comprehensible, the guarantee of fundamental rights will mean nothing to such people.

Nienaber (2001:113-131) conducted a comprehensive empirical study of the comprehensibility and accessibility of the Bill of Rights to lay persons because "the Bill of Rights is meant to be read by ordinary people" (2001:120). The group studied were divided into three groups, those with law training, those with matric, and those without matric. The differences in understanding of the Bill of Rights between the three groups was vast. The findings have serious implications for schools where governing bodies must deal with codes of conduct, disciplinary hearings in a constitutional context, and other legal matters. Low levels of ordinary literacy are problematic, but when that extends to affecting effectiveness in guiding a school, it becomes a critical problem. Nienaber concludes as follows,

> A policy for plain language drafting will have to be developed and applied... The importance of plain language in legal texts cannot be emphasized enough. The very foundation of our democracy depends on it... It is impossible to know the rules of our new democracy if these rules are written in abtruse legal language.

To write and speak of a constitutional right to freedom of expression has little value if learner or teacher is denied access to such right through ignorance arising from the lack of access and comprehensibility of the Bill of Rights to him (them).

5.5 CONCLUSIONS

Freedom of expression is one of the rights found in the South African Bill of Rights. The Bill of Rights is a part of the entrenched Constitution of South Africa (RSA 1996a). Having examined the key areas of how the Constitution and Bill of Rights may be applied and interpreted, and having examined the possible ways in which such a right might be limited, the next chapter examines the right to freedom of expression and its relevance in the South African school setting, focussing on particular areas in which problems are possibly most likely to arise.

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Chapter 6: THE RIGHT TO FREEDOM OF EXPRESSION IN SOUTH AFRICAN SCHOOLS

6.1 INTRODUCTION

Freedom of expression in the wider international context was extensively covered in Chapter 3. In the historical context, the experience of freedom of expression in South Africa prior to 1994 and the Interim Constitution (RSA 1993a) was limited. This needs, however, to be clarified.

6.2 FREEDOM OF EXPRESSION IN HISTORICAL CONTEXT

Much is made of the repressive nature of South Africa prior to 1994 and it is correct to say that individuals, groups and organizations strongly opposed to the government and its actions faced such repression. This repression came in the form of repressive laws, arbitrary arrests, detention without trial, and constant harassment by state security and the police. But, such repression went wider. The state control of radio and, from 1976, of television, together with the constant attacks on the press and its freedom affected not just those in strong opposition to the government but affected every individual in the country to a lesser or greater degree.

For the citizen who was not politically involved or even interested, there was probably no overt repression but such citizens were denied access to information or fed slanted or misinformation via state controlled radio and television. But even more, the repressive laws and actions had a "chilling" effect. The effects permeated the entire society, distorting even social and personal expression [*Gardiner v Whitaker* 1995 (2) SA 672, 688 (A-C) (E)], in the sense of people being guarded in their expression. Once there is any sense of, "I must be careful what I say because the State ...", the "chilling" factor takes effect.

Moseneke [*Forward* in Basson (1994)], reflects on the pre-1993 Constitution period as follows:

> A cursory look at the catalogue of fundamental rights contained in Chapter 3 [Interim Constitution] will immediately show that virtually each and every one of these rights were violated by one statutory enactment or another. Roman Dutch law *grundnorm* had a judicial capacity to protect most, if not all, fundamental rights and freedoms. However, [in South Africa] time after time the statutory overlay violated each of these fundamental rights and freedoms with impunity, without any significant challenge from the judicial authority of the day.

In fairness, there were judges who spoke out. Justice Rumpff, in a minority judgement in *Publications Control Board v William Heineman Ltd.* 1965 (4) SA 137 (A), at 168 reflects something of a judicial challenge to the restricting of freedom of speech. He spoke of freedom of speech bringing out the constant desire in some people to abuse it, while in others it provokes an inclination to repress such freedom more than is necessary. This latter tendency he described as 'fraught with danger' because it is 'based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which he does not agree'. Rumpff went on to say that courts should steer a course as close as possible to the preservation of liberty, because 'freedom of speech is a hard-won and precious asset, yet easily lost' [see 2.2.2.1 for reference to Milton's very similar views, in 1644, on fighting for and guarding free expression (Suffolk 1968:11)].

In Rumpff's words may lie a key to understanding why many find the changes brought by the Bill of Rights so difficult to accept and adapt to. This is particularly so having come from a rigid and repressive system where prohibition by the state of what they did not like was, seemingly, a way of life. However, Rumpff's warnings about those taking advantage and abusing freedom of speech are equally relevant in a period of rapid transition.

6.3 FREEDOM OF EXPRESSION UNDER A DEMOCRATIC CONSTITUTION

With the political transition of the 1990s came a move away from the authoritarian culture to one of openness, accountability and justification for actions. Included in this transition were all the issues of freedom of expression which Marcus (1994:148) described as "... issues which pervade our entire legal system". Sec. 15 of the Interim Constitution (RSA 1993a) and Sec. 16 of the final Constitution (RSA 1996a) provided definitive clauses on *freedom of expression* as one of the entrenched rights in the Bill of Rights. Section 16 of the 1996 Constitution states:

> **Sec. 16(1)**
>
> Everyone has the right to freedom of expression, which includes -
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive and impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> **Sec 16(2)** The right in subsection (1) does not extend to
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence;
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The right to freedom of expression is never absolute but subject to both the general limitations clause (Sec. 36) (see 5.4.4) and also the particular limitations built into the right itself, as indicated in Sec. 16(2).

What follows is an examination of the various aspects of freedom of expression and an examination of the limitations contained in Sec. 16(2). This will then serve as basis for the examination of specific aspects of freedom of expression which may or do impact on South African schools.

In the first Constitutional Court judgement on freedom of expression, *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), the court articulated the underlying values of freedom of expression as follows:

> Freedom of expression lies at the heart of democracy. It is valuable for ... its instrumental function as guarantor of democracy, its implied recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a whole range of matters.

In this case the Constitutional Court restated the three widely held basic arguments for freedom of expression expanded on in the next section.

6.3.1 Basic arguments for freedom of expression

The three basic arguments for freedom of expression are developed below.

6.3.1.1 FREEDOM OF EXPRESSION AND THE POLITICAL PROCESS

The political process can never be democratic without openness to hear and express differing views. Such open expression of dissent furthers social stability by allowing a socially acceptable approach to working through conflict rather than people having to act out their dissent in socially destructive ways (Marcus & Spitz 1996: 20-8).

Kairys (quoted by Suttner 1990:373) expresses the view that the basic principle of individuals and groups having the ability [and opportunity] to express different and even unpopular views without prior restraint or facing punishment, is a necessary element of any democratic society.

Another angle on the political importance of freedom of speech [expression] was given by Justice Dumbutshena in *Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS), when he stated:

> In the context of Namibia freedom of speech is essential to the evolutionary process set up at the time of independence to rid the country of apartheid and its attendant consequences. In order to live in and maintain a democratic state citizens must be free to speak, criticize and praise where praise is due. Muted silence is not an ingredient of democracy because the exchange of ideas is essential to democracy.

The judge quoted from *Rankin v McPherson* (1989) 493 US 378, 97 L.Ed 2d 315, 326-7 where that court stated:

> [D]ebate on public issues should be uninhibited, robust and wide open, and... may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

(See *Poling* 4.11.1 where a high school student's speech could have been considered as political speech.)

Freedom of expression also enables a check to be kept on the State's abuse of power, thereby ensuring a legitimate form of resistance to totalitarian control. Justice Cameron, in *Holomisa v Argus Newspapers Limited* 1996 (2) SA 588, 608J - 609A (W) stated that "[t]he success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens".

6.3.1.2 FREEDOM OF EXPRESSION AND INDIVIDUAL SELF-FULFILLMENT

Individual self-fulfillment and autonomy depend heavily on the freedom and ability of the individual to develop, hold and express his own opinions, even if such opinions differ radically from those of others. The individual must also be free to express those opinions, orally and in writing, and be exposed to the opinions of as wide a selection of other persons as he chooses to expose himself to.

In *Gardiner v Whitaker* 1995 (2) SA 672 (E), 687 I-J, the above position is stated as follows:

> Democratic societies have placed a high value on ensuring the conditions under which individuals may develop their capacities, participate in their own self-definition, and exercise independent judgement... The development of individual autonomy and the value placed on self-fulfillment require that a range of expressive activities... enjoy constitutional protection.

The desire to communicate, to express one's feelings and thoughts, and to contribute to discussion and debate is an essential characteristic of human nature. Freedom of expression is thus as fundamental a human right as the rights to privacy, religion, belief and opinion (Van der Westhuizen 1994:269) and these, together, are an essential part of the right to dignity (Meyerson 1997:55-170; Wellman 1995:94-95). To deny a person the right to express his views, beliefs and emotions is to deny him a sense of self-fulfillment so important to his personal dignity.

In *Holomisa* (see 5.4.4.1), Justice Cameron stated that the South African guarantee of freedom of expression

> ... is rooted not only in the instrumental conceptions of the value of free speech and expression, but in that respect that the possession of that freedom grants to every individual as an autonomous moral agent.

Meyerson (1997:84) compliments this view when she argues that, when the state closes the door on expression or receiving of certain information or opinions, it denies the individuals their ability to exercise their own judgement and fails to respect their dignity, equality and freedom.

Equally, to force an individual to be a captive audience is a denial of freedom of expression. It is the denial of the captive person's right to dissent by the act of leaving that audience.

6.3.1.3 FREEDOM OF EXPRESSION AND THE SEARCH FOR TRUTH

The search for truth as a reason for the entrenched right to freedom of expression is discussed in Chapter 3 (see 3.2.1). Marcus and Spitz (1996:20-7) suggest that the search for truth requires openness to competing or opposing opinions which, with continuing criticism, ensures that stated opinion remains open to further development and/or refinement.

The suppression of unfavourable opinions can mean the suppression of the truth or deny the possibility of truth being arrived at by the examination of such unpopular opinions. Meyerson (1990:397-398) suggests that the reliance by conservative thinkers on 'revealed truth and infallibility of authority' can lead to suppression of the truth or the refusal to consider alternative opinions.

Van der Westhuizen (1994:268) quotes J.S. Mills' 1859 work 'On Liberty' where Mills states: "Different and opposing views must be permitted to compete in the market place of ideas from which the most valuable will emerge". Van der Westhuizen points out that such differing views, in the form of malicious propaganda can do a great deal of harm before the fallacy of such views becomes exposed as such. Similar sentiments against and warnings of the dangers of the totally open market place of ideas have been expressed by Justice Dickson and by Wellington (see 3.2.1).

Drawing the line on expression of opinions raises the issue of censorship. Formal censorship is a legal "suppression or control" (Oxford Dictionary 2001) over what is said, written or expressed in whatever form. However, it is equally possible for schools to apply 'censorship' by exertion of authority without any legally defensible basis. The issue then becomes not only *where* to draw the line, but *who* draws the line and on *what basis* [cf. Henkin (4.3.1)]

The purpose of freedom of expression makes it highly desirable that the right should enjoy maximum protection, but what guarantees are there that the right will not be brushed aside?

6.3.2 The Guarantee of the Right to Freedom of Expression

6.3.2.1 WHAT IS THE GUARANTEE AND WHAT DOES IT ENTAIL?

Rautenbach and Malherbe (1998:17) summarise Sec. 16 as including freedom to receive and impart information, freedom of the press and other media, freedom of artistic creativity, and academic freedom and freedom of scientific research. Marcus and Spitz (1996:20-17) point out that freedom of expression provides protection for a wider range of activities which convey meaning than the mere articulation of ideas and opinions [Sec. 16(1)(b) of the Constitution (RSA 1996a)], provided that the activities and actions convey or attempt to convey meaning. If expression, which was purely physical, were equally protected the door would be open for criminal activity to be justified as 'freedom of expression'.

The various elements of freedom of expression are discussed in Sec. 6.4 below, as they relate to schools.

In reality how guaranteed is freedom of expression? The guarantee is as safe and strong as its guarantors choose and are able to protect it. The Constitutional Court, for as long as it plays its crucial role of the defender of human rights, provides the needed protection. But, the truth is, in a revolution or a military take over new rulers could wipe out the constitution, the bill of rights and all the guarantees. The greater the impact of real democracy and the belief that the citizens interests are being seen to, for so long will the guarantees [probably] last.

6.3.2.2 IS THE GUARANTEE A GUARANTEE OF AN UNLIMITED RIGHT?

As previously indicated (see 5.4.4), the right to freedom of expression is not unlimited but subject to limitations built into Sec. 16(2) and those contained in Sec. 36 of the Constitution (RSA 1996a).

Sachs (1990:50), writing prior to the Interim Constitution, pointed to the potential danger that freedom of expression could be used to generate further racial hatred in South Africa. He stated:

> [A]fter so many interferences with the rights of free speech ... the tendency to let people say what they want, when they want, how they want, is very strong ... The problem then is how to reconcile the need for openness and the right to speak one's mind, with the necessity for healing wounds created by racism.

Suttner (1990:374) expresses a similar view that one cannot argue that all people have the right to say anything, at any time or in any place. Even before the Interim Constitution (RSA 1993a), Meyerson (1990:394) and Cockrell (1991:339-341) provided conflicting responses to Sachs' views. The former writer expressed herself willing to defend a restriction on the expression of racist views which had a high probability of incitement, but also argued for tolerance. She argued that arguments against tolerance and a ban on the expression of racist views were inconsistent with progressive [liberal] views, and that intolerance comes at a high price by driving the not tolerated underground and increasing its strength. Open exposure, she believed, exposed its weaknesses and abhorrent nature.

Cockrell differed strongly with Meyerson and posed the question he believed all liberals have to face, namely "...how far people should have the right to do the wrong thing". One of the implications of Cockrell's view is that it could lead to a situation of people denying anyone else the right to espouse anything which they themselves honestly believed to be wrong.

While pointing to the great benefits of protection given to freedom of expression, Van der Westhuizen (1994:270) states that in the use of anything good, there is always the risk that someone will abuse the good.

Sachs (1990:50) suggested that "freedom of expression and accountability become inseparable". He pointed out that the real dilemma lay in what to do about the *organized mobilization* of racial and ethnic hatred. Sachs' concerns seem to have been met in Sec. 16(2) (c) where the right to freedom of expression is stated as not extending to the advocacy of hatred that constitutes incitement to cause harm.

The limiting of freedom of expression is widely and hotly debated. Steenkamp (1995:112), for instance, argues for restrictions on the right. His view is that "... a strict limitation on expression in the South African Constitution which is similar to the Covenant [International Covenant on Civil and Political Rights (1976)] (see 2.3.4), abides by international human rights norms and is necessary for national reconciliation". But what is meant by 'a strict limitation'? The very words he uses seem synonymous with the antithesis of freedom of expression.

J.S.Mill, Justice Holmes and many others might strongly argue that real access to "the market place of ideas" is infringed by such restrictions.

Section 16 (2) does not use the words 'hate speech' but the advocacy of hatred. However, both 'hate speech' and the advocacy of hatred refer to a 'put down' or infringing of the dignity of a sector or sectors of the population. Marcus and Spitz (1996:20-47) opine that hate speech broadly refers to expressive conduct which insults a racial or ethnic group, whether by suggesting inferiority or effecting exclusion.

The Promotion of Equality and Prevention of Unfair Discrimination Act (RSA 2000) deals with issues of *hate speech* as follows:

> Sec. 10(1) Subject to the proviso in section 12, no person may publish, propagate, advocate, or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
>
> (a) be hurtful
>
> (b) be harmful
>
> (c) promote or propagate hatred.

Further section 14 refers to determination of fairness or unfairness [of discrimination] as referred to in sec. 9 of the Constitution (RSA 1996a). But, sec. 15 states that in cases of hate speech and harassment, section 14 does not apply. The clear implication is that all hate speech and harassment are unfair discrimination.

Section10 (1) (a) and (b) of this Act appear to broaden the limitation of hate speech as found in sec. 16 (2) (c) of the Constitution (RSA 1996a), by adding "...communicate words... with clear intention to be... *hurtful* and *harmful*". This addition may pose real difficulties for school management in dealing with racial slurs made by teenage learners.

The debate around hate speech is considerable and the interpretation of the term itself is open to dispute. The issue hinges, fundamentally, around the issue of human dignity and should be read in conjunction with the section on limitations (see 5.4.4.1) and, in particular, Meyerson's reference to the fundamental underlying principles of the Constitution.

De Villiers (1899) [quoted in *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1, 23] highlights the core of the right to reputation and dignity under Roman-Dutch Law and, by implication, the requirement to refrain from abusing others or inciting third parties to do so.

> By a person's reputation is here meant that character or moral or social worth to which he is entitled among his fellow-men; by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt...
>
> The rights referred to here are absolute or primordial rights; they are not created by, nor dependent for their being upon any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion... The law recognises the absolute character of this right, so far as it is well founded and has not been lost or forfeited in the eye of the law itself, and it takes this right under its protection against aggression by others.

However Sec. 16(2) (b) and (c) impose a 'limit on the limitations'. In Sec 16 (2) (b) the words *incitement* and *imminent* are crucial. There is a considerable difference between a personal racial slur made to an individual on his own, and incitement which implies the stirring up of other people to cause harm to the person or persons who are the target of abuse.

Prior to the implementation of the Interim Constitution (RSA 1993a), the Regulation of Gatherings Act 205 of 1993 (RSA 1993b) provided a guideline which is still useful today. Section 8(3) of the that Act states that

> ... no person present at or participating in a gathering or demonstration shall, by way of banner, placard, speech or singing, or in any other manner, *incite* (italics added) hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion.

The focus of the limitations in Sec 16(2) of the Constitution (RSA 1996a) appear to fall strongly on incitement of others rather than what might loosely be called personal racial and other insulting remarks. While Sachs (1990: 51) states that "... there is no democratic right to be a racist", the very word 'racist' is often used so emotively and far too freely. This gives rise to a serious question of whether the emotive use and misuse of the word 'racist' is giving

rise to a 'chilling' of freedom of expression for certain sectors of the South African population, out of fear of offending other sectors and having unfounded accusations being made against them.

Prior to the Interim Constitution (RSA 1993a), Malherbe (1993:704) wrote that viewpoint discrimination would not be permitted, that is, that anyone in a school would have the right to express their own opinion or standpoint, and have the right not to do so. However, despite Malherbe's stand on 'no viewpoint discrimination', expressing any point in South Africa which has any racial connotation opens the possibility of being accused of being racist or of engaging in some form of hate speech. This presents real problems for school management and teachers in maintaining harmony in the school.

