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# The right to academic freedom in South African schools

First submission: July 2006

The right to academic freedom is a contested one, often held to exist only in the context of tertiary education. However, the South African Constitution imposes no such restriction: Section 16(1)(d) declares that everyone has the right to academic freedom. This article presents and seeks to substantiate the case for the application of academic freedom in the school context, and specifically within secondary education. Freedom of expression, which includes academic freedom, may be said to be a freedom without which other freedoms could not survive. The specific element of expression, the right of the individual learner and educator to academic freedom within the school context, and the question of whether such academic freedom of learners and educators can be limited, comprise the focus of this article.

## Die reg op akademiese vryheid in Suid-Afrikaanse skole

Die reg op akademiese vryheid is 'n bestrede reg wat gereeld as slegs van toepassing op tersiêre onderwys geag word. Die Suid-Afrikaanse Grondwet bevat egter geen sodanige beperking nie: afdeling 16(1)(d) verklaar dat almal 'n reg op akademiese vryheid het. Hierdie artikel verdedig en begrond die toepaslikheid van akademiese vryheid in die skoolkonteks, in die besonder in sekondêre onderwys. Vryheid van uitdrukking wat akademiese vryheid insluit, kan immers beskou word as 'n vryheid waarsonder geen ander vryheid sou oorleef nie. Hierdie artikel fokus in die besonder op die element van uitdrukking, die reg van die individuele leerling en onderwyser op akademiese vryheid in die skoolkonteks, en die vraag of hierdie akademiese vryheid van leerlinge en onderwysers enigsins beperk kan word.

Freedom of expression is not the property of any political system or ideology. It is not conferred as a favour by any government. It is, instead, a universal human right, defined and guaranteed in international law in terms of the Universal Declaration of Human Rights (Johannessen 1994: 218) and entrenched in the South African Constitution (RSA 1996a).

Section 16(1) of the South African Constitution stipulates that everyone has the right to freedom of expression and that such freedom includes academic freedom and three other constituent items. It is clear from the *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners*, issued in terms of Section 8 of the South African Schools Act (RSA 1996b) that the right to freedom of expression can have an impact on a number of issues which are directly relevant to schools. The *Guidelines* attempt to provide schools with guidance as to what freedom of expression in the school context involves:

Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read [...]. However, learners' rights to freedom of expression are not absolute. Vulgar words, insubordination, and insults are not protected speech [...](RSA 1998: Sec 4.5.1).

Section 16 of the Constitution, however, is less specific. It may take the courts years to determine how broadly it may be interpreted.

The purpose of this article is to endeavour to substantiate the constitutional right to freedom of expression in the form of academic freedom within the South African school community. It will include consideration of some current practices and take cognisance of the possible limitation of the right. It hopes to open up these issues to further enquiry and academic debate, rather than to provide definitive definitions or practices.

## 1. Methodology

The interpretive methodology employed comprises an examination of a range of views expressed in the literature and in case law on the meaning and practice of academic freedom. In the school situation, the only South African case law relates to two cases in which the right to academic freedom of a learner and of an educator, respectively, had been infringed, with legal consequences in the form of out-of-court settlements. It is

useful, however, to examine foreign case law, specifically from the USA, to provide a guide to the possibilities facing South African schools. However, foreign law cases are referred to in the knowledge that they must be read in the context of the legal system in which the decisions were made and that they are not necessarily directly transferable to any other country.

## 2. Statement of the problem

In attempting to assess what has occurred since the introduction of the (final) Constitution in 1996 with respect to freedom of expression in schools, the lack of case law means that other sources of information must be used, including newspaper reports, interviews and responses to previous research, apart from the literature and cases from other countries.

The lack of court involvement and case law means that schools have not, up to now, had to defend their point of view publicly in a court of law. As a result, schools' reasons for their actions appear to involve conforming to rules rather than providing any substantial pedagogical research and/or justification for their actions in restricting learners' freedom of expression. Secondly, the literature on academic freedom in South Africa has focused almost entirely on universities, and the foreign literature leans largely in the same direction. The question that arises from this is in what measure the right to freedom of expression, in the form of academic freedom, has relevance for individuals or schools and in what legally substantiated way this right might be limited.

## 3. What is freedom of expression?

Freedom of expression has been variously described as the core of all other freedoms. In the USA case of *Palko v Connecticut* (1937) 302 US 326, Justice Cardozo described freedom of expression and freedom of 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) regard 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 society and for progress in society as a whole. Freedom of thought, conscience and belief is described by Richards (1996:

166) as the 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 both them and the dictates of his conscience.

This connection between thoughts, beliefs and expression is often artificially separated in bills of rights in various forms. Of what value are profound beliefs, developed in the thought processes, unless one is able to express them? Part of being human is the need to share one's beliefs, ideas and ideals, and equally to access and share in the beliefs, ideas and ideals of others.