The issue of so-called 'racism' and 'hate speech' *has* reared its head in South African schools. Van Heerden (2000:279-280) refers to the conflicts experienced by black and white learners in 'desegregated' schools, specifically with reference to racial slurs or name calling and counter slurs or retaliation. The real difficulty is for teachers to know when remarks are purely school boy/girl remarks typical of teenagers around the globe, and when those remarks need to be stopped before ugly scenes result. The question of "intention to be hurtful or harmful" [Sec.10(1)(a) and (b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (RSA 2000)] could prove very problematic in this situation, particularly in a case of it being the word of one learner against another.

Burchell (1998:vii) summarises the issues in pointing to the conflict between protecting an individual's dignity on the one hand, and ensuring the right of people to freely express themselves on the other. In a country in transition from racial disharmony to a modern non-racial constitutional democracy, the balancing of these two crucial rights "places the 'modern *actio injuriarum*'

[protecting an individual's right to dignity and reputation] at the cutting edge of constitutional theory".

6.3.3 Freedom of expression as a universal human right.

Freedom of expression is not the property of any political system or ideology. It is not given as a favour by any government. It is, instead, a universal human right, defined and guaranteed in international law (Johannessen 1994:218) and entrenched in the South African Constitution (RSA 1996a).

Van Schalkwyk, in *Mandela v Falati* 1994 (4) BCLR 1 at 8, described freedom of expression as the freedom without which other freedoms would not long endure. In response, Govender (1997:20) suggests that all expression, other than that which is aimed at achieving the objectives set out in Sec. 16 (2) of the Constitution, is protected, provided it conveys a message. This view is echoed by Marcus and Spitz (1996:20-58). De Waal *et al.* (1999:298) adds the important reminder that the specific inclusion of some particular forms of expression in Sec. 16 (1) does not single them out for greater protection than other forms of expression. He states rather that every act by which a person attempts to express some emotion, belief or grievance should qualify as constitutionally protected expression. This view seems to go too far since it could be misread to include many criminal actions.

Section 16 has two other key words, namely that the right to freedom of expression belongs to *everyone* and *includes* the aspects set out in Sec 16 (1) (a), (b), (c) and (d). No person is excluded and the list given is not exclusive.

Johannessen (1994:239) provides a useful overview in stating that, by including a clause which guarantees the right to freedom of expression, South Africa has adopted the line of freedom of expression as a cornerstone for the democratic society.

The inclusion of *everyone* and the *non-exclusive* list of Section 16(1) introduces the reality that teachers and learners have a right to freedom of expression. As stated in *Tinker* (see 3.3.1), rights are not left outside the school gates. Sec 4(1) of the National Education Policy Act (RSA 1996c) requires the Minister of Education to formulate education policy which will ensure the advancement and protection of the fundamental rights of every person as guaranteed in Chapter 2 of the Constitution (RSA 1996a). Wood (2001:142) views freedom of expression as such a fundamental right which a learner in a public school can demand that it should be given effect to and be protected in the public school environment.

The question of *'everyone'* in the school context raises for De Waal (2000:51,55) the matter of a learner's age. She suggests that the age and level of maturity of learners serve as examples of functional reasons which could result in the limitation of the learner's independent right to exercise his rights, but she further states that "...it appears that the SA Constitution does not distinguish...between children able and children not able to exercise their fundamental rights independently".

The problem raised by De Waal (2000:51,55) plays out in the question whether freedom of expression by the learner can, in fact be limited by factors of age and/maturity, or whether age/lack of maturity will be used as a mitigating circumstance if the young child oversteps the bounds of freedom of expression. A second question facing any school attempting to use age/lack of maturity to limit the learner's freedom of expression is the need to define those two factors in a way in which they can substantiate their right to impose limitations. It is suggested that the acceptance of *everyone* to mean just that, may be a more practical and workable route to take (see 5.4.1).

It is clear, however, that children under certain ages do not have the right to exercise all the rights provided in the Bill of Rights. Under the age of 18 they

may not vote. There are age restrictions (limitations) on the right to contract. This is why the South African Schools Act (RSA 1996b) prevents learner representatives on Governing Bodies from signing contracts or being held legally accountable for any financial decisions of the Governing Body. Further, because of the immaturity of young children, those who teach learners in the early grades have a higher degree of responsibility placed on them to care for their learners. However, when it comes to freedom of expression in the six areas under discussion, it is difficult to justify limitations on the exercise of the right simply because a learner may, for instance, be only eight years old. What the young learner may be exposed to may be of greater concern, and the school may thus rightly impose limits on the academic freedom of the young learner's teacher to prevent such a teacher presenting unsuitable or harmful material to that child. When it comes to limitations on dress, hairstyles and jewellery (other than for safety reasons), on the grounds of the learner being young would seem beyond possible justification.

The next section examines freedom of expression in the context of the South African Schools Act (RSA 1996b) and the related *Guidelines* (RSA 1998b).

6.3.4 Freedom of Expression and the South African Schools Act (RSA 1996b)

Reference has been made to the issue of the counter-majoritarian perspective (see 5.4.3) and the right or otherwise of the majority to impose their will on the minority. Before examining the specific aspects of freedom of expression in the South African secondary schools, it is important to examine the powers of schools and their governing bodies in respect of discipline, codes of conduct and other aspects which might or might not allow them the right to limit learners, and/or educators, right to the aspects of freedom of expression discussed in the following sections.

Key to understanding these powers are the South African Schools Act (RSA 1996b) and the Guidelines for the Consideration of Governing Bodies in adopting a Code of Conduct for Learners (RSA 1998b), issued in terms of Section 8(3) of the Schools Act (RSA 1996b), and hereafter referred to as the *Guidelines.*

In an introduction to Section 8 of the Schools Act (RSA 1996b), Boshoff and Morkel (2000:2A-9) describe a school code of conduct as a document meant to ensure that all stakeholders in a public school agree to a disciplined and purposeful school environment to achieve and maintain quality education in such a school. They go on to describe the underpinning principles as 'respect for one another' and 'a concern to ensure the fundamental rights contained in Chapter 2 of the Constitution of the RSA are adhered to, in particular the principles of human dignity, equality and freedom'.

Section 8(2) of the Schools Act (RSA 1996b) refers specifically to the code of conduct which must be *'dedicated to the improvement and maintenance of the quality of the learning process'* (italics added). Section 8(4) states 'Nothing contained in *this Act* (italics added) exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner'.

The South African Schools Act (RSA 1996b) outlines the functions of school governing bodies in Section 20, two of which are of particular concern here, namely

> Sec. 20 (1) The governing body must
>
> (a) promote the best interests of the school and strive to ensure its development through the *provision of quality education for all learners at that school* (italics added); and
>
> (d) adopt a code of conduct for learners at that school.

In the *Guidelines* (RSA 1998b), a number of sections are especially relevant here. Among other things, the code of conduct must establish a disciplined and purposeful environment to *facilitate effective education and learning in schools* (italics added) [sec 1(a)], and must be subject to the Constitution (RSA 1996a), the South African Schools Act (RSA 1996b) and provincial legislation. In Sec 1(4) the *Guidelines* spell out the role of the code of conduct in informing learners behaviour 'in preparation for their conduct and safety in civil society' and must be *focussed on facilitating constructive learning* (italics added). Further, in Sec 1(6), the purpose of the code of conduct is described as being 'to promote positive discipline and exemplary conduct, as learners learn by observation and experience'.

Those writing the code of conduct are instructed to include a preamble which directs the code of conduct *'to a culture of reconciliation, teaching, learning and mutual respect, and the establishment of a culture of tolerance and peace in all schools'* (italics added).

In terms of principles and values, Sec 4(1) emphasises the rights and democratic values of the Constitution (RSA 1996a) and states, *"The school must protect, promote and fulfil the rights identified in the Bill of Rights"* (italics added). Section 4(5) provides clear reference to a wide interpretation of *freedom of expression* and some very specific but limited limitations.

The use of italics above is to focus attention on the fact that both the Schools Act (RSA 1996b) and the Guidelines (RSA 1998b) appear to place heavy emphasis on the quality of education (teaching and learning) within the context of the Constitutional principles of respect for human dignity, equality and freedom.

It is against this legal background that the issues discussed below must be judged, together with the right or otherwise of a school and/or its governing

body to make rules which effectively limit or curtail the learners and/or educators rights to freedom of expression, as demonstrated in grooming, dress, the wearing of jewellery, artistic creativity, press freedom, and academic freedom.

6.4 FREEDOM OF EXPRESSION IN SOUTH AFRICAN SCHOOLS: SOME SPECIFIC ISSUES

One of the difficulties in confining the examination of freedom of expression to Section 16 of the Constitution (RSA 1996a) is that both Sections 15 and 17 refer to issues that fall strongly into the ambit of *expression*, namely the right to express one's beliefs and to engage in public demonstrations to do so. To illustrate the overlap of these three sections of the Constitution one has to examine the American case of *Tinker* (1969) (see 3.3.1) and ask under which section of the South African Constitution the case would be dealt with. Likewise one asks whether *Barnette* (1943) (see 4.10.3.6) was, in South African terms, a freedom of expression or freedom of religion case?

The overlaps of expression and religious freedoms in *Barnette* are not unique to the United States but have been found in Canada (see 4.3.4) and New Zealand (see 4.5) where pupils chose religious artifacts or clothing which conflicted with a school's prescribed dress code.

In examining issues in the South African school contest, Section 16 will be the focus of attention while at the same time conceding that others may see aspects of the issues as belonging under Section 15 and/or Section 17. Suffice to say that there are cases where drawing clear lines of distinction are inappropriate.

Section 16 sets out the right to freedom of expression but the definition is not, nor is it intended to be, precise or all inclusive. A key word in Section 16 is

'*includes*'. The extent of freedom of expression is thus clearly broader than the mere words of Section 16.

In the *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* (RSA 1998b), Sec. 4.5.1 attempts to provide a guideline to schools of what freedom of expression *includes* in the school context,

> Sec. 4.5.1
>
> *Freedom* of expression is more than freedom of speech. The freedom of expression *includes* (italics added) the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learners' rights to freedom of expression are not absolute. Vulgar words, insubordination, and insults are not protected speech. (cf. the last sentence with reference to the Equity Act in 6.3.2.2).

It is important to note

(i) that this is not the constitution but an interpretation and a guideline;

(ii) that the interpretation fits with experiences in other countries with entrenched constitutions; and

(iii) that again the word, *includes*, indicates that this is not an all inclusive list, but a pointer to schools.

In attempting to assess what has occurred since 1996 in regard to freedom of expression in the schools, the lack of case law means that reliance must be on other sources of information including newspaper reports, interviews and responses to previous research, apart from the literature from other countries.

The lack of court involvement and consequent case law means that schools have not had to publicly defend their standpoint in a court of law. As a result the reasoning of schools for their actions appears to be about conformity to

rules rather than providing any substantial pedagogical research and/or justification for such actions.

What follows is an examination of aspects of freedom of expression that have already affected and/or are likely to affect secondary schools in South Africa. These include grooming/hairstyles, dress, jewellery and other ornamentation, learner press, art and artistic creativity, and academic freedom. Running through these issues are some or all of the transversal issues of religion, culture, age, limitations and school rules.

6.4.1 Grooming/Hairstyles of Learners

A close examination of Sec 4.2.1 will serve as a reminder of the fuss made over the length of the hair of school going children, particularly boys, and the extent to which courts have become involved in the issue. The United States cases of *New Rider* and *Stull,* in that same section, highlight two of the wider issues involved in hair length, specifically culture and the expression of individual personality.

In South Africa hair length cases have not, as yet, reached the Courts but have already received wide publicity in the press, and, in some cases, involved the intervention of the South African Human Rights Commission. The following serve as examples of cases involving the length and/or style of learners' hair in South African schools and serve to illustrate some of the issues involved.

In 1998 a school inspector was forced to intervene when a school wished to suspend a Xhosa speaking learner for shaving his head. The learner had previously explained and the inspector confirmed that shaving of the head was an act of respect for a deceased relative [Anon: Personal Interview, School Inspector (name withheld), August 1999]. Hairstyles are not just an issue of teenage rebellion. There are other factors such as culture and genuine personal preference.

In 1998 a Grade 5 learner was suspended indefinitely for not having a 'proper' haircut, 'proper' being a haircut without a 'step'. The school management was subsequently reprimanded by the KwaZulu Natal Minister of Education (*Sunday Times*, 27 September 1998). In 2000 an identical situation arose involving a Grade 3 learner. The mother, a single parent, indicated that at that stage she could not afford the cost of a second haircut for her son until pay day. The school refused to back down and insisted the child remain at home until he had had a 'proper' haircut. [Anon: Personal Interview, Parent (name withheld), May 2000].

In October 2000 a secondary school suspended a learner, without a hearing, for having hair which was too short. A week long battle ensued with much press publicity before the direct intervention of the Human Rights Commission led to the boy's return to school (*The Herald* 3 and 6 October 2000). At the same time a long standing battle over another secondary school learner's hairstyle came to a head when the parent confronted the school with the legal position of his son. The school decided to drop their proposed action (Van Rensburg: Personal Interview, November 2000).

Early in 2001 a Rastafrarian Grade 1 pupil was refused permission to attend school until his hair was properly cut and washed. Again intervention from outside and publicity followed before a resolution was reached (SABC TV 3 News, January 2001). This last case has another dimension in that one might argue that the health of co-learners might be affected if, for example, such a child had lice in his hair, or the possibility exists that other learners might refuse to sit next to a child who is obviously dirty and whose parents refuse to see that he comes to school in a clean state [cf. the findings in the *Gere* case (4.2.1)].

There are cases which have either reached the press or involved consultation with the author. It is reasonable to believe that there are many more cases of action taken against learners where learners give way to school pressure and conform for the sake of peace.

While the focus thus far has been on boys' grooming, girls have not been immune from school action. A particular issue concerns the wearing of braids. In one secondary school the principal informed the school that the only girls permitted to wear braids would be those from a culture with which braids was usually associated. This act of cultural discrimination did not go unnoticed [Anon: Personal Interview, Secondary School Learner (name withheld), July 1997]. Some of the issues of concern to schools are the colouring of hair and the tying back of long hair with the 'right' coloured ribbon or bobbles.

The first case concerning girls' hairstyles was heard in the Cape High Court on 8 February 2002. The unreported case arose from 18 year old Danielle Antonie's suspension by Settlers High School for wearing dreadlocks. She was suspended in 2000 when the school's governing body ruled her hairstyle did not comply with its regulations (*Sunday Argus*, 10 February 2002). The case does not provide clarity over the acceptability of various hairstyles nor did it deal with the issue of hairstyles and freedom of expression. Danielle took the case to the High Court to clear her name and her school record. The Court found that "Danielle had been suspended for breaking a rule that did not exist". Fritz Gaerdes, of Lawyers for Human Rights, stated that he had intended fighting the case on constitutional grounds. The case was unopposed by Settlers High and the constitutional issues were thus not an issue which needed attention.

Of particular note is the decision of the High Court to refer the matter to the Western Cape Education Department for further attention (ETV News, 8 February 2002). This is not the first time the Cape High Court has followed

this route. In October 1998 in *De Kock v Department of Education and others* (Case 12533/98 Unpublished), the expulsion case was referred for the purpose of ensuring that the department established rules and guidelines for schools so that similar cases did not end up in Court action.

Any case which is successfully brought by a learner against a school provides a precedent of which *all* schools need to be informed in order to act appropriately in similar situations in the future. The case of *Antonie* has potential implications for all schools in respect of hairstyles and freedom of expression, despite the constitutional issues not being raised in *this* case. It appears that the Cape High Court may be doing what they can to prevent similar cases coming to Court in the future.

The Education Department's response is awaited and may provide some clarity on instructions to schools on the handling of these issues in the future.

Alston (1998: 91) describes the following as examples of school rules relating to hair:

- Hair must be neat and acceptable *according to school norms* (italics added);
- Pupils' hair must at all be well kept according to regulations *prescribed by the staff.* It must be cut in a presentable way;
- Hair may not be coloured; and
- Boys are not allowed to have beards and moustaches and they must shave daily.

These rules raise several questions. The prescribed rules are seen by school authorities as binding. But when these rules limit freedom of expression without justifiable reasons, their validity can and will be challenged.

The last of the rules above has implications for learners from different religions and, specifically, for learners from conservative Jewish sectors where the wearing of a beard or long side burns is part of being an adult Jewish male (adulthood being from an age as early as 12 years), or from a Moslem family where the shaving of male facial hair after puberty is frowned on or forbidden in certain religious circles. Restrictions placed on such learners will contravene the free expression of religious beliefs.

Logical explanation for the apparent obsession many schools have with haircuts and hair length is difficult to find. Perhaps it is an issue of insisting on conformity and a desire to 'protect' the school's good name. If these are the reasons, they fall outside justifiable reasons for limiting a learner's freedom of expression. Much of the problem currently may be a carry over from the past where the South African principal and staff exercised great power and where questioning of rules and motives for the rules seldom occurred.

One question remains if any restriction of personal grooming is to be justified, namely, "Is there clear evidence that grooming affects a learner's academic performance and/or general discipline?" Unless there is a clear affirmative response backed up by valid research, the grooming restrictions may be seen purely as personal preferences of the schools concerned. However, the case of the Rastafrarrian Grade 1 learner introduces a possibly valid reason for a limitation on 'grooming' freedom, namely the child's health and the health of fellow learners.

6.4.2 Dress Code of Schools : What to Wear

If the *Guidelines* (RSA 1998b) are to be taken seriously, and specifically *the right to wear* as an aspect of freedom of expression, then there is an implication that a learner may dress as he/she pleases when attending school (within the bounds of 'modesty', and 'common decency', however those two terms may be defined).

The exercise of the right in such a way has the potential for confrontation. This raises critical questions. Are school uniforms either compulsory and/or enforceable? Is a school entitled to enforce a dress code? What action can a school take against the non-conforming learner? Can a school refuse to admit a learner whose parents refuse to sign acceptance of the school's dress code?

The issue of dress is further complicated when learners (or their parents) insist on the right to wear strict religious dress or traditional cultural dress. A further complication arises when poverty plays a role in a parent's inability to pay for the often very expensive school uniform. Can the poor be denied access to specific schools for such a reason?

In South Africa, with its wide socio-economic discrepancies, there is possibly a strong case to be made for school uniforms. The uniform, it can be argued, tends to minimise or cover those differences. However, the argument only has validity when uniforms are kept affordably simple.

The following recent cases illustrate something of the complexity of the issues.

In East London a Grade 4 learner was turned away from his new school because he did not have shoes. The single mother asked for time, until she was paid at the end of the month, to purchase the shoes (*Daily Dispatch*, 24 January 2001). Following bad press coverage the school relented and purchased a pair of shoes for the child concerned. The argument forwarded by the school that their uniform included the wearing of shoes and that no exception could be made, might be seen as blatant discrimination on socio-economics grounds. An incident of this kind places the school in a dilemma of trying to maintain standards and satisfy the broader parent body whose children are conforming to the dress code. At the same time poverty is a harsh reality and one may ask whether shoes are essential for education.

The above issue, however, could become a more obvious violation of freedom of expression if parents insisted that their child wear slip-slops or sandals in place of 'regulation' shoes and the school acted against the child.

If a claim to freedom of expression involves actions which carry a message, was the lack of shoes purely a matter of poverty, or could a case be made that going without shoes was a message in itself?

The second case involved cultural dress. Following Xhosa initiation rites, initiates are required to wear particular dress at all times for some weeks. A secondary school learner approached his principal with his problem (Terblanche, Personal Interview, May 2000). An agreement was reached whereby the learner would wear required Xhosa dress to and from school but would change into school uniform once inside the building and change out of uniform at the end of the school day. During breaks he was permitted to remain within the buildings. This amicable agreement avoided a serious cultural confrontation and met the needs of both the school and the learner. One of the reasons for wearing the required initiates clothes was the learners fear of victimisation, ridicule or attack if he were seen by other initiates to be in the 'wrong' clothes, e.g. school uniform. Peer or initiate pressure is very powerful.

The amicable solution may have been impossible to reach if more than one initiate had attended the school at the same time. What right would the school have had to insist on such an arrangement if learners insisted on attending school all day in the required initiate dress? The potential for confrontation would be enormous. To refuse permission to the initiates to attend in their required initiate clothes could be interpreted as disrespect of Xhosa culture and the specific learner's pride in his cultural heritage. Further, given that the

initiation practice is the Xhosa boy's entry into manhood, a negative action on the part of the school would be seen as insulting a Xhosa *man.*

Again, the school's dilemma is that of being both culturally sensitive and maintaining standards expected by the majority of its community.

A similar situation arose recently in a KwaZulu Natal secondary school where a Zulu learner faced a similar problem, but with the difference that he had been appointed as a school prefect. The school insisted that, as a prefect, he had to set an example and thus refused his request to wear the required traditional clothing [Anon: Personal Interview, Principal (name withheld) June 2001].

The Zulu learner's situation raises serious questions. He had to *set an example*. To whom? What of the example he should have been setting to other Zulu male learners?

The third case revolves around religious dress. While the case concerns a KwaZulu Natal secondary school, the issue has been repeated in several other schools and is likely to occur in many more.

The specific case is described by Liversage (1998:1-8) and further clarified by two personal interviews (Liversage, February 1999 and June 2001). The school concerned, a former Model C school, had a clearly laid down dress code, approved by the parent body and with strong support from the learner body. In 1997 a girl was enrolled by her father to start in grade eight in January 1998. The parent signed an undertaking which included, "I will ensure that my child attends school regularly and complies with the rules and regulations of the school, which I endorse". On the first day of the 1998 school year Marian arrived at school in Moslem dress, was intercepted and the father was asked to fetch her. She could return to school when dressed in the prescribed uniform. So began a year long battle involving heavy legal costs.

The father began action against the school via the KwaZulu Natal Education Department. The school was informed that it could not refuse the girl admission to the school. While the school engaged legal counsel, the girl attended school in Moslem dress. When, at the end of 1998 the same parent enrolled a second daughter, to start in grade eight in 1999, he signed the Code of Conduct but crossed out references to the dress code. His second daughter was refused admission to the school. Finally the principal was given an ultimatum to accept the child and to accept that Moslem dress had to be permitted, or face removal from his post. The Governing Body relented and a negotiated settlement was reached. The basis of the settlement is that Moslem girls may wear either Moslem dress or school uniform but not in combination. In 2001 there were seven girls attending the school in Moslem dress.

Because the incident had stirred up so much emotional involvement, the principal realised he would have to enforce the settlement as an order. The parent body and learners were informed that the settlement was final and that no harassment of the girls concerned would be tolerated. The school has become a tranquil place. The seven girls are quiet, dedicated, hard working learners.

This case raises a number of questions. The father signed the Code of Conduct but the daughter's dress was in defiance of the code the father had signed. The case has a similar ring to the case of *Mfolo and others v Minister of Education, Bophuthatswana* 1994 (1) BCLR 136 (B). In the latter case the students had signed a code of conduct which included agreeing to a statement that any student who became pregnant would have to leave. When Mfolo and others fell pregnant they were asked to leave. Their court challenge was upheld. One of the key points in the judgement revolved around the signing of

rules which were not in line with the Constitution. The court for that reason, refused to bind the students to what they had signed.

In the case of the Moslem learners, the will of the majority of parents and learners was not upheld but rather the *counter-majoritarian dilemma* (see 5.4.3) played itself here in this situation. Thus one learner was allowed to exercise her freedom of expression and freedom of religion in terms of the Constitution.

The case never went to court. A number of questions thus remain. Will demands for variations in school dress based on religion enjoy more support than demands based on freedom of expression? If the answer is 'yes' then one will be forced to ask, "Why?' Secondly, will all religions enjoy such protection? What if an exclusive group considers itself so bound by the biblical injunction to "be separate" (Bible N.I.V. 1978: 2 Corinthians 6 vs 17) and believes they can best comply with their interpretation of Scripture by refusing to allow their children to conform to uniform requirements?

But the issue goes beyond religious dress to the heart of the right to freedom of expression. Can schools enforce school uniform? Is it merely maintained by tradition and learners need to conform to their peers? Is there a case for a more standardised and cheaper uniform for the country with minor variations for each school?

One of the dilemmas which may yet face schools is their use of "civvies days" for fund raising. The very act of allowing learners to come to school in 'civvies' at all, may be construed as acceptance that the school can survive without an enforced uniform (Van Staden & Alston 2000:113).

The support of Education Departments for school uniforms ranges from non-existent to ambiguous (Liversage 1998:1-8). All of this leaves school

governing bodies in a dilemma and there are questions which need answers. At face value, freedom of expression appears to outweigh any claim to a right to enforce the wearing of school uniforms.

It can be argued that the wearing of school uniform may be less of an infringement of a learner's freedom of expression than, for example, rigid hairstyle rules imposed by the school, if only for the reason that uniforms can be removed after school hours but hairstyle rules affect the learner in school and out, 24 hours a day. The socio-economic factors do present a case for uniforms but this is not directly related to freedom of expression. The issues of uniforms is complicated by a further less obvious pressure brought to bear on learners wearing uniforms, namely that "those who wear our uniform must be a good advert for the school" implying that all the other "prescriptions" such as hairstyles, no jewellery, go with wearing the uniform. The issue then becomes muddied.

The educational advantages of a uniform, outside of conformity, are hard to find. The suggestion that it promotes discipline is negated by evidence of extremely well disciplined schools without uniforms. The confused perception is illustrated by an incident where a grade 3 learner wore brown shoes to school instead of uniform black shoes, and the mother refused to buy new black shoes as her daughter had lost the previous pair. The school argued that allowing her to continue to wear brown shoes would undermine school discipline (Personal interview, School Principal (name withheld) May 2002). Discipline which depends on the colour of shoes is simply unsubstantiated.

The argument that uniforms improve academic performance would be hard to accept, for the same reason that schools without uniforms produce equally excellent academic results.

The real problem of uniform and related issues probably lies more in deeply ingrained traditions and attempts to restrict changes. To quote Meyerson (1997:41), it is important to check that the reasons for limitations [to what learners may wear to school] are not for an "impermissible purpose behind permissible-sounding language".

Uniform is part of a wider dress code. A further part of the dress code concerns jewellery, the subject of the next section.

6.4.3 Jewellery and Other Ornamentation

The issue of jewellery clearly falls into the "wear" of freedom of expression (see 4.5.4 of *Guidelines* in 6.4 above) but it also extends to the wearing of religious and cultural symbols. Jewellery, however, brings an added dimension of safety. The wearing of certain jewellery can increase the risks to a learner's safety in *some* school based situations. On such grounds a school may be able to make a case for limiting a learner's freedom of expression in the form of wearing jewellery in those particular situations.

In the past many schools had only two exceptions to a "no jewellery" policy, namely that girls were permitted to wear 'studs' or 'sleepers' in place of earrings if they had had their ears pierced, and learners were permitted to wear medic-alert bracelets.

In the present situation, under the Constitution (RSA 1996a) with an entrenched right to freedom of expression, the 'jewellery' policy is being or is likely to be challenged in secondary schools. Can a school refuse to allow girls to wear earrings to school or while in school uniform out of school? The modern trend of body piercing has resulted in school girls having rings or other jewellery on eyebrows, nose, lips, tongues or other visible and non-visible places (Manager, East London Tattoo Parlour, Personal Interview, 7 July 2001). Has the school the right to draw the line on such wearing of jewellery?

Rings on fingers are a further issue, further complicated by the possibility of a secondary school learner becoming engaged and wearing an engagement ring, and later a wedding ring if she marries while still at school. Six years ago a High School in Pretoria refused such permission to an engaged learner and wanted to remove the ring [Anon: Personal Interview, former learner (name withheld), March 2002]. The question of marriage and possible discrimination must be seen in the context of Section 9 (3) of the Constitution (RSA 1996a).

The wearing of jewellery or a ban on it is further complicated by two other issues. The permission given to learners to wear medic-alert bracelets or necklaces complicates a school's problem in attempting to refuse learners the right to wear similar items of a non-medical nature.

A refusal to allow boys the right to wear earrings can be seen as gender discrimination and still further complicated by the homosexual's desire to identify and express his sexual orientation by the wearing of a single earring. Such restrictions might lend support to Pantazis (2000:52) who contends that "it may be safer for lesbian and gay youth to be invisible, to be 'in the closet' ". Pantazis (2000:65) refers to the Gauteng Education Department regulations for School Governing Bodies which state that no learner may be unfairly discriminated against by the Education Department or by the school on grounds of, *inter alia*, sexual orientation. This confirms the provision of Sec. 9 (3) of the Constitution (RSA 1996a). Pantazis (2000: 56) refers to the new phenomenon of teenagers who no longer wait until adulthood to declare themselves gay or lesbian. This then is the setting for a potential battleground for the "*school v single earring*" to occur.

Jewellery and other symbols of a religious or cultural nature add further dimensions to the topic. It seems clear that schools cannot favour the jewellery of one religion over another but can a school ban all religious jewellery, or, alternatively, all cultural artifacts?

A more recent development facing schools is the problem of tattoos. Unlike jewellery which can be removed during school hours, a visible tattoo is far more problematic. The management of East London Tattoo Parlour (Manager, Personal Interview, 7 July 2001) indicated that their rule was to refuse a tattoo to anyone under the age of 18 unless the parent personally came with their child and gave permission. At the same time they had seen younger people who had had tattoos done elsewhere.

The "no one under 18 years" rule does not solve the school's problem with tattoos as almost every grade 12 learner is either 18 or older or turning 18 in the Grade 12 year. The Manager admitted that many 18 year olds are having tattoos. Can a school ask for a tattoo to be covered during school hours? Can a school ask that a tattoo be removed by a dermatologist, a very expensive and not always successful procedure [cf. *Stephenson* (see 4.5)]?

Jewellery and other ornamentation (tattoos included) is a complex and delicate issue needing both great wisdom and sensitivity on the part of school management. The possibility of legal challenges exists. Such legal challenges could be based not just on the right to freedom of expression, but also on the right to freedom of religion, or as a charge against a school of discrimination on grounds of gender, marriage and sexual orientation.

Can any educationally based reasons be provided for the ban on jewellery or other ornamentation? No research has thus far been found to support a ban on educational grounds. It is difficult to begin to imagine any possible pedagogically valid arguments. At this stage it appears that the strongest reasoning comes down to ensuring safety and a desire to enforce conformity.

How strong is the case for limitations based on the need for safety? Where machinery is involved, or physical education and/or other sporting activities, it

is possible that a strong case could be made for some jewellery to be removed.

When schools impose restrictions on the colour of watches and/or watch straps then the case for such limitations would seem to be either extremely thin or non-existent.

It would seem that court rulings may be needed before schools will enjoy any sense of certainty about the rulings they make or wish to make on jewellery and other ornamentation.

Having examined the grooming, dress and jewellery issues in respect of learners, it is important to next examine the freedom of expression rights in these respects for the learners' teachers.

6.4.4 Teachers' Freedom of Expression: Dress, Hairstyles and Jewellery

Can a teacher be forced to wear particular clothing to school, or be made to cut his hair in a particular way, or be ordered to remove jewellery which his principal or governing body may feel is 'inappropriate' for a teacher to wear? These may appear to be unimportant issues but, in the past, many teachers were ordered to dress in a particular way, or where a suit and tie when the school inspector was visiting. Ladies were refused permission to wear slacks, even when teaching Grade 1 to 3 children and having to sit on carpets or crawl on the floor. How lawful or defensible such 'rules' were in the past may be debatable, but school authorities had almost unchallenged powers.

Nothing can be found in the South African Schools Act (RSA 1996b), or the Employment of Educators Act (RSA 1998a) or the South African Council of Educators Code of Conduct for Educators (RSA 1998c) which can be construed as providing for a dress and grooming code for present teachers in South Africa.

Pretorius *et al.* (2001:8-133) state: "Generally speaking, an employer is not prohibited from imposing *job related* (italics added) rules for personal appearance, workplace attire and grooming on its employees".

Who is the employer in the case of teachers? In Sec. 1 of Chapter 1 of the Employment of Educators Act (RSA 1998a), the employer is defined as the Director-General (in the case of those employed in the Department of Education) and the Head of the Provincial Department (in the case of those employed in such provincial education departments).

In Sec 16(4) of the Schools Act (RSA 1996b) the position of the principal is defined as follows:

> Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the H.O.D..

Is a teacher's dress a professional issue in the domain of the principal, or a non-professional issue in the domain of the governing body? Given that there is a South African Council of Educators Code of Conduct for Educators, can the school impose additions on a select group of teachers who happen to be employed at that particular school? With the possibility that, in the light of the wide interpretation of freedom of expression of learners given in the *Guidelines* (RSA 1998b), particularly with respect to dress and grooming, an enforced dress code for teachers could be regarded as imposing restrictions on a teacher's freedom of expression even beyond what the school may be able to legally impose on its learners.

All of the above indicates something of the complexity of the issues and the potential grounds for legal challenges by teachers to any attempt by a school to impose a dress code on them. At the very least, the variations on dress

code already permitted for learners on the grounds of religion and/or culture would need to apply equally to teachers.

Pretorius *et al.* (2001:133) indicate that "differential dress and grooming codes have been attacked most commonly on the basis of sex discrimination". While appearance requirements for male and female teachers cannot be identical, the United States courts have been more favourably inclined to support employer's dress codes where they are equally enforced and impose comparable standards on both sexes.

Differentiated appearance requirements for learners has been extensively covered in Sections 4.2 to 4.5 in respect of overseas pupils, and in Sec. 6.4.1, 2 and 3 of this chapter. The imposition of any rigid or specific dress code on teachers may limit a range of their fundamental rights (Pretorius *et al.* 2001:8-134). These include freedom of expression, dignity, personal freedom and privacy.

The "no beard - clean shaven" policy serves to illustrate the above. First, it invades the individual teacher's life 24 hours a day, when in school and when in the privacy of his own home. Further, if he is a Jew or Moslem, it may invade his religious and/or cultural beliefs and his related dignity. Thirdly, it may invade his personal expression of who he is, without any religious connotations (see 4.6, *Canadian Safeway v Steel*).

Canadian Safeway raises the issue as to the powers of parents (as 'customers') to pressure, through the principal or governing body, their children's teachers to conform to a dress code that they (the parents) believe is 'correct'.

The key issue of employee dress revolves around the *job-relatedness* or otherwise of what is worn in the workplace. When this "test" is applied, a

number of issues raised above become easier to respond to. The wearing of a beard has no relationship to a teacher's work. Equally the desire of a Grade 1 teacher to wear slacks is directly related to her work involving sitting on the floor with little children. To force her to wear a dress would be to deny a valid reason for her job related choice of attire. It would seem equally indefensible for a school to insist that a teacher of physical education who must teach another subject between two physical education lessons should change out of a track suit for that one lesson.

Any attempt by a school to ban the wearing of earrings by male teachers would seem open to the same challenges of bearing no relation to the job, apart from challenges on the ground of gender discrimination and/or sexual orientation discrimination. It is equally unlikely that the imposition of grooming regulations on teachers could be enforced. This would be particularly difficult if such regulations had even a taint of gender differentiation. The job-related issues of safety, for example, in workshops, would however apply.

Job-relatedness provides the most valuable guide to employee dress in schools and would assist in eliminating the attempts by a limited number of autocratic principals or School Governing Bodies to enforce personal preferences without justification.

Uniforms for teachers does not appear to have been an issue for teachers in South Africa, but the questions raised in the first paragraph of this section all would seem to fall in the context of an imposed 'dress code', even if unwritten.

In a study of United States cases on dress code none of the cases were related to schools and the judgements were not consistent. They do however reveal that business has attempted to challenge males with long hair [*Willingham v Macon Telegraph Publishing Company* (1974) 507 F.2d 1804], and attempted to impose a uniform on female staff only (see 4.6 for *Carroll v*

Talman). A recent interview [Anon: Personal Interview (name withheld) 9 February 2002] revealed that an East London advertising agency had a compulsory uniform for female staff only, which the individual concerned found to be humiliating and an invasion of her individuality.

De Kock, De Klerk and Labuschagne (2001:534-548) make a case for legal attire in the legal profession in South Africa. They quote a statement from the Constitutional Court that "[l]egal practitioners appearing before the [Constitutional] Court in open court are required to robe". The authors also quote Van Dijkhorst and Miller as saying, in respect of practising advocates in South Africa, "Proper reverence should be afforded in the court and advocates should be properly robed in court". Does the legal profession with its robes, or the nursing profession in white uniforms, or bank staff in specific company uniforms offer defence for a principal or governing body who insists on a dress code for teachers? Probably not.

The arguments of De Kock *et al.* about the professional image created by robes is probably only applicable if, for instance, one were to insist that all teachers in the profession had to wear academic gowns to class and at other professional times. The strength of this line of reasoning would seem dubious and certainly unlikely to be able to support a connection to job-relatedness. It is worth noting that De Kock *et al.* make no reference to grooming or jewellery.

Dress codes for teachers, in the South African context, would seem open to challenge on the grounds of being an invasion of their freedom of expression and/or freedom of religion. It would seem that the only legitimate 'rules' can relate to remaining within the bounds of modesty, safety, cleanliness and tidiness.

6.4.5 Freedom of the Learner Press

Freedom of the press, which is provided for in Section 16(1)(a) of the Constitution (RSA 1996a) is a necessary part of freedom of expression, described in *Free Press of Namibia (Pty) Ltd v Cabinet of the Interim Government of South West Africa* 1987 (1) SA 614 (SWA), 623, as the right to report on matters of public interest no matter how controversial or offensive, without inappropriate interference by the courts (Marcus & Spitz 1996:20-20). Justice Cameron [in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W)], stated that "... the Constitution recognizes the special importance and role of the media in nurturing and strengthening our democracy".

Like all freedoms, freedom of the press is not an unlimited freedom. Chief Justice Corbett [in *Argus Publishing and Printing Co Ltd. V Esselen's Estate* 1994 (2) SA 1], made it clear that such freedom can never be unrestrained and cannot permit "...unjustified savaging of an individual's reputation". Corbett highlighted the difficulty in finding a balance between the right to speak one's mind and the right not to be harmed by what another says. Solving Corbett's balancing problem may be seen as part of the educative function of a school in respect of school publications by learners.

The learner press in South Africa, as part of specific schools, has not been a major problem in South Africa. In general it appears that schools have exercised control of so-called school newspapers, mainly by staff members having the school newspaper as a specific portfolio.

It is difficult to assess the extent, if any, of so called underground learner produced newspapers or news sheets. Clearly in many South African schools the lack of access to printing facilities was and is a reality and possibly plays a role in limiting the learner press.

Despite the very limited available evidence, it is essential to examine what control schools could exercise should 'underground' papers become a reality in the future. The power of all press freedom still demands respect of individuals dignity.

The paper produced on campus uses school property and other facilities and often carries the name of the school or can be linked to the particular school. In that sense the school may be in a position to exercise some restraining powers. However, the exercise of prior restraint or censorship before publication would seem to be outside the reach of school management's powers. It is likely that a learner could be held accountable for damage done by the publication of a damaging article in a student paper, but only after publication.

Malherbe (1993:704) suggested, even before the Interim Constitution (RSA 1993a) that (translated) "...as long as the school is not disrupted, pupils enjoy press freedom in respect of their publication". What is meant by 'disruption' or the extent of the disruption is not clear, nor is it clear what is meant by 'their publication'. *Hazlewood* (see 4.8) provides a useful guideline for action schools in South Africa can take before problems arise, namely that of reaching consensus with learners on the policy and parameters to be agreed upon, *before* actual problems arise. Learner press freedom may be a big issue in even the near future, but of now it remains a matter of speculation as to the powers schools will seek to exercise and how far learners' freedom will be able to be exercised without such learners having to take legal action to preserve their constitutional *freedom of the press*.

An article in the *Mail and Guardian* (15 June 2000) began, "Cape High Court has dealt a severe blow to press freedom by ruling that the reputation of an institution outweighed a reporter's right to freedom of expression". The case of *Humata and Another v Chairperson, Peninsula Technikon IDC*, 2000 (4) SA

621 concerned a Technikon student who wrote an article and knowingly published untrue information about the alleged prostitution on the Peninsula Technikon campus. The Court ruled that the student's actions were not necessarily outside the ambit of the constitutional right to freedom of expression, but knowing the statements were untrue provided greater grounds for limitations and overriding the student's right in favour of the Technikon's reputation (Wood 2001:145). Humata's expulsion was based on a Technikon rule for actions which "...whether on the Technikon premises or not... brings discredit in the eyes of reasonable persons".

While it is clear that liable and defamation are generally outside constitutional protection, institutional reputation as a grounds for expulsion raises a whole new issue which may need a Constitutional Court ruling. Was there clear proof of damage to reputation? At what point can educational institutions, including schools, claim that what a student or learner has written has damaged the institution's reputation. The ruling has serious implications and great potential for 'chilling' student and learner press freedom.

6.4.6 Artistic Creativity

Van der Westhuizen (1994:264) suggests that it can be argued that freedom of expression encompasses "appeals to the emotions or the senses, through sound, colour etc.". If that is so, artistic creativity has a legitimate place as part of freedom of expression. In terms of Sec 16(1)(c) of the Constitution (RSA 1996a), artistic creativity is a part of freedom of expression and is specifically listed as such. Marcus and Spitz (1996:20-23) describe this specific inclusion as possibly being a response to the South African history "of draconian censorship of the arts".

What is art? What is artistic creativity? Are the two synonymous? Marcus and Spitz (1996:20-23) respond that "[it] is notoriously difficult to produce a satisfactory definition of 'art' and, by extension, 'artistic creativity' ". Van der

Westhuizen (1994:285) describes artistic creativity as a far wider term than art. The former term encompasses artistic effort which is not necessarily successful art. For the artistically creative individual, the freedom to express his creativity in the form of art, in its broadest definition or form, would seem fundamental to his self-fulfilment, autonomy and dignity.

Artistic creativity is, however, not confinable to fine art, but may reasonably be extended to, amongst others, photography, drama, music, and dance, each in their various forms. Following Van der Westhuizen's argument above, such art forms will not need to be 'successful' to enjoy constitutional protection.

Marcus and Spitz (1996:20-22) believe that because art is defined in such a wide way, artistic creativity as a form of freedom of expression, will need to be dealt with on a case-by-case basis. Oosthuizen and Russo (2001:260-261) summarised the advantages and disadvantages of a broad definition of art and artistic creativity. They argue that "[t]he wider the definition, the more difficult it will become to determine the appropriate level of constitutional protection on such case by case basis".

The concern of Oosthuizen and Russo is to determine how to limit artistic creativity so that it will not necessarily hamper freedom of artistic creativity, while at the same time ensuring "protection of societal norms against the unacceptable vulgarity of unbridled art". The very reference to *societal norms* raises questions as to their meaning in the light of the limitation clause (RSA 1996a: Sec. 36).

If art and artistic creativity remained outside the school gates the issue would be irrelevant to this study. The next sections examine art and artistic creativity as an aspect of freedom of expression within the school. None of coverage given to the particular topics below should be regarded as all-inclusive, but

rather as a brief introduction to some aspect(s) which may prove problematic in the school setting.

6.4.6.1 FINE ART

Artistic creativity has the potential to cause major problems for a school offering art as a subject. Where a Grade 12 teacher requires learners to submit a portfolio of their work including prescribed as well as personal choice work, the question arises as to how such a teacher would handle a nude painting particularly if the model turns out to be another learner of the opposite sex. This may be an extreme scenario but it challenges the limits of a school's right to impose limitations on learners' freedom of expression in the form of artistic creativity.

A current educationalist (Galbraith, Personal Interview, September 2000) referred to a time in his own experience where, as a learner, he was part of a group who modelled for other learners doing art as a subject. However, all such learners were 'strategically covered up'.

The above scenario raises further issues. If the portfolio must be submitted to external examination, would the particular teacher feel obliged or have the right to withdraw such a nude painting? Would the teacher have the right to refuse to allow it to be displayed at an exhibition on a school's open-day? Would the permission of the model be required before the painting was displayed? In terms of the right to freedom of expression these are questions which demand answers.

Further questions remain. How will a teacher defend his mark allocation for a particular learner's art, given the very nature of artistic creativity? Has the learner the right to challenge what could be seen as a judgement on his artistic creativity?

There is much to speculate on but little factual information with which to draw any firm conclusions. It would appear that the case-by-case basis is the only way constitutional answers will be found to the many questions.

6.4.6.2 PHOTOGRAPHY.

There are schools which have photographic clubs and strongly encourage learners to engage in photography, and some may hold learner exhibitions. Such an activity can move beyond taking "school snaps" to be a means of artistic creativity. At that point all of the fine art issues referred to above are applicable. All that has changed is the medium of presentation and the rapid production of many images.

6.4.6.3 MUSIC.

Much modern music has lyrics with messages of a strongly sexual nature or which promote the use of harmful substances. In the Learning Area, *Arts and Culture,* where learners may take to writing their own lyrics and singing such lyrics, the school may be faced by challenges to such lyrics from other learners or from parents. Can the school apply a legitimate limitation on such lyrics and their presentation on the grounds of such lyrics being contrary to the educational mission of the school, or on grounds of such lyrics being presented to a captive audience? There is no current case law but their case may be very weak without a prior written school policy on the issue which meets the requirement set out in *R v Jopp* (1949) 4 SA 11 (N) where the Court stated that

> ... a by-law or regulation must indicate with reasonable certainty to those who are bound by it the act which is enjoined or prohibited so that they may regulate their conduct accordingly.

6.4.6.4 DRAMA

The production of drama in a school has the making of a variety of problems. If the particular dramatic piece, whether from an outside script or written by a learner or teacher, contains blasphemy or vulgar words, the school runs the risk of parental or learner complaints. But does this entitle the principal to vet

every production, be it a class production, or a school performance for parents and the public? Is such vetting reasonable, let alone possible? Without a prior school policy later action taken against learners or teachers may be very difficult to uphold.

6.4.6.5 DANCE.

In the Learning Area *Arts and Culture* [Draft Streamlined Curriculum 2005 (RSA 2001)] a section is devoted to dance. In terms of the minimum assessment standards (or what a learner is able to do by the end of a given grade) learners are, according to the draft, expected to perform dances, for example "to convey particular feelings or moods" and "communicate ideas, thoughts and feelings through dance". Such requirement of teenage learners opens the possibility of questionable activities unless there is careful control by the teacher. This is not to suggest that such assessment standards *will* lead to what Heins (quoted by Marcus & Spitz 1996:20-23), refers to as 'sexy dancing'. This serves merely as a call for vigilance and control.

Dance also raises the critical issue of the right of a learner not to engage in such activity for personal, religious or other reasons.

6.4.6.6 LITERATURE

The writing of creative literature in a school setting overlaps strongly with the right to academic freedom, covered in the Sec 6.4.7 and this section should be read in conjunction specifically with sec. 6.4.7.3.

There is little doubt that creative literature is a creative art form. If, for example, a learner were to write a poem of real literary merit but the poem had heavy sexual overtones, or proclaimed a message seen as contrary to "accepted social norms", would a teacher have the right to refuse such work, or refuse to have it included in the said learner's portfolio for Department of

Education Continuous Assessment? The issue of creative writing may never, but could become a 'minefield' for the school and its language teachers.

6.4.6.7 ARTISTIC CREATIVITY AND THE TEACHER.

The above issues serve to highlight the responsibility of the teacher who has anything to do with any of those five types of artistic creativity. To crush any form of artistic creativity is constitutionally indefensible. There is, however, the possibility that such creativity could be seen differently by parents and lead to informal and/or formal complaints.

Artistic creativity which flows from the learner, even if open to questioning, is very different from such work deliberately provoked or pushed for by a teacher who may have a dubious agenda. Such a teacher may seek to impose his/her values on the learners, and encourage learners to engage in creative dance, art, drama or literature in ways which make learner(s) feel very uncomfortable. Such a situation, arising from within the constitutionally protected field of artistic creativity, could lead to serious problems for the school.

The attempt by Oosthuizen and Russo (2001:260) to "determine when, how and under what circumstances freedom of artistic creativity is to be limited" is not really resolved in their work. The constitutional right to artistic creativity must not only be protected but encouraged. The above examples serve to indicate that the exercise of the right, within the school context, may need both delicate handling and the exercise of great responsibility by management and teachers alike.

In a sense artistic creativity is a link to, and in some respects overlaps with, the topic of the next section, namely academic freedom.

6.4.7 Academic Freedom

6.4.7.1 INTRODUCTION

Academic freedom is extensively discussed in the international context of four selected countries (see 4.10). In the South African context, academic freedom was an emotive issue during the more than forty years of Nationalist Party rule. The focus was entirely on academic freedom at the university level and led to the response from the *Open Universities of South Africa* which issued a now famous statement on academic freedom. The statement was signed at a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including the Chancellors of both universities. Extracts of the statement include the following:

> A university ceases to be true to its own nature if it becomes the tool of the Church or State or any sectional interest. A university is characterized by the spirit of free inquiry ... implies the right to examine, question, modify or reject traditional ideas and beliefs.
>
> It is the business of a university to provide that atmosphere in which there prevail 'the four essential freedoms' of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study [quoted by Justice Frankfurter in *Sweezy v New Hampshire* (1957) 354 US 234, 262-263; and Dlamini1999 : 5-6].

Reference to academic freedom outside the confines of the universities does not appear to have been an issue for South African academic writers either during Nationalist Party rule or since. Both Malherbe (1993, 1998 and 1999) and Dlamini (1999) have focussed their writing on academic freedom at the university level. The place of academic freedom in the secondary school is seen by many as controversial, and it was not an issue prior to the 1996 Constitution. Thus far, the only tentative reference found to academic freedom being a right which extends beyond the university is found in De Waal *et al.* (1999:305-306) where he states that academic freedom "no longer applies only

to 'institutions of higher learning'. In principle, any academic enterprise is now protected".

Beinart (quoted by Dlamini 1999:5) stated that "...academic freedom, like 'other great abiding truths', is only 'abiding' as far as each generation reinterprets and makes that truth its own". The concept of academic freedom is, like all other concepts, subject to some reassessment in the light of changing needs and changing social circumstances, though the core of belief remains unchanged.

While Beinart might not agree, the changing needs and social, and educational circumstances appear to require a broadening of the narrow perspective of academic freedom being confined to universities only. The perceived dichotomy between universities and schools in respect of academic freedom is discussed in a previous chapter (see 4.7.4).

6.4.7.2 ACADEMIC FREEDOM AND THE CONSTITUTION

As previously indicated (see 4.10.1) and based on an internet search, the South African Constitution (RSA 1996a) has the apparent unique distinction of being the only constitution to contain the words "academic freedom". In certain other constitutions, or conventions or other legal documents the two words are not used, but the wording could legitimately be used to describe the particular clause.

Section 16 of the 1996 South African Constitution states:

> (1) Everyone has the right to freedom of expression, which includes...
>
> (d) academic freedom and freedom of scientific research.

Part of the problem of placing 'academic freedom' in Section 16 is that much of Section 15 relates both to broad aspects of freedom of expression and, specifically, to academic freedom. Section 14 (1) of the 1993 Interim Constitution read as follows:

> Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

The equivalent clause in the 1996 Constitution, Section 15 (1), states that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion."

Conscience, thought, belief and opinion are aspects of expression, religion and academic freedom. Thus sections 15 and 16 do not provide a neat package for any single aspect.

The removal of the words "in institutions of higher learning" from the 1996 Constitution and the use of "everyone" in introducing Section 16 broadens academic freedom to a far more inclusive right.

What then, is meant by "*Everyone* (italics added) has the right to freedom of expression, which includes ... academic freedom and freedom of scientific research"?

Does *everyone* mean EVERYONE? There is clearly no constitutionally stated limitation on the word 'everyone'. Woolman (1996a:10-7) suggests that it is unlikely that the courts will deny child citizens *prima facie* entitlement to basic rights of life, privacy or expression (see 5.4.1 and 6.3.3). What then is the meaning of academic freedom for the school going learner? And, what does academic freedom mean for the learners' teachers?

Three key arguments for freedom of expression, one of which is self-fulfilment, are widely advanced (see 5.5.1). Flekkoy (1993:102), in discussing needs as a basis for children's rights, refers to Maslow's hierarchy of needs, the last of which is self-actualisation. Flekkoy lists characteristics of self-actualisation as including spontaneity, problem solving ability, a democratic character and a frequency of peak experiences. In the context of academic freedom, the

question arises as to what effect academic freedom or lack of it will have on the development of such characteristics and the need for self-actualisation. A stifled, rigidly controlled 'academic' environment would seem to be contrary to developing such characteristics.

Meyerson (1997:80) describes as a trivial freedom an academic freedom which protects only those who confine their views and opinions to those which do not dissent from mainstream or orthodox values, or which do not 'threaten' anyone's comfort. Govender (1997:21) adds a positive touch in describing academic freedom protections as necessary as they contribute in a profound way to the healthy, robust exchange of ideas. This echoes the thoughts of Milton and Chafee (see 4.7.1).

In contrast, where school teachers are confined to the transmission of knowledge, restricted to a single text book, and forbidden to venture outside the prescribed curriculum or into anything controversial in content or methodology, their academic freedom has little or no meaning. Uniformity also arises where the 'educational' focus falls on strict 'discipline', or where silence is highly valued as a sign of good teacher control. It is further reinforced by the view of the teacher as the font of all knowledge.

Both Meyerson and Govender point in the direction of classrooms free of deliberate uniformity and conformity. A function of education is to develop in young people a sense of responsible citizenship. Such responsibility must involve the making of choices and being confronted with controversial and difficult issues which may even demand taking a personal stand. In the classroom free of choices and marked by uniformity, everyone 'learns' (or is forced) to think in the same way - which means no one is thinking at all - and there is no challenging of opinions and information. This is well illustrated in *Keegstra* (see 4.10.4).

Where high school learners are denied the opportunity to develop critical thinking and to be exposed to the market place of ideas, or to raise pertinent, if controversial issues, or write essays or articles which conflict with school policy or the establishment, their academic freedom, likewise, has no meaning. Reasoning and debate in the 'search for truth', for both teacher and learner, in such an educational climate is thus deeply 'chilled' if not frozen.

Such unjustified restrictions may infringe the rights such as freedom of opinion and conscience (Van der Westhuizen 1994: 269). Van der Westhuizen (1994: 290) goes on to state that what must be achieved is freedom not only from legal restrictions but from fear, intimidation and inferior or suppressive education. He suggests that what is needed is the development of confidence to express one's views, and a willingness to listen to, and tolerate the views of others. All of this is fundamental to real academic freedom. Majola (1990: 49) puts it differently when he states that teachers and students "...must learn that difference of opinion is not a sin to be condemned but... a value to be warmly embraced and a source of great wisdom".

What Van der Westhuzen is suggesting is fundamental to real academic freedom. While the negative aspects he lists remain, academic freedom cannot even begin to take root.

In the school the multiple strands of academic freedom concern what is taught and learnt, its relevance and relation to prescribed curriculum and the right to go beyond the prescriptions. Further it concerns access to materials, including a range of texts, and the right of a teacher to use various methodologies and learners to be exposed to these differing methodologies. Still further, the concept raises the issue of the right of teachers to publicly criticize their employers and the educational system and the right of learners to publicly criticize teachers, teaching, the system and the school. And with all of this, is a

question of the right of teachers to strongly disagree with one another in terms of intra-mural speech.

The claim to academic freedom of a secondary school learner, it is suggested, is a claim to the right to be exposed to a variety of information, evidence and opinion, and the freedom to openly debate such differences, no matter how controversial they may be. Further, it is a learner's claim to a right to develop, hold and openly express his/her own opinions, orally or in writing, no matter how much they may differ from the views of teachers or the views seen to be propagated by the wider school community. Squelch (1993:238) suggested, even before the Interim Constitution (RSA 1993) that learners should have the right to express their opinions, thoughts and ideas, even if controversial. At the same time the secondary learner must recognise the right of other learners, teachers and the wider school community to differ from him/her, and to respect their differing standpoints. As Jefferson (quoted by Suttner 1990: 375) stated: "If a book be false in its facts, disprove them; if false in its reasoning, refute it; But, let us freely hear both sides".

Academic freedom is not a safe haven from controversy but a ship on a journey in often stormy waters. To misquote Tolstoy's description of civilization that "[e]ducation is a movement and not a condition, a voyage and not a harbour". But, academic freedom is equally not academic licence. It will always have limitations.

6.4.7.3 SOME SOUTH AFRICAN EXAMPLES REGARDING ACADEMIC FREEDOM

In South Africa there is little to go on in deciding how the courts might rule in academic freedom cases involving secondary school learners or their teachers. The following are cases which have already occurred in South Africa and point to the kind of problems one might expect in the future.

The first concerns a Primary School in Gauteng where a Grade 6 teacher used, for a comprehension test, a passage from a Herman Charles Bosman short story. The passage contained the word *Kaffir*, and the teacher said that he had explained to the class Bosman's use of the word (compare *Hardy,* see 4.11.3). The school attempted to dismiss this teacher, his post being a governing body appointment. While the details are sketchy, the school reached an out of court settlement with the teacher who challenged his dismissal [Anon: Personal Interview, Primary School Principal (name withheld) June 2001].

The saga raises the critical issue of a teacher's right to select material he believes to be academically suitable. The use of the word *Kaffir* in South Africa today is considered controversial, but is all controversy to be avoided? Should learners be denied access to anything controversial? Is the classroom to be bathed in antiseptics? If so, the world of the school classroom becomes increasingly distant from the real world outside the school walls, instead of being the very place where learners are exposed to debate on such controversies.

The second case concerns a private school where a learner wrote a strongly pro-Palestinian essay that brought the wrath of certain sectors of the school community. The school moved to expel the girl concerned. Once again, when the matter was challenged, the school settled out of court [Anon: Personal Interview, School's Legal Advisor (name withheld) June 2001]. The case raises critical issues about the right of learners to hold and express divergent and even very controversial opinions which do not always fit with the community values. One has to ask what might happen if a learner, orally or in writing, presented a strongly pro-Azapo view in a right wing Afrikaans community, or presented a topic entitled "The benefits of Apartheid to the Black Community of South Africa" in a strongly pro-PAC school environment. The issue here is that these are real tests of the genuineness of the right to academic freedom in South Africa in 2002.

The issue of a learner not wishing to be held as a captive audience is illustrated in a case where secondary learners objected to a teacher's choice of the setwork book *Catcher in the Rye* because of its content and offensive language, and insisted on being allowed to study the alternative setwork book, *Shades* (Furman, Personal Interview, March 1999). While this incident has a similarity to *Keefe* (see 4.7.6) offering an alternative assignment to *The Young and the Old*, it also raises interesting and difficult questions. How far does the right of a learner stretch in regard to setwork book selection? Can learners object to books on the grounds of being offensive? Is this academic freedom, or is real academic freedom to study the chosen book and challenge the content and message in open debates in the classroom, taking a stand in the form of defending their views to their peers? There may well be a case to be made from either standpoint. There is no apparent legal ruling on which to judge whether a refusal to accede to the learners' request would or would not have been overturned by a court.

The learners' right to academic freedom must, at the same time include the right to have teachers with a similar right to academic freedom and be exposed to their thinking, however different it may be from their own, from their text books, from other sources of information, or even the prevailing views and values of the school community. Learners know that their teachers have their own views. An environment which confines teachers by rigid regulations, single text books, syllabus conformity, and an official or unofficial gagging of differing opinions, hinders a teacher from sharing his views or anything controversial. It equally denies learners access to the very world for which education is supposed to be preparing them - a world of diverse ideas which need to be heard and debated.

The teachers' right to academic freedom must allow them to go beyond the prescribed, with the possible proviso that what they do is within the intellectual capacity of their learners. An equally important part of the teachers' academic freedom is their crucial right to select what they perceive to be the most

appropriate methodology for the subject matter to be presented and the particular group of learners. It is possible that their selected methods might be described by others as 'way out' or 'controversial', and may give rise to emotional responses or sharply divided opinions amongst learners, but such choices must be the right of every teacher. For an education department or a school to impose one methodology on all teachers is to deny them their personal dignity, autonomy and the right to make free professional judgements. Such is a denial of academic freedom for teachers and it denies their learners the opportunity of exposure to a variety of teaching methodologies.

6.4.7.4 TEACHER ACADEMIC FREEDOM AND CURRICULUM 2005

As stated above, an important part of teachers' right to academic freedom is their crucial right to select what they perceive to be the most appropriate methodology for the subject matter to be presented to the particular group of learners. For an education department or a school to impose one methodology on all teachers is to deny them their personal dignity, autonomy and the right to be free to make professional judgements. Such is a denial of academic freedom for the teacher and it denies the learner the opportunity of exposure to other teaching methodologies.

In the South African context the current (2002) format of Curriculum 2005, with its methodology focussed on group work and activities, and the pressure on teachers to integrate 'outcomes' has all the appearances of being too close to a prescribed methodology. Such a prescription may be totally out of tune with the personality of the teacher and/or the needs of his learners, or even the requirements of the specific aspect of the content. Malherbe and Berkhout (2001:11), while referring to university academic freedom, provide a comment equally applicable to schools, namely,

> The assumed linkage between the purpose, exit-level outcomes and assessment standards will affect the way in which teaching and learning are

> planned and facilitated. The GETC school exit is already being structured in a way that schools are being advised to strictly adhere to the present Curriculum 2005 and not to make use or change to the streamlined curriculum. The reasoning is that the so-called CTEs and EATS will demand 2005 conformity and any variation will disadvantage learners. It is true that any examination can affect the way teachers teach. However, where a prescriptive assessment format hems in a teacher to the extent of restricting teachers from venturing beyond the prescribed, it would seem that that teacher's constitutional academic freedom will have been breached.

Whether action has been or will be taken against a teacher who refuses to use such OBE or other prescribed methodology, there remains pressure to conform.

It is accepted that the state has the right to set the broad curriculum parameters. However, any attempt to prescribe or pressure teachers to use a particular methodology raises serious issues about the infringement of a professional teacher's right to academic freedom.

The academic freedom rights of both learner and teacher are restricted when a syllabus or learning plan defines what may be taught and learnt in exact terms and allows no deviation or addition. Van der Westhuizen (1994:267) points to this by saying that "... if the genius of Mozart were to have been restricted to the mediocre standards of his contemporaries, music might not have developed as it did". It could be added that Mozart's own development might have been considerably curtailed. Likewise, when the prescribed academic programme restricts learners and their teachers to the mediocrity of 'the lowest common denominator' such programmes need to be challenged as infringing the academic freedom of teacher and learner alike.

6.4.7.5 THE LIMITS AND ABUSE OF ACADEMIC FREEDOM

Academic freedom is not without limits. Young people need a measure of protection from teachers who abuse their positions in order to indoctrinate. True academic freedom, when given to both learners and teachers, is the antithesis of, and protects learners from indoctrination. The issue of the abuse of academic freedom is discussed at length in a previous chapter (see 4.10.4).

Teachers' rights to academic freedom must allow them to go beyond the prescribed. The limitation might be that what they do should be within the intellectual capacity of their learners and not go beyond the bounds of decency. Some of the greatest learning may occur in the introduction and debate of current issues, or where a teacher has a specialised interest beyond the prescribed curriculum. To deny learners access to such knowledge and experience is to limit their learning and development. At the same time, for teachers to misuse their positions and side-track their classes to other issues without fulfilling the requirements of their teaching position, it becomes an abuse of freedom.

The use of single text books is one of the easiest ways of engaging in apparently legitimate forms of indoctrination, particularly when a particular text book is selected for its specific slant on the subject, thereby denying learners access to a range of perspectives.

Equally effective in denying the learners' their right to academic freedom is to teach without allowing questions or challenges to information. The text book seen as, and/or the teacher behaving as the source of all knowledge is a route to stifle independent thinking and learner development.

Moshman (in Clarick 1990:725) suggests that research on intellectual development reveals the crucial importance of "exposure to diverse points of view and encouragement to form, express and discuss one's opinions...".

Both the restriction of teachers' academic freedom, or teachers' abuse of their position to indoctrinate, offend and deprive the learner of his/her academic freedom *and* intellectual development.

Yet another form of academic freedom is the right not to express as one's belief something one does not believe in. The United States Courts were a battle ground, first in the case of *Barnette* (see 4.10.3.6) during the Second World War, and then over the issue of loyalty oaths in the post war and early cold war period (see *Adler* in 4.10.3.1). Those who failed to take such oaths faced possible expulsion from school or dismissal from their teaching posts.

The suggestion of introducing any form of loyalty oath in South Africa, to be recited in a school assembly, is another danger signal on the horizon since it would force some learners and teachers into that very form of denial of academic freedom, the expression as belief of what they may not believe at all. The implications of such a loyalty oath become a little clearer if placed in the context of a possible exam question as follows: "Explain the positive value of a flag raising ceremony and the pledge of loyalty in developing a spirit of national unity in South Africa".

The problem with loyalty oaths in an academic institution lies in forcing teachers and learners into corners. *Barnette* highlights the danger from a religious perspective but the forcing of persons into a predetermined mould of thinking or expression flies in the face of the right to think differently, without being accused of being disloyal.

6.4.7.6 ACADEMIC FREEDOM AND TEACHER RESEARCH

Beyond the classroom a further academic freedom issue is concerned with the right of a teacher to conduct and publish research. Research away from the school premises presents little difficulty, but when that research involves either learners or the teacher's employers or the education system, queries may arise. It is understandable that learners need to be protected from

unscrupulous research and such research needs to be in a proper academic context and done with the permission of the school management, without management having the right to alter findings or the research report. Where an educator conducts research on methodology, or assessment methods, or the school management, must he first apply for permission? To what extent can an education department or school management interfere with such research? It is conceded that again the employer has rights and responsibilities, including the right to protect the interests of the school and learners. However, if the research is approved, can the employer block the publication if he does not like the findings?

All of the above are open questions within the framework of the extent of academic freedom. Part of the answer may lie around the question of whether such research is being conducted under the auspices of a university or other educational institution, or is 'private research' for, for example, journal publication. Test cases in this regard will be needed to provide clear answers.

6.4.7.7 THE TEACHERS' RIGHT TO OFFER PUBLIC CRITICISM

Another vexed question concerns the right or otherwise of a teacher to speak out critically regarding academic issues and management of education issues where that criticism is of his own school or education authorities. Where education involves a burden for tax payers, such information as contained in the criticism may be of public interest, or in the interest of improving the quality of education for learners.

Whether the issue is academic freedom or general freedom of expression would depend on the nature of the issues which receive the teacher's criticism.

To silence teachers on issues like this would be to silence those who may have the best insight into the problems which are occurring. Much has been

made in the past of "following the correct channels" but where does the teacher stand if those channels are used to block critical comment?

To provide a practical example, one needs to consider the reaction to the initial Curriculum 2005 and O.B.E. Without over generalizing, the reaction of teachers was mixed. There were those who simply accepted the changes. There were those who made critical noises in their staff rooms but conformed none the less. There were those who applied their minds, and made outspoken criticism based on academic insight. If teacher x wrote an academic paper strongly critical of the new policy and its implementation, based on sound analysis and research, would he be able to claim his right to academic freedom to do so?

If the apparent American line is followed (see 4.7.9), the right to criticism of the kind above would be upheld provided that it is not tainted with a personal vendetta or attacks on (a) person(s) as (an) individual(s).

It is important to distinguish academic freedom in the school from the broader freedom of expression. Where the teacher (or learner) aims his/her criticism at academic matters, be they such things as curriculum, methodology, text book selection, time allocations, or funding (provided it is directly related to academic matters) then the claim to academic freedom would seem to be sound. Where the criticism is aimed at school fees, uniforms, neglect of buildings, such criticism may well fall under general freedom of expression. It is equally clear that issues will not necessarily have such a clear dividing line as the above might seem to imply.

6.4.7.8 THE LEARNERS' RIGHT TO OFFER PUBLIC CRITICISM

Does the learner have the right to public criticism of his school, of his education or of the Education Department? Andrew Hallett, a sixteen year old learner, (quoted by Alston 1988: 177) stated:

> The Gifted Class gave a particular prestige to education... I really cherished the freedom of that year, the chance to be myself. I fear, however, for those who spend 3 years in the class and how, if they have experienced themselves fully, they will react and readjust to the environment of High School. *I would go for anything which is more fulfilling than the restrictive C.P.A./Government styled education* (italics added)! If only I could have spent more time in the class.

The sentence in italics above drew sharp criticism from a senior Cape Education Department official. He indicated that the quote should have been omitted from the journal article as it was a criticism of the Department and put the Department in a bad light.

The incident, years before the 1996 Constitution illustrates an approach totally contrary to genuine research and academic freedom. The criticism reflected a desire to prescribe that only what was complimentary or positive should be published.

The public criticism by learners would appear to enjoy the same protection as that of teachers, particularly if a similar line to that followed in the United States were to be followed in South Africa.

6.4.7.9 ACADEMIC FREEDOM AND INTRA-MURAL SPEECH

Finally, there remains the question of academic freedom and intra-mural speech. Simply put, can an educator be disciplined for outspoken criticism of academic policy and/or its implementation, or other academic matters, made within the confines of an internal staff meeting? Could that particular school's governing body reprimand such an educator or recommend disciplinary action by the Education Department? It would seem clear that personal attacks on individuals would be likely to enjoy little or no protection, but if the criticism remains on an academic front, such criticism would seem to fall within the bounds of academic freedom. Personal attacks and vendettas are not protected but the speaker is open to being sued for libel if the offended

individual believes his/her personal reputation has been harmed by such speech.

The above situation is complicated in a case where a teacher employed by the governing body engages in strong criticism of academic matters and then finds his/her contract with the school terminated. Such a situation would appear to have all the ingredients for a test case.

6.4.7.10 ACADEMIC FREEDOM - SOME FINAL THOUGHTS

All of the above has a lesser or greater measure of conjecture because the extent of a teachers' or learners' academic freedom remains untested in the South African courts. At present one can only draw on overseas experience and raise the issues in a South African context.

Malherbe and Berkhout (2001:12) refer to Bray's argument that academic freedom encompasses a combination of all of freedom of expression, conscience, thought, religion, belief, and opinion, and the rights to assemble and associate. The authors suggest that "...a democracy without academic freedom is unthinkable and any limitation of the right should be tolerated only for a very compelling reason".

On the basis of this section on *Academic Freedom* it is argued that the views of Malherbe and Berkhout are not only applicable to universities but also to schools in South Africa.

What is vital in the changing South African situation is the avoidance not just of unacceptable rules and regulations that inhibit the academic freedom of learner and teacher alike, but equally an avoidance of 'chilling' factors, factors which cause teachers and/or learners to avoid controversy, avoid being different, avoid challenging simply to remain on the right side of authorities. In the long term the "chilling" effect of regulations, rules, public statements by

senior officials or the 'hidden' pressures of different kinds, all of which may be far less evident but far more damaging than outright legal action taken against teachers or learners. Such restrictions deny both the learner and teacher, and the wider society the benefit of new thinking and new ideas. Van der Westhuizen (1994:267) stresses the importance of the critical mind when he suggests that if Voltaire had not ridiculed the monarchy in pre-1789 France, the world might not have come to experiment with democracy. While the outspoken criticism by teachers or learners might not have a Voltairian effect, it may be as important in ensuring that meaningful changes and developments occur.

So much in this world has come from the radically different and even wild ideas of mavericks, young and old. Denying academic freedom and demanding conformity may develop a school-educated citizen but risk the possibility of denying the development of bold new ideas, and deny the world access to ideas that can change this world for the better.

6.5 CONCLUSIONS

Freedom of expression in the South African schools remains an unknown for many. This chapter presents a view of the variety of issues with which schools may be confronted. The lack of case law leaves schools having to make judgements on issues.

The questions remain. How well informed are schools in South Africa about the right to freedom of expression? What are their perceptions of this right? How do governing bodies, principals, teachers and learners anticipate such freedom of expression impacting on their lives and their schools? What are the implications of their perceptions?

These and other questions are not the focus here but arise from the relevancy that the Bill of Rights and especially the right to freedom of expression has on the school community.

Having examined the right to freedom of expression in schools, both in an international context (Chapters 3 and 4) and in the South African context (Chapters 5 and 6), the next chapter draws comparisons between the various selected countries and South Africa in respect of both the differing legal systems and the right to freedom of expression in schools of the five countries.

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CHAPTER 7: FREEDOM OF EXPRESSION IN SCHOOLS: A COMPARATIVE ANALYSIS

7.1 INTRODUCTION

Justice La Forest of Canada provided a reminder to all who engage in any form of comparison of constitutional issues to

> ... be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances... (quoted by Sussel 1995:37-38).

About three hundred years ago, Vico [see 2.2.2.1(c)] pointed to the danger of attempting to impose laws from one country on another when countries were at different stages of development, and pointed to law as shaped and developed over time.

With such warnings it is equally important to recognise that, as a result of the dramatic technological developments of the 20th century, the world has become more of a 'global village' and, as such, the experiences of one country not only affect other countries but point to the need to learn lessons from other countries.

In comparing the right to freedom of expression in the school context of the five selected countries (see 1.5) it is necessary to first examine the historico-legal setting of each to grasp the 'different stages of development' referred to by Vico and the 'different circumstances' pointed to by La Forest.

7.2 CONSTITUTIONS AND LEGAL STRUCTURES

In comparing the five specific countries, the literature and case law of the United States on freedom of expression is vast. This dominance of United States case law is reflected in a major text on Constitutional Law in South Africa where the case law reference list contains two cases from New Zealand, one and a half pages of cases

from England, five pages from Canada and nine pages of United States cases (Chaskalson *et al.* 1996: Cases 1-47).

7.2.1 Constitutional Issues

The United States Constitution dates back to 1787 (see 2.2.3.2) and the right to freedom of speech is contained in the First Amendment, proposed in 1789 and passed in 1791 (see 2.2.3.3). The First Amendment is different from 'freedom of expression' articles in modern Constitutions, first in its reference to 'freedom of speech' and secondly it is a '*restraining of state powers*' type of Amendment rather than a '*giving of a right*' article.

The words 'freedom of speech' used instead of 'freedom of expression', in terms of application, must be seen as more than mere semantics. The broadening of freedom of speech to a broader interpretation (without changing the wording) of today's 'freedom of expression' took a long time to occur and much of the change occurred in the past fifty years.

The United States First Amendment states, "Congress shall make no law ... abridging the freedom of expression, or of the press ..." (see 2.2.3.3), which contrasts sharply with the Canadian Charter of Rights and Freedoms (Canada 1982) which states,

> Sec. 2 a) everyone has the following fundamental freedoms,
> b) freedom of thought, belief, opinion and expression ...

New Zealand does not have a Constitution but Section 14 of the Bill of Rights Act (New Zealand 1990) states, "Everyone has the right to freedom of expression including ...".

Section 16 of the South African Constitution (RSA 1996a) begins with identical wording to that of New Zealand with only 'including' being replaced with 'which includes' (see 6.3).

In the case of Great Britain, as a result of the Human Rights Act (Great Britain 1998), freedom of expression is protected by Sec. 12(4) of the Act which incorporates Section 10 of the European Convention on Human Rights, as interpreted by British Courts (see 3.3.3). The ECHR wording of Section 10 begins, "Everyone has the right to freedom of expression. This right shall include...".

The extent and range and development of freedom of expression case law is not determined purely to the wording of the particular Constitutional of legislative article. It appears that the historical time frame has played a major role being directly related to prevailing circumstances. Further the social and legal culture of a country has its effect. The liberal individualism of the United States contrasts sharply with, for instance, the more conservative social and legal climate of Canada, Britain and New Zealand. South Africa is in the process of moving from a very conservative and rigid, authoritarian climate, to, at least in terms of the Constitution, one of the most liberal of social and legal climates.

It is important to realise that social and legal climates are not static and factors outside of both can bring dramatic changes to legal interpretations given to Bills of Rights.

A key difference between the United States and the other four countries is the age of the Constitution and the freedom of expression article. The United States First Amendment dates back 211 years while in the other four countries freedom of expression date back 20 years or less. This clearly impacts both on the volume of case law and the type of interpretations.

When one examines school related freedom of expression issues, the United States case law on the subject is from a far more recent time. While there are earlier cases, the *Tinker* case of 1969 (see 3.3.1) is regarded as a turning point in American legal history.

Judge Fortas's words, in *Tinker* (see 3.3.1), that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gates ...", changed the playing fields and led to Justice Black's words that "... this case ushers in ... an entirely new era in which the power to control pupils ... is in ultimate effect transferred to the Supreme Court".

In reality, later cases have not always reflected consistency with the *Tinker* judgement. *Hazlewood* (see 4.8.4) has been seen by some as an attempt to undo the breadth of the *Tinker* judgement. In *Hazlewood* the court stated that

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

In respect of Canada, Sussell (1995:123) points to the slow development of school related case law and the possibility of far more cases as pupils become more aware of their rights. What Sussell pointed to was the gradual development of a rights conscious society. In similar vein, Bray (1992:16), prior to the Interim Constitution (RSA 1993a) anticipated the possibility of South African courts becoming more and more involved in education policy and practice.

What Sussell and Bray anticipated has not yet occurred in the sense of a flood of cases before the Courts in their respective countries, but rather the growing rights awareness and an increasing number of cases. In South Africa several cases have involved the Human Rights Commission and resulted in schools "backing down" (see 6.4.1) on freedom of expression issues. Two South African cases referred to (see 6.4.7.3) were settled out of court by the schools involved.

In respect of New Zealand, the Bill of Rights (see 3.3.4) did bring some immediate challenges to schools (see 4.3.2 and 4.5) but these have been via the New Zealand Human Rights Commission. There is a 'too early to tell' situation in Great Britain as

the Human Rights Act of 1998 has only been in force since October 2000, too limited a time for any sense of clarity.

7.2.2 Legal Structures

The case law and legal clarity on freedom of speech and other human rights issues is also affected by the legal structure of a given country. The United States has a federal system of government and federal courts. While the Constitution and Amendments are applicable to all [United States Constitution, quoted by Tribe (1978:lv-lxix)], rulings in State or Circuit Courts are not binding on all other courts. Only Supreme Court decisions are binding on all. This situation gives rise to great variation in decisions made on cases which are very similar (see 4.2.1).

Canada too has a tiered judicial system. The decisions of higher courts in each province are binding on that province's lower courts but having no binding force on other provinces but serve only as guidelines. The Supreme Court of Canada is the final court of appeal (MacKay & Sutherland 1990:174).

Great Britain, without a constitution but with a strong parliamentary democracy, has a tiered legal system with the House of Lords as the final court of appeal. Prior to 1998 human rights enjoyed protection only via legislative acts but with no Bill of Rights. Before the Human Rights Act (Great Britain 1998) a person who felt his freedom of expression [or other human right(s)] was being violated had first to exhaust all other legal channels before he was allowed to attempt to bring his case before the European Commission on Human Rights (Partington 1990:107). Now British Courts must take account of the European Convention on Human Rights and European case law when reaching decisions.

Like Britain, New Zealand has no Constitution and rights are protected by the unentrenched Human Rights Act (New Zealand 1993), thus providing for protection of the right to freedom of expression. The involvement of Courts in school related cases seems limited by cases being referred to the Human Rights Commission.

The Constitutional and legislative acts and the legal structures in the four countries reveal differences which impact both on the decisions and their consistency. It is against this background that some of the uniqueness of the South African position must be seen. Having moved from a parliamentary to a constitutional democracy with an entrenched Constitution (RSA 1996a), the constitution is the supreme law [cf. *Marbury v Madison* at 177 (see 2.2.3.2) for a United States ruling on "supreme law"].

South Africa has a tiered legal system [Chapter 8 of South African Constitution (RSA : 1996a)]. A Provincial High Court decision in one province is binding on all other provincial High Courts, while decisions of the Appeal Court and the Constitutional Court, are binding on all lower courts. In respect of school related cases this ensures that a decision in the High Court (or the Constitutional Court) is binding on all schools in all provinces. It can be argued that this creates the possibility of greater legal certainty than might come from legal systems in other countries.

It is the Constitutional Court which makes the South African legal system unique in comparison to the four other countries under discussion (see 5.4.1) allowing for a specialist court to make binding decisions on all constitutional issues. The case of *Christian Education South Africa v Minister of Education* (see 5.4.4.1) illustrates the binding nature of Constitutional Court decisions on all schools. The *De Lille* case (see 5.4.1) illustrates how a Constitutional Court decision on a matter with no school linkage creates a precedent with direct implications for all schools.

7.2.3 Application, Interpretation and Limitations of Constitutional and Legislative Human Rights provisions

How the respective constitutions and acts passed by the various Legislatures/Parliaments are applied, interpreted and limited impacts directly on the extensiveness of rights.

7.2.3.1 APPLICATION

The United States constitution makes no direct reference to application and interpretation and has no limitation clause. This leaves courts to apply limitations in the light of the particular right. However, the United States courts have developed principles of limitations which are used in such decisions (see 3.3.1). It took *Tinker* (see 3.3.1) to clarify the fact that freedom of expression was a right applicable to pupils and teachers within the schools, but *Hazlewood* (see 4.8.4) muddied that ruling. The nature of the First Amendment as an Amendment restraining the State from restricting freedom of speech is different from the "everyone has the right to freedom of expression" found in Canada, New Zealand and South Africa and the European Convention of Human Rights (applicable in Great Britain).

The Canadian Charter (Canada 1982) application clause (Sec.32) states,

1) This Charter applies
   a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ..., and
   b) to the legislature and governments of each province in respect of all matters within the legislature of each province.

Section 52 confirms the supremacy of the Constitution over all other law.

Section 3 of the New Zealand Bill of Rights Act (1990) makes clear that the Act is applicable to the State and persons or bodies performing public functions (similar but not necessarily identical to the term *organs of state* used in the South African Constitution (RSA 1996a). This would point to schools being bound by the Act, providing protection for the rights of all in the school.

In contrast, Sec.8 (1) of the South African Constitution (RSA 1996a) deals with application and states that "the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and *all organs of state* (italics added)", organs of state being defined in Sec. 239(b)(ii). Because, by definition, public schools are organs of state, the applicability of the Bill of Rights to schools is clarified and not left

to Courts to decide. The question of whether "everyone" includes children has not been tested and Woolman's comment (1999:10-7) appears to offer the best available guidance, namely that courts are unlikely to deny children *prima facie* entitlement to basic rights, including freedom of expression (see 5.4.1).

7.2.3.2 INTERPRETATION

The Canadian Charter (Canada 1982), states in Sec.27 that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canada". The precise legal meaning of the statement is not clear.

At a different level, Canadian Justice Estey spoke against a "narrow and technical interpretation" of the Charter (see 3.3.2) but several legal academics have been critical of the inconsistencies displayed by the Canadian Supreme Court.

In contrast, in the South African Constitution (RSA 1996a), the interpretation clause (Sec.39) spells out in precise terms the requirement to interpret the Bill of Rights in terms of the founding values of human dignity, equality and freedom. It further demands such interpretation not only from Courts, but also from tribunals and forums. The South African interpretation issues are extensively covered in 5.4.2.

7.2.3.3 LIMITATIONS

No right is unlimited but the way in which limitations are arrived at and applied may vary considerably from country to country. As indicated in 7.2.3.1, the United States has no limitations clause but is not without the means to limit rights (see 3.3.1). Canada has, as indicated in Section 1 of the Charter (Canada 1982) (see 3.3.2), a very broad limitations clause stating that rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

As neither New Zealand nor Great Britain have entrenched constitutions limitations clauses in the form found in Canada or South Africa, limitations do not apply. New

Zealand's Human Rights Act (New Zealand 1993) is a normal Act of Parliament. In Great Britain, with the introduction of the Human Rights Act (Great Britain 1998), and the requirement that the European Convention on Human Rights be applied by British Courts, Sec 10 of the Convention provides the directions in regard to how limitations may be applied in the application of Convention rights in Great Britain (see 2.3.2 and 3.3.3).

The South African limitations clause is extensively discussed in 5.4.4. While the prescription that limitations must be "reasonable and justifiable in an open and democratic society" are very similar to a part of Sec. 1 of the Canadian Charter (see above), there are two elements which direct the Court, namely the factors which must be considered (see 5.4.4) and the addition of the words following 'democratic society', namely, "... based on human dignity, equality and freedom".

If case law is the guide to how different countries have applied limitations, the United States offers little decisive clarity. Canadian case law is, according to a number of writers, inconsistent. New Zealand and British case law is insufficient.

While one can never say for certain that, even with the present limitations clause, the South African Constitutional Court will always reflect a broad interpretation of the Bill of Rights and apply limits very sparingly, this approach appears to be the case during the first eight years since 1993.

That there are differences between countries is clear. To make a value judgement on constitutional protection of human rights in general and freedom of expression in particular would be risky. Historical factors have played a role. For South Africa, coming out of a history of repression of the majority, it is essential that the courts promote human rights and the key values of dignity, equality and freedom [Sec 7(2) of the Constitution (SA 1996a)]. In a sense each of the five countries carries particular responsibilities for ensuring the rights of their multi-cultural populations, and

unnecessary and/or inconsistent limitations could undermine attempts to ensure a unified nation.

7.3 FREEDOM OF EXPRESSION IN THE FIVE COUNTRIES

Freedom of expression is an internationally proclaimed human right (see 2.3.1 - 2.3.5, 2.3.7). In a sense, it is the fulfillment of President Roosevelt's 1941 *Four Freedoms* message to the United States congress (see 2.2.5.1), of how he had foreseen the post-World War 2 world should be founded. He stated that "the first is freedom of speech and expression - everywhere in the world".

The access to and extent of freedom of expression in the five countries under discussion has come differently to each. It is equally important to recognise that access to freedom of expression, its interpretation and limitations are not a fixed star in the constitution but rather a developing concept, broadened by changing case law over time.

The United States, with 211 years of freedom of speech (see 2.2.3.1) reflects this broadening perspective and interpretation (see 3.3.1). The words, *freedom of speech* allowed for a narrower interpretation than *freedom of expression* might have allowed. However, as the two terms became increasingly seen as synonymous (see 3.2.1), so the broader interpretation expanded through the last century, slowly at first, but rapidly in the second half of the 20th century.

In distinct contrast, the four other countries were all still parliamentary democracies well into the second half of the last century. While Canada had a Bill of Rights from 1960, it was not entrenched but a legislative Act which proved less than effective. Justice Beetz made the power of parliament clear when he stated, in 1978, that no so-called freedoms were beyond the power of the Canadian parliament to overturn them (see 3.3.2). This type of parliamentary sovereignty is made clear in *Sachs*, a 1934 South African case discussed in 5.2.

Without an entrenched Constitution or a legislated Bill of Rights with the most stringent protective clauses (which are nevertheless never as secure as an entrenched Bill of Rights with an entrenched Constitution), human rights will enjoy little protection and be open to the whims of the majority party in a parliamentary democracy.

Canada was the first of the four countries (other than the United States) to have an entrenched Constitution and Bill of Rights (Canada 1982) which ensured citizens protected right to freedom of expression. The current position in New Zealand has some similarity to the Canadian position from 1960 to 1982 with the Bill of Rights Act of 1990 and the Human Rights Act of 1993, neither of which is entrenched. However, the clearly defined roles of the Attorney-General and the New Zealand Human Rights Commission (see 3.3.4 and 4.3.2) provide greater "teeth" in ensuring, first, a check on proposed legislation that it does not infringe human rights and, secondly, both the watch-dog and directly constructive role the Human Rights Commission plays in ensuring the upholding of human rights, including freedom of expression, for all New Zealanders.

The position in Great Britain is uniquely "British". The 1998 Human Rights Act is not entrenched, retains a measure of parliamentary sovereignty, but incorporates the European Convention on Human Rights into the British legal process, thereby providing for legal challenges in British courts to infringement of human rights as set out in the Convention (see 3.3.3). This is seemingly a vast improvement on the process previously required for a British citizen to challenge human infringements where he had to go to the European Court - an arduous and extremely expensive process that limited challenges from the ordinary citizen (see 7.2.2). How effective this unique approach will prove to be will take time to emerge.

In terms of protection of freedom of expression in South Africa, the entrenched Bill of Rights requires that rights must be respected, protected and promoted and fulfilled [see 7(2) of the Constitution (RSA 1996a)]. Further the limitation clause requires

detailed analysis of a number of key issues (see 5.4.4.1). Finally, the legal system does not allow for each provincial high court to make decisions not binding on other courts and all are subject to appeal and/or Constitutional Court scrutiny.

In South Africa, freedom of expression at least appears to enjoy a greater measure of protection from unreasonable limiting by all and sundry and the legal system offers a seemingly greater degree of legal certainty because of the binding nature of High Court decisions on all other High Courts.

7.3.1 Freedom of expression in differing educational systems

The way in which education is structured and organised can play a role in the extent to which freedom of expression of teachers and students/learners are protected, without having to resort the courts. There are considerable differences in the educational systems of the five countries.

The very decentralised education system of the United States, the result of constitutionally guarded federal powers, and the powers rested in local communities has resulted in School Boards exercising powers which have severely limited freedom of expression in certain school districts. This is well illustrated in cases such as *Stull, Zeller* and *New Rider* (4.2.1) and *Scoville, Eisner* and *Stanley* (4.8.2). In all these cases high school students challenged School Board decisions. The federal nature of the United States judicial system further complicated the issue as different Circuit Courts gave differing judgements.

In a country with an entrenched Bill of Rights binding on all courts and High Court decisions binding on all other courts, precedent is created in one court and another court would have to provide very solid reasons for creating a differing precedent. In the United States from the haircut sagas of 1965 to 1975 (see 4.2.1) it would seem that a vast amount of time and money would have been saved if precedent had been established in one haircut case, the precedent tested in the Supreme Court and then seen as binding on all. It would also be likely that if the United States had a national

education act which stated that educational authorities and schools were bound by the Constitution, fewer court cases may have been necessary. This was not and is not the case, and so School Boards continue to test the waters by encroaching on aspects of freedom of expression in the schools.

There is a lot of similarity between the Canadian provincial system and the United States federal system resulting in variations in decisions and a series of challenges, despite the *Charter* being part of the supreme constitutional law of Canada The *Keegstra* case illustrates this (see 4.10.4) with the case reopened even after a Supreme Court decision.

In similar vein Britain, with a more centralised system, grants extensive powers to Local Authorities but with such radical changes occurring or potentially present, it is difficult to anticipate the level of protection for freedom of expression that will emerge in British schools.

New Zealand has a more centralised education system and, despite the lack of an entrenched Bill of Rights, offers students and teachers the opportunity of a far less costly challenge to infringements of rights through the Human Rights Commission (illustrated in 4.3.2.).

The South African education system is both centralised and decentralised, the latter by way of powers and responsibilities given to provinces to implement national policy. The South African Schools Act (RSA 1996b) and the *Guidelines* (RSA 1998b) are binding on all public schools (see 6.3.4). Both the Schools Act (RSA 1996b) and the *Guidelines* make clear references to the Constitution. In the *Schools Act* such phrases as "Subject to the Constitution.." are found, for example, in Sec. 6(1) and 7(1). In the *Guidelines* Sec. 1.3 states, "The Code of Conduct must be subject to the Constitution of the Republic of South Africa, 1996,...". Most important, schools, as organs of state (see 5.4.1 and 7.2.3.1) are bound by the Constitution and subject to binding High Court judgements on issues pertaining to schools.

None of the above is to suggest that human rights are always upheld in all schools. In the four countries with human rights protection dating from no earlier than 1982, the development of a human rights culture is not an overnight process.

In examining and comparing protection of freedom of expression in the schools of different countries, a key question remains. Does the system and legal structure protect the right to freedom of expression of learners/students and teachers alike, and does it provide for redress of violations without being so involved and expensive that only the rich can afford to challenge infringements of their or their children's rights? In the South African situation the issue of comprehensibility and accessibility of the Bill of Rights to ordinary South African citizens, including teachers and learners (see 5.4.5) is one which casts doubt on the extent of protection in reality, although not in theory. Similar questions can be asked about any country where the population is far flung, isolated and without great reading skills or ready access to the required legislative materials.

In the next section the focus shifts to comparing how the different countries have handled different aspects of freedom of expression in their schools and the challenges to infringement of that right.

7.4 SPECIFIC FREEDOM OF EXPRESSION ISSUES

7.4.1 Grooming / Hairstyles

In comparing responses to hairstyles of school going young people, it appears that all five countries have schools who have experienced challenges to their hairstyle rules. These challenges have occurred as a result of changing fashions, or a determination of young people to express their individuality and/or culture through their hairstyles. While earlier literature focussed on challenges from boys, more recently girls' hairstyles/grooming has also become a focus of attention.

The key issue has been the School Board or individual schools' rules on haircuts or hairstyles. It is fair to say that the initial reaction was against the rigid rules which restricted boys to 'short back and sides' type haircuts. Challenges came when young people were suspended or excluded from schools because of long hair or 'inappropriate' styles (see 4.2 and 6.4.1).

But length of hair and type of style is not all related to teenage rebellion, even if some cases might have an element of rebellion. Cultural and religious issues have a pertinent impact on hairstyles and reflect the particular cultural or religious identity of the individual. This is no better illustrated than in the cases of *New Rider* in the United States (see 4.2.1), *Sehdev* in Canada (see 4.3.4), the Ninuena Maori in New Zealand (see 4.2.2) and Xhosa and Rastafrarian learners in South Africa (see 6.4.1). The power of principals in Great Britain left pupils near powerless, especially with an entrenched Bill of Rights. Even the 1998 education legislation continued to grant such powers to principals and governing bodies.

In each of the above countries, prior to the introduction of a Bill of Rights, pupils had little or no basis on which they could challenge such school rules.

In South Africa only one case has actually reached the courts (see 6.4.1) but was focussed on ensuring the female complainant's clean school record rather than over the Rastafrarian hairstyle that led to her original suspension.

However, there have been a number of other "haircut cases" reported in the press or in interviews and settled before reaching the stage of legal action. In a couple of cases the Human Rights Commission has become involved in getting the school to back down on action taken against the learner (see 6.4.1).

The e-mail correspondence with a New Zealand principal revealed a more modern approach to hairstyle issues where great flexibility is allowed but way out hairstyles are dealt with on an individual basis (see 4.2.2). In Ontario (Canada) there is a

Provincial Code of Conduct for all schools (see 4.2.4). The only reference to personal 'dress' of students is addressed to parents who are required to "help their child to be neat, appropriately dressed and prepared for school".

The South African position is made somewhat unique by the reference in the *Guidelines* (RSA 1998b) that states that freedom of expression extends to "forms of outward expression as seen in clothing selection and hairstyles". This line alone points to schools having little or no support for rigid hairstyle regulations, but rather learners having support for their right to express their individualism, culture or religion through their hairstyles.

The hairstyle issue, from a comparative perspective, seems destined to remain a point of contention for as long as schools seek to impose rules which both ignore changing fashions, and have no measurable relationship to educational performance or discipline, but instead impinge on young people's personal dignity.

7.4.2 Issues of Dress and Dress Codes

How young people dress and what they wear to school has been a long standing issue in many countries. The first divide is between having compulsory school uniforms or not, and the second is how much freedom the non-school uniform student has in his/her choice of clothes.

The United States appears to have had only one school uniform case reach the courts and that was in 1921 (see 4.3.1). However there is a desire by some American School Boards to return to uniforms (see 4.3.1). Any forcing of a school uniform has the potential to bring legal challenges as being an infringement of freedom of expression. School Boards would have to offer an extremely strong case for enforcing uniforms and the possibility of the Supreme Court being approached for a ruling seems highly likely.

Uniform can go beyond the set "dress" students must wear to school but can include, for example, a compulsory outfit for physical education. Such an outfit was challenged on religious grounds in American courts (see 4.3.1).

The wearing of uniforms or not has not been a major issue in the United States, while in Great Britain uniforms cannot be enforced in government schools (see 4.3.3) but the powers of principals to exclude almost anything can result in "a uniform by exclusion of all else". While it is not possible to enforce school uniforms, a school uniform may end up being "prescriptive" by peer pressure to conform. If enough parents fall in line with a proposed uniform it creates pressure on all others. The only case contesting uniform regulations in a British school as an infringement of a child's rights, was rejected by the European Commission (see 2.3.2). Whether this ruling will serve as a precedent for British courts as they apply the European Convention in Britain remains to be seen.

There is a clear similarity between the European Commission's decision (discussed above) and a Canadian court ruling stating that the wearing of the school uniform did not violate the applicant's freedom of expression (see 4.3.4). However, in the same year the court provided a contradictory decision involving religious dress, by stating that school uniform violated Sikh religious dress requirements. The issue of religious and cultural impact on grooming, dress and jewellery is elaborated on in 7.4.4.

When the Bill of Rights Act of 1990 came into force in New Zealand there were challenges by students against school dress regulations (see 4.3.2) particularly in respect of such compulsory school uniforms being an infringement of freedom of expression. The Human Rights Commission rulings went in favour of certain students on grounds of freedom of expression, sex discrimination and religion.

Examining the experiences of the United States, Canada, Britain and New Zealand, it might have been expected that uniforms might have been the subject of an early challenge in South Africa after the Interim Constitution (RSA 1993a) came into force.

Up to 1993 the powers of schools were such that challenges were never made. However, school uniform was a tradition rather than being enforceable by law. Up to the present there is no report of a court challenge to uniforms. In former White schools there are deep traditions which are used to enforce dress codes. For how long those traditions will be a source of persuasion is hard to estimate.

In the overall South African context it is probable that the majority of learners do not wear uniforms, particularly in rural Black schools, for reasons of poverty, lack of access to suppliers and a lack of a tradition of wearing uniforms. Visual evidence based on travelling and visiting schools seems to suggest that there has been a shift towards uniforms in urban Black schools and schools on the outer fringes of towns, but that these uniforms are not rigidly enforced.

As indicated in 7.4.1 the *Guidelines* (RSA 1998b) has pointed to freedom of expression as including "clothing selection", a statement learners could use as a strong argument for dressing in other than school uniform.

The issue of poverty and uniform, commented on in 6.4.2, could be used by the poor to make a strong case that schools who insist on a compulsory uniform are engaging in unfair discrimination. While *poverty* is not contained in the list in Section 9 (3) on the Constitution (RSA 1996a), the word 'including' indicates that the list of grounds of unfair discrimination is not exclusive.

Unlike the United States, South African school uniform issues rest with School Governing Bodies and the parents who elect them. However, an unconstitutional decision of a governing body can be challenged, as illustrated in the case of the Kwa Zulu Natal Secondary School (see 6.4.2).

The five countries do not present a common approach to uniforms. They do, however, together illustrate that uniforms are not only a legal issue but an issue strongly touched by culture, religion, traditions and socio-economic factors (The

impacts of culture and religion on uniforms and school dress are elaborated on in 7.4.4.). The uniform issues will not go away. While it is impossible to predict what changes will be forthcoming in South African schools, it seems unlikely that the status quo on uniforms will remain unchallenged for long.

Having examined dress codes and grooming, the next section examines adornments, or additions to dress and grooming, in the form of jewellery and other ornamentation.

7.4.3 Jewellery and Other Ornamentation

In examining this issue in the five countries, it is clear that it has not enjoyed the same attention as hairstyles and dress. However, this may be due to the fact that it has not been seen as an issue about which to make a great fuss. A closer examination shows that there is potential for conflict.

The wearing of jewellery is done for a number of reasons. These include the expressing of cultural connections and beliefs, religious beliefs, sexual orientation, or simply as adornment or, more simply, to add to one's appearance or expressing oneself in terms of physical attractiveness.

The role of cultural jewellery is reflected in New Zealand's experiences with the Maori pupil wearing the taonga (see 4.5), while the wearing of the kirpin by Sikh boys is a religious issue (see 4.5).

The wearing of earrings is seemingly a worldwide phenomenon. This may be purely for adornment but may also be for religious and/or cultural reasons. However, earrings have also become a symbol of sexual orientation, specifically for the gay community, and, according to McCarthy (1998:23) used by going members to indicate their association.

While there is not a vast array of cases to draw on, McCarthy's comments (see 4.5) on the increased interest in body piercing, tattoos and other fads, are not unique to

the United States. This phenomenon seems to be prevalent in South Africa (see 6.4.3).

A common factor in schools' opposition to jewellery is that of safety (see 4.5 and 6.4.3) in that jewellery can be a danger to the wearer and may be a danger to others, particularly in any form of contact sport.

Cases from the United States and the New Zealand and Canadian experiences are limited but indicate what schools may be facing. In the multi-cultural, multi-religious South African context, this issue is one with potential for legal action if it is handled incorrectly. In societies undergoing rapid change and young people reflecting changed values at an earlier age, jewellery and other ornamentation present challenges to schools on where to draw the line, if it is to be drawn at all.

7.4.4 Freedom of Expression: Religion and Culture

In the broad discussion of human rights and the impact of religion and culture (see 2.5) Alston (1994:23) was quoted as saying "... no amount of universalistic aspirations can cancel the inevitable influence of cultural values and perceptions". In all five countries under discussion (see 1.5) there exists distinct cultural diversity. Four of the countries have at least one indigenous culture apart from the descendents of the colonizers and immigrant families. Britain, apart from its own cultural heritage, has many "imported cultures" as a result of immigration.

As pressure grows for recognition of the cultural heritage of all peoples, a human right, so such cultural heritage will, in each country, impact on other aspects of school life including hairstyles, dress and jewellery (see 7.4.1 - 7.4.3) and the application of freedom of expression in other respects.

As diverse in each country are the religious differences including religions of indigenous people, through a range of Christian perspectives, and what are broadly

termed eastern religions. The possibility of varying 'religious' demands can impact on issues of dress, hairstyle and jewellery.

What the above highlights is the somewhat inseparable nature of freedom of expression, freedom of religion and expression of cultural identity.

In applying the learners' right to freedom of expression there is evidence of potential conflicts. To illustrate, the Canadian cases of *Devereux* and *Sehdev* (see 4.3.4) indicated that religious dress was given special concession over school dress codes, but a child who wore clothes other than those prescribed by the dress code, on the grounds of right to freedom of expression, did not enjoy protection.

The question then becomes, is freedom of religion of greater importance than freedom of expression? But if Devereux had worn ordinary clothes and claimed religious freedom because he belonged to a sect who required him to "be separate" (see 6.4.2), would he have enjoyed "freedom of religion" protection? In South Africa the same issue arose from the KwaZulu Natal Secondary School case (see 6.4.2). In forcing the school to accept a child wearing Moslem dress, the Education Department has opened up related issues. Would that Department have, as forcibly, insisted on the right of a learner to defy a school's dress code by wearing cultural dress, or, as forcibly, supported a learner who decided to exercise his right to freedom of expression of his personality by wearing a T-shirt, shorts and slip-slops? In New Zealand, where the Maori pupils' right to wear the Taonga was supported by the New Zealand Human Rights Commission (see 4.5), would the Commission have equally supported pupils wearing non-cultural, non-religious jewellery?

The Justice Douglas dissent in the *New Rider* case (see 4.2.1) in the United States highlighted the importance of the need to recognise an individual's cultural identity. Cases of hairstyles not related to culture or religion but simply as issues to freedom of expression did not get consistent court support (see 4.2.1).

Cultural and religious diversity are realities. However, can they be expressed in ways which enjoy court support but which would not be supported by the courts if there was no reference to religion and/or culture?

There are serious questions surrounding religious and cultural impacts on human rights. Key to this is whether freedom of expression is a right for everyone, regardless of its religious or cultural connections. Or, is freedom of expression to enjoy special support if religious and cultural pleas are attached?

There is no indication that any of the five countries has a clear and consistent response to these issues. Thus there remains a serious challenge to the statement "... *everyone* has the right to freedom of expression", especially with regard to religious and cultural issues.

7.4.5 Teachers' Freedom of Expression: Hairstyles, Dress and Jewellery

In comparing teachers' freedom of expression in these three aspects, no case law has been found from any of the five countries. The lack of case law raises questions. Is there an expectation that teachers will conform to particular styles of dress and grooming, or at least conform to the approximate level of expectation of pupils/ learners?

In a study of United States cases on dress code, none of the cases were related to schools and the judgements were not consistent. They do however reveal that business has attempted to challenge males with long hair [*Willingham v Macon Telegraph Publishing Company* (1974) 507 F.2d 1804], and attempted to impose a uniform on female staff only (see 4.6 for *Carroll v Talman*).

The case law referred to by Pretorius *et al.* (see 4.6) is important to business and industry but their applicability to education settings is untested. What the cases do provide are useful principles of avoiding gender discriminating rules, i.e. dress codes for ladies but not for men, or infringements of personal appearance to please the

wishes of parents or individual principals without any valid justification, an example being imposing a "no beard" policy for male staff or "no make-up" policy for ladies.

It is difficult to believe that schools will be allowed to infringe a teacher's freedom of expression if such a teacher is neat, clean and tidy. The pressure on men in certain schools to conform to a "jacket-and-tie" policy may not be defensible, nor is a "no-slacks" policy for ladies likely to enjoy support. But will a "no jeans" or "no jewellery" policy enjoy support? Or will support depend on the colour of the jeans or their style? The key issue in teachers' dress code must remain job relatedness.

These questions relate to what powers schools have to control the rights of teachers to "move with the times", and whether the exercise of such powers, if challenged, will enjoy legal support. In the South African context there is no legislative act, guideline or national code of conduct which prescribes or implies a dress code for teachers.

7.4.6 Press Freedom in the Schools

What John Milton fought for in 1644 (see 2.2.2.1) remains an issue as relevant today, namely freedom of the press. Three hundred and fifty years later freedom of press is an established freedom in international conventions (see 2.3) and in various constitutions. In almost all constitutions or bills of rights, it is linked to freedom of expression, being a particular aspect of that particular human right.

The two early constitutions, those of the United States and France, both made reference to press freedom although, for the people of the United States it came via the First Amendment. In all five of the countries under discussion (see 1.5) freedom of press is a right although the wording of the section varies from country to country. Apart from the United States, the statements in the other four countries all begin with 'everyone' (see 2.3.2, 3.3.2, 3.3.3, 3.3.4 and 6.3).

The freedom of student press would appear well protected given the above. In reality, the vast majority of case law and literature on student press freedom comes from the United States with only passing references from the other countries, if at all.

What is seemingly unique about the United States is the 'underground' school newspapers (see 4.8.2), those produced off campus by high school students and distributed in a variety of ways. Such papers have provided students with access to a press which enjoys no, or almost no control from the school or educational authorities. The only controls are those applicable to the normal press of responsibility for defamation, liable and incitement, or leaks of secret information.

But school authorities have challenged such papers (see 4.8.2). The judgements of the quoted cases went against school authorities for engaging in *prior restraint*, or not following proper procedures, or for overbroad rules.

The most important case of school sponsored newspapers, i.e. newspapers produced on the school campus, was *Hazlewood* (see 4.8.4) where a controversial 4-3 ruling went in favour of the Hazlewood School District, built around *'legitimate pedagogical concerns'*. The case is seen as giving principals increased powers to control student press when the school is involved, but the *underground* student press was untouched by the decision. The result is an even bigger divide between the two types of student press.

The questions remain as to how far press freedom extends in school, whether *prior restraint* is acceptable because a paper carries the school's name, and whether student editors become mere puppets of staff members.

With a lack of case law, the extent of student press freedom remains an undefined issue in four of the countries concerned, while the United States *Hazlewood* case is seemingly the precedent which continues to be used.

The electronic media of the internet (see 4.8.3) poses an entirely new challenge for schools across the globe, largely because an electronic *underground* media is beyond school control, is infinitely cheaper to operate and readily accessible to all who have an internet connection. The only control a school can exercise is over what is produced on school computers and on school premises, which would, in the United States, probably be covered by the *Hazlewood* precedent.

In the South African context school papers appear to be school sponsored and underground or internet media, if they exist, have, as far as can be seen, not been an issue of action by the school. The issue of the distribution of newspapers produced by the Congress of South African Students (COSAS) could give rise to legal dilemmas. One can at this stage only speculate as to what action might be taken if a school refused permission for the distribution of such a paper, and on what grounds such refusal would be made.

A comparison of the five countries offers little on which to make decisive conclusions or predictions.

7.4.7 Artistic Creativity

"Artistic creativity" is a term which occurs in only one of the five countries' constitutions, namely the South African Constitution (RSA 1996a) and forms part of the right to freedom of expression (see 6.4.6). It is a term which covers a wide range of art forms (see 4.9, 6.4.6.1 to 6.4.6.6). The term 'art' is found in some international conventions where freedom of expression "in the form of art" is referred to (see 2.3.3, 2.3.4 and 2.3.7). The UDHR (see 2.3.1) makes reference to the right to "seek, receive and impart information through any media" but whether the term 'media' includes art, is not clear.

In the United States the First Amendment (see 2.2.3.3) makes no reference to art but it is this Amendment, covering freedom of speech, which was the grounds for the challenge against restrictions on limits of pornography in *Miller v California* (see

3.3.1). The cases of *Boring* and *Lacks* were school related, the first dealing with art in the form of drama, and the second with the allowing of students to use vulgar language in creative expressive assignments (see 4.9). In both cases judgements went against the teachers, leaving the question as to what protection non-conformist artistic work might really enjoy.

While the Canadian Charter Sec.2, dealing with freedom of expression, refers to "... including freedom of the press and other media of communication" (see 2.3.1 and 3.3.2), no case law was found.

The question of artistic creativity in schools in Great Britain is equally obscure. When the European Court provided a test for obscenity in *Muller* (see 4.9), it does not clarify the issue in respect of what is acceptable or unacceptable artistic creativity in the school context.

New Zealand, like Great Britain, appears to have no case law on the subject. Section 14 of the Bill of Right Act (New Zealand 1990) includes the right to "impart information and opinions of *any kind* in *any form*". One can assume that a high school student and teacher would make use of that clause to defend any attempts to restrict his artistic creativity in whatever form.

A similar lack of case law exists in South Africa. However, it is worth considering what might happen if a case, similar to *Boring* (see 4.9), occurred in a South African context. The fact that a piece of drama performed in a classroom might draw criticism from parents and/or learners do not imply an automatic right for a principal to intervene. An examination of the Schools Act (RSA 1996b) and the *Guidelines*, as well as disciplinary procedures in the Employment of Educators Act (RSA 1998a) leaves an uncertainty as to the grounds on which either a learner or educator could be disciplined for such a production.

The issue of artistic creativity in the schools lacks case law and clarity. It is controversial at certain times and in certain settings. Further, it covers a wide range of art forms. In a world of changing values and increased tolerance of the previously unacceptable, which was possibly seen as pornographic or morally intolerable, it is an issue filled with uncertainty. Confronted by this uncertainty, a learner cannot be sure if he is within his rights to produce a particular artistic work, in whatever form. The teacher is equally uncertain of the boundaries of the acceptable. This uncertainty can have a "chilling" effect on artistic creativity within the school context, for fear of negative reactions and disciplinary action.

To discover the extent of artistic creativity at school will require a brave learner and/ or teacher to test the limits, and it will be the response of the courts to legal challenges which will then be required to prescribe the limitations or boundaries of artistic creativity within the school context.

7.4.8 Academic Freedom in the School

In the constitutions or legislated human rights protection of the five countries (see 1.5), the words *academic freedom* occur only in the South African Constitution (RSA 1996a), in Section 16 (as a sub-section of *freedom of expression*) as a right for *everyone* to enjoy. If the United States experience is to be used as a yardstick, academic freedom would have to fall within the general right to freedom of expression, including belief, opinion and communication through various means of communication.

It will be evident from 4.10 to 4.10.7 that the vast amount of both academic input and case law on academic freedom emanates from the United States. However, the differing decisions from Circuit Courts do not provide a sense of "legal certainty" on academic freedom in the schools.

What is academic freedom? Definitions abound but Pavela's view of the *pursuit of truth* as a key element provides a useful base for any definition (see 4.10.1). Yudof's

reference to 'multiple strands' indicates the difficulty in arriving at a neatly packaged definition (see 4.10.1). Suffice to suggest that it includes academic research and teaching with integrity and the right to share one's insights and findings without fear or favour.

In some United States judgements judges have spoken strongly in favour of academic freedom in schools, to the point of giving an impression that such freedom is a "given". In the *Adler* case in 1952, the first case in which the term 'academic freedom' was used, it was used with specific reference to public schools (see 4.8.3.1). In *Parducci* (1970) the reference was again to public schools, as in *Webb* (see 4.8.3.2).

In contrast to the United States, Canada has limited case law but one case which, although it was not about academic freedom *per se*, has a great deal to offer on the limits of academic freedom. Keegstra (see 4.10.4), a Social Studies teacher, provided a one-sided, personally biased, perspective of an aspect of history and denied his students the right to question or disagree, and ignored requests to present material in an unbiased way. The *Keegstra* case forces a reevaluation of what is taught and how it is taught, particularly where there are controversial perspectives.

While academic freedom in South African schools has not been an issue before and, as far as could be uncovered, not before the subject of academic writing, the two cases in 6.4.7.3 serve to highlight just two of the problems schools can possibly face. However, the various academic freedom issues covered in the previous chapter (see 6.4.7.3 to 6.4.7.9) and contrasted with those in 4.10 to 4.10.6 provide an overview of the breadth of the implications of academic freedom in schools.

The debate on whether academic freedom is only for Universities or whether it is, as it proposed, a continuum (see 4.10.2) on the path of life long learning in the context of various academic institutions, will probably remain an on-going debate. Unlike the other four countries, South Africa has, through its Constitution (RSA 1996a) declared

academic freedom to be the right of everyone without reference to age or specific type of academic institution.

7.5 CONCLUSIONS

It is important to be wary of "too ready a parallel between constitutions..." and equally of too ready a parallel between case law or attempts to transfer case law from one situation to another without contextualising the constitution and the case law. In comparing the right to freedom of expression in the context of schools of five different countries, one has also to consider the legal structure of each country and the structure of the education system.

Freedom of expression is an important human right in all five countries. While New Zealand and Great Britain do not have entrenched human rights protection, there are provisions within the legislative frameworks and specific acts covering human rights in each of the two countries which suggest that there is far more protection than might at first be envisaged.

The comparative approach is hindered by an uneven case law "playing field", dominated by mountains of United States case law, but only small mounds from the other countries. However, the case law of the five countries as a whole offers a useful overall picture on which each country can draw for possible issues they may not yet have experienced.

For South Africa, with only nine years of the right to freedom of expression, the experiences of other countries and examination of foreign case law, provides a platform for anticipating possible problems and developing sound processes to avoid or overcome freedom of expression related problems.

The final chapter provides a summary, findings and recommendations of this study.

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CHAPTER 8 : SUMMARY, FINDINGS AND RECOMMENDATIONS

8.1 INTRODUCTION

This chapter provides an overview of the previous chapters followed by findings based on the research. The chapter concludes with recommendations aimed at assisting towards the right to freedom of expression being given its rightful place in the schools. At the same time the recommendations have the purpose of ensuring that the school community is adequately informed, prepared for and able to respect, protect, promote and fulfil the right to freedom of expression of teachers and learners, and others in the school community. The chapter also has recommendations for possible further research to add other dimensions to this area of study.

8.2 SUMMARY

Chapter One provided an introduction to the study, outlining the problem (see 1.2) which led to this research and provided a brief focus on the specific problems which would be dealt with in detail (see 1.2.1 to 1.2.1.6). The chapter further provided an outline of the objectives of the research (1.3) and the research methodology (1.6) to be followed, specifically using primary legal sources in the form of law reports from the four foreign countries (see 1.5) and from South Africa, together with literature from those and other countries.

The second chapter focussed on the historical development of human rights and, specifically, freedom of expression. The historical development (see 2.2.2) was shown to be closely related to philosophical perspectives over the centuries, and the key events of the times, specifically changing political factors, revolutions and wars (see 2.2.3). While the development was slow until the start of the 20th Century (see 2.2.4), the chapter opens up the rapidly widening interpretation of freedom of speech and expression during the last century (see 2.2.5) and, specifically over the past 50 years, leading to various international declarations, conventions, covenants and charters for enshrining and protecting human rights, including the right to freedom of expression (see 2.3). The chapter further provides a focus on religious and cultural

issues affecting freedom of expression (2.5), and examines the issues in an African context.

All of Chapter Two is focussed on painting the background for the detailed focus on freedom of expression in schools which follows in the remaining chapters.

A range of interpretations and meanings of freedom of expression (see 3.2) and its development in the four selected foreign countries (see 3.3) in the context of their specific legal structures, forms the focus of Chapter Three.

Having established the wide interpretations of freedom of expression and its development, Chapter Four focuses on the six specific issues which are seen as having already affected, or are likely to affect schools in the four foreign countries. These issues are hairstyles/grooming, dress codes, jewellery, student press, artistic creativity, and academic freedom (see 4.2 to 4.11).

Chapter Five provides an introduction to the development of the South African Constitution from before Union to what we have today and in which is found the right to freedom of expression for everyone (see 5.1 - 5.2). The chapter examines the matters of application, interpretation and limitations of rights (see 5.4) in the said Constitution. The chapter concludes with a focus on the accessibility or otherwise of the law and Bill of Rights to the ordinary citizens, many of whom have language difficulties, and the implications of these difficulties for school communities (see 5.4.1).

In Chapter Six the focus is first on the right to freedom of expression as stipulated in the South African Constitution (see 6.2 - 6.3.3) and its place in the South African Schools Act (see 6.3.4). The focus then moves to the same six key issues covered in Chapter 4 but now in the South African context (see 6.4 to 6.4.7).

Finally, Chapter Seven provides a comparative perspective between the four foreign countries and South Africa first with reference to the differences in the different constitutional frameworks (see 7.2.1) and legal systems (see 7.2.1 to 7.2.3.3), then with reference to freedom of expression in those countries, and finally comparing the differences in approach to the six key issues, including the impact of religion and culture. The similarities and differences provide some direction for South African schools in what they are facing or may face, and in handling freedom of expression issues.

8.3 FINDINGS

The findings of the research and comparative study are presented in terms of the original objectives of the study (see 1.3).

8.3.1 Findings in respect of the first objective

> To provide an introduction to the concept of human rights and, particularly, the right to freedom of expression, by examining the historical development of human rights and some philosophical, cultural and religious perspectives which have affected that development up to the 20th Century, together with the right to freedom of expression as expressed in international human rights treaties of the past half century.

- The concept of human rights has developed over a long period (see 2.2) but has been the focus of close attention, specifically over the last half century, following the Second World War. Freedom of expression is a core right within the spread of human rights (see 2.2.5.1) and demonstrated by its place in international human rights treaties (see 2.3 to 2.3.7).

- The implementation of and access to the right to freedom of expression is affected by prevailing cultural and religious values in different countries (see 2.5), resulting

in a universally proclaimed right (see 2.3.8) not being universally applied (see 2.5 to 2.5.3.4).

- The African experience of human rights and freedom of expression, affected by culture, group identity and dependence, and living in a 'survival' mode, is in sharp contrast to the experience of those in the Western world with the focus on liberalism and individuality (see 2.6 to 2.6.6).

8.3.2 Findings based on the second objective

To provide a closer look at the place of freedom of expression in an international setting by examining the development of the right to freedom of expression in each of the four selected countries (see 1.5).

- Freedom of expression has a wide variety of interpretations which have developed, particularly, over the last century. These vary from pure speech to a range of forms of expression in non-verbal forms (see 3.2.2).

- Many of the interpretations of freedom of expression have arisen from legal challenges and the case law resulting from such challenges (see 3.2).

- The development of freedom of expression in the four foreign countries is far from even. The United States (see 3.3.1) has by far the greater experience and case law, while the experiences of Canada (see 3.3.2), Great Britain (see 3.3.3) and New Zealand (see 3.3.4) are far more limited. The latter two countries experience is also different by way of not having Constitutions and entrenched rights.

8.3.3 Findings based on the third objective

To examine some of the key problem areas of freedom of expression in the schools of the selected foreign countries, by scrutinizing literature, case studies and case law on problems which have arisen in those countries.

- Freedom of expression directly touches the lives of teachers and pupils in the context of schools in the four countries (see 4.1).

- The issue of school hairstyles/grooming (see 4.2) has been a controversial issue over many years but the court rulings have not been definitive but affected by local conditions, culture and religion, as well as the non-binding rulings of courts on other courts, particularly in the United States and Canada.

- Dress codes (see 4.3) are marked by differences in emphases from country to country. Where uniforms are not worn concern is expressed over negative messages carried by dress which is associated with elements in conflict with schools' educational focus.

- Jewellery (see 4.4) is not a major issue in any of the four countries, but the refusal to allow the wearing of religious or culturally related jewellery or artifacts has given rise to legal challenges. Tatoos and body piercing are relatively new issues confronting the schools. An overriding concern with the wearing of jewellery is that of safety.

- Issues of teachers' hairstyles, dress and jewellery (see 4.6) have not attracted attention from authorities or been the source of conflict in the four countries under discussion.

- Religious and cultural issues (see 4.7) have been taken account of in making decisions about learners/students hairstyles, dress and wearing of religious/cultural jewellery. However, this has not always been the case in the United States.

- The student press (see 4.8) issues are confined to the United States where a clear distinction is drawn between *school sponsored* and *underground* papers, the school having greater latitude to exercise control over the former. The use of the

internet for off campus publications has raised new and more difficult problems for schools.

- Artistic creativity (see 4.9) is a term for a wide range of artistic activities which are subject to rapidly changing social and moral values. These changes pose problems for teachers and pupils as to what is acceptable and what is not.

- While the place of academic freedom in the schools (see 4.10) is a matter of wide debate in the United States, mixed messages have come from the Courts, some reflecting strong support and others believing it to be for Universities only. The courts have used the claim to academic freedom to overturn School Board decisions on a range of issues affecting individual teachers.

8.3.4 Findings related to the fourth objective

To examine the right to freedom of expression in terms of the South African legal system.

- The entrenched South African Constitution as the supreme law and the binding nature of High Court decisions on all other High Courts offers legal certainty for teachers and learners to exercise their right to freedom of expression in South African schools, other than where rulings to the contrary have been made or such exercise of the right is clearly in conflict with the Constitution and infringes the rights of others (see 5.4).

- The position of schools, as organs of state, places on them the responsibility to respect, protect, promote and fulfil the rights provided for in the Bill of Rights, including learners' and teachers' rights to freedom of expression.

- The application of limitations on human rights, including freedom of expression, have to meet stringent conditions (see Sec. 36 of the Constitution and 5.4.4) and unjustified restrictions imposed by schools can be challenged (see 5.4.1).

- Sound legal structures and the liberal constitution are in place but its accessibility to all South Africans is in doubt (see 5.4.5) with consequent implications that the right to freedom of expression may not be accessible for many learners and teachers as a result of ignorance or lack of understanding of the Bill of Rights.

8.3.5 Findings related to the fifth objective

To explore the relevancy of the Constitutional right to freedom of expression for the South African school community.

- There is a lack of South African case law on the six specific issues, but other case law outlines the principles related to freedom of expression (see 6.3).

- There are schools in South Africa which, through ignorance or refusal to change, are restricting learners' freedom of expression by imposing rules which are contrary to the provisions of the Bill of Rights and the *Guidelines*. Such rules impose conformity in hairstyles (see 6.4.1) and dress (see 6.4.2) at the cost of a lack of respect for learners' individuality, dignity, cultural and/or religious identity.

- Culture and religion impacts on freedom of expression, but whether the courts will support a learners' choice in matters of hairstyle, dress or jewellery based on freedom of religion or culture, but not purely on freedom of expression remains untested (see 6.4.1 to 6.4.3).

- The learner press (see 6.4.5) is, at least for the present, not a major issue in South African schools.

- The right to artistic creativity (see 6.4.6) in its many guises, is both crucial to an individual's development, and creates the possibilities of conflict with its potential to be the source of challenge to established ideas, values and rules in the school context. This is particularly possible when artistic creativity which has sexual

overtones or orientation which may have been previously seen as taboo in the school situation.

- Learners' freedom to experience and contribute to the "market place of ideas" is equally crucial to their individual development. But, it is dependent on their right, and that of their teachers, to academic freedom (see 6.4.7 to 6.4.7.9). However, where the "market place" may not be in tune with the schools predetermined ideas or values, the potential for serious conflict exists if schools attempt to restrict access to the "market place".

8.3.6 Findings from the sixth objective

To apply the comparative law method to compare the constitutional foundations of human rights and, particularly, freedom of expression in the selected countries and in South Africa, including interpretation, application and, especially, the limitation of rights. The relevancy of the right to freedom of expression for schools (based on law and press reports), and the possible influence with reference to specific school related issues are examined.

- The constitutional (see 7.2.1 and 7.2.3) and legal structures (see 7.2.2) of the different countries affects the interpretation and application of freedom of expression in those different countries.

- The United States, Canada and South Africa have entrenched Constitutions with Bills of Rights which serve as ultimate tests, in the respective countries, on whether freedom of expression is being unconstitutionally restricted.

- New Zealand and Great Britain (see 7.2.1) lack Constitutions and entrenched Human Rights legislation, but have legislation and/or supporting structures which provide a considerable measure of protection of the right to freedom of expression (see 7.3).

- South Africa has certain unique features relevant to the protection of freedom of expression, namely the specific inclusion of "artistic creativity" (see 7.4.7) and "academic freedom" (see 7.4.8) as rights for *everyone.*

- Unlike the other four countries, South Africa has a Constitutional Court (7.2.2) as the independent and final arbiter on all Constitutional issues, including freedom of expression, and whose rulings are binding on the State, Parliament, the judiciary and on all organs of state (including public schools).

- New Zealand's Human Rights Commission (see 7.3) plays a positive role in dealing with school related human rights issues, resolving issues, wherever possible, before the need arises to engage in litigation.

- The provision of, or lack of a structured limitations clause, in the various countries, plays a key role in protecting the right to freedom of expression and ensuring greater legal certainty or otherwise (see 7.2.3.3).

- The case law of the United States far exceeds that of the other four countries and offers guidelines to other countries in dealing with freedom of expression issues, provided the differing structures and circumstances of the United States are taken account of.

- The impact of religious and cultural factors (see 7.4.4) on freedom of expression in schools in the five countries provides support for the statement by Alston (1994:23) that the inevitable influence of cultural values and perceptions can never be cancelled out.

8.4 RECOMMENDATIONS

The recommendations which follow are made with a view further supporting, protecting and promoting learners and teachers right to freedom of expression in the school. The purpose is to further assist in ensuring that the right is exercised in a way

that prevents, as far as possible, disruption to the educational goals and processes of the schools, or interference with the rights of others in those schools.

The following recommendations are offered:

- Urgent research is needed to establish the accessibility of the Constitution and Bill of Rights to schools, and the understanding of the document and its application.

- Courses in Human Rights need to be made obligatory for all final year preset teachers' courses, as well as part of relevant, A.C.E. courses and post-graduate study. This is in order to ensure that teachers are familiar with their rights and those of their learners, and their responsibility to both protect, promote and fulfil such human rights (see 1.1 ; 5.4.3 and 6.3.4).

- The role of the New Zealand Human Rights Commission in educational issues needs to be closely researched with the purpose of examining the possibility of the South African Human Rights Commission playing the same, apparently, positive role in resolving school related problems and enabling schools to avoid unnecessary legal action.

- All Provincial Education Departments need to appoint, as a matter of urgency, a specialist in education law and human rights, to ensure that all schools in the particular province, via both literature and workshops, are made aware of the Bill of Rights and its implications, including the right to freedom of expression, and further, that such persons serve as advisors to schools and respond to their queries.

- The legal implications for schools of the right to freedom of expression should be made accessible to all members of school communities in a form which is both easy to read, and spells out the specifics that affect codes of conduct, school rules and the application of both.

- The issues of rights and responsibilities need to be included in the Life Orientation programme of all schools in order to ensure that all learners are made aware of both their rights and responsibilities and, further, ensure that human rights become a reality in the lives of the future adults of South Africa.

- Codes of Conduct and School Rules of all schools need to be annually monitored by Provincial Education Departments to ensure that learners' rights, including their right to freedom of expression, are not unfairly restricted.

- There is need for the matter of school uniforms to be the subject of a detailed enquiry to establish:
    a) the possible infringement of learners' right to freedom of expression in terms of how they dress;
    b) the possible discriminatory effect of uniforms on children from homes with very limited resources; and
    c) the advisability of a simpler 'uniform' for all schools which allows for greater freedom and individuality.

- Issues of hairstyles and jewellery need to be further examined to determine what rules are essential for protecting learners' safety in order to avoid litigation, while at the same time protecting learners' and teachers' rights to dignity and individuality.

- It is recommended that a National Code of Conduct be established for all schools which includes a clear statement on learners' and teachers' right to freedom of expression and the obligation of all schools to support the exercise of the right, within admissible limitations.

8.5 CONCLUDING REMARKS

Human Rights are not a fixed star with universal application, neither in the broader society, nor in education. Instead, the development and application of human rights is rightly in constant need of promotion. The world and the world of school education is far from utopia. Freedom of expression has been shown to be a fundamental right, and the basis for many other rights. The rights of learners and their teachers need to be guarded and protected. Without the right to freedom of expression education can easily slide into indoctrination, as evidenced in totalitarian states across history.

This study highlights the learners' and teachers' right to freedom of expression, in its various forms, within the school context. The issue thus becomes one of direct relevance to every school community in South Africa. Not only must the school uphold the right to freedom of expression, but is required by the Constitution to promote such right. The implications for schools are such that they demand a rethink of many things previously taken for granted or assumed to be accepted practice. It is clear that schools can no longer simply "limit" such rights by reference to their "authority", but rather any limitation will have to be carefully weighed and tested for defensible justification. At the same time, since all rights and freedoms must be matched with responsibility and accountability, the school community must take a lead in human rights education of all learners, staff and their wider communities. A failure to do so, may well leave the door wide open for conflict and disputes.

Freedom of expression in the form of dress, hairstyles and jewellery all have bearing on individual personality and dignity, and the expressing who one is as an individual. Freedom of expression in one's writing, art and wider academic endeavours is part of participating in the wider "market place of ideas". All of these have direct relevance in the school context as young people develop towards playing their role in the society of tomorrow and the years ahead. To limit, without justified, defensible reasons, the

opportunities of learners and their teachers to experience such freedom is to limit or deny personal growth and full participation in what it is to be human.

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