Van Schalkwyk, in *Mandela v Falati*, 1995 (1) SA 251 (W) describes freedom of expression as the freedom without which other freedoms cannot endure. In response, Marcus & Spitz (1999: 20-58), echoed by Govender (1997: 20), suggest that all expression, other than that which is aimed at achieving the negative objectives set out in Section 16(2) of the Constitution, is protected, provided it conveys a message. De Waal *et al* (1999: 298) add the important reminder that the specific inclusion of certain forms of expression in Section 16(1) does not single them out for greater protection than other forms of expression: rather, every act by which a person attempts to express some emotion, belief or grievance should qualify as a constitutionally protected expression. This view seems to go beyond the boundaries of acceptance since it could be misread to include many criminal actions.

In order to discover what is constitutionally protected expression, and its importance for school communities, it is essential to look first at the stipulation in Section 16 of the South African Constitution and then to examine one specific aspect of freedom of expression: academic freedom.

#### 4. Section 16 of the South African Constitution

Section 16 contains two important keywords in its stipulation that the right to freedom of expression belongs to everyone and includes the aspects set out in Section 16(1)(a), (b), (c) and (d). No person is excluded and the list presented is not exclusive.

Johannessen (1994: 239) provides a useful overview: by including a clause which guarantees the right to freedom of expression, South Africa has adopted freedom of expression as a cornerstone for its democratic society. The inclusion of everyone and the non-exclusive list

of Section 16(1) introduce the reality that both educators and learners have a right to freedom of expression, including the right to receive and impart information and to academic freedom. Academic freedom could not exist without the broader freedom of expression, which includes the reception and imparting of ideas.

This view is echoed in Section 4(1) of the National Education Policy Act (RS 1996c) which requires the Minister of Education to formulate an education policy that 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 one such fundamental right which a learner in a public school can demand. It should thus be given effect to, and protected in, the public school environment.

For De Waal (2000: 51 & 55), the question of “everyone” in the school context raises 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 their independent right to exercise their rights, but states further that “... it appears that the South African Constitution does not distinguish [...] between children able and children not able to exercise their fundamental rights independently”.

## 5. Academic freedom

### 5.1 Constitutional stipulations

The results of an internet search indicate that the South African Constitution (RSA 1996a) has the apparently unique distinction of being the only constitution to contain the words “academic freedom”, although in other constitutions the concept is referred to in other forms which could be read as meaning the right to academic freedom. Section 16 of the South African Constitution states:

- (1) Everyone has the right to freedom of expression, which includes  
...
- (b) freedom to receive and impart information and ideas;
- (d) academic freedom and freedom of scientific research.

Part of the problem with 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 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. Instead, they allow for inseparable connections between freedom of thought, belief and opinion, and the freedom to receive and impart information, including thought, belief and opinion. Together, these connections form a critical part of academic freedom when applied within the educational context, whether at the secondary or the tertiary level.

In the 1993 (Interim) Constitution, academic freedom was protected in terms of Section 14(1) but restricted to institutions of higher learning. Had that clause remained in place in the 1996 Constitution, there would be no room for debate. However, in terms of the 1996 Constitution, the right has been broadened to include everyone and the restriction of the right has been removed from institutions of higher education.

What is meant by “everyone”? There is clearly no constitutionally stated limitation on the word “everyone”. Woolman (1996: 10-7) suggests that it is unlikely that the courts would deny child citizens *prima facie* entitlement to the basic rights of life, privacy or expression. What, then, is the meaning of academic freedom for the school-going learner? And for that learner’s educators?

## 5.2 The meaning of academic freedom

In an endeavour to answer the question as to what academic freedom entails, Yudof (1987: 858) refers to a quotation by Berlin from Archilochus: “[t]he fox knows many things, but the hedgehog knows one big thing”. Explaining this 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 apparently 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 single definition of academic freedom but rather “multiple strands” which include universities and schools, professors and lecturers, university councils, school governors, principals and teachers, university students and school pupils. Any attempt to focus on a single strand would be simplistic, while the multiple focus can lead to much blurring.

Many have tried to define the term in many different ways. A few examples must suffice. Byrne (1989: 261-2) describes academic speech as “the most important model of expression [...] meaningful as well as free, coherent yet diverse, critical and inspirational”. Byrne argues that the term has application only to universities, with specific regard to the goals of “disinterested scholarship and teaching”.

Prof Gary Pavela regards the pursuit of truth as the critical element of academic freedom (Clarke 1999: 349). The implication, though it relates primarily to research, may be 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 may easily degenerate into academic licence. The pursuit of truth would demand justification for findings, implying a considered, reasoned analysis conducted with the utmost integrity, rather than allowing personal, unsupported ideas to be expressed as if they were academic truth.

Chafee (1956: 102) writes:

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.

The author here describes the oldest attack on open discussion: the assumption that such discussions are unnecessary because those in authority already know the truth. Both Pavela and Chafee, though from different contexts, 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 first of these is referred to by Pavella as crucial to academic freedom (Clarke 1999: 349). The third occupies a special place in the value of academic freedom. The term “self-realisation” would be self-contradictory

in the description of a person whose views, opinions and beliefs were imposed on him by others, rather than arrived at by personal decision on the assessment of all the available evidence. In other words, the relationship between self-realisation and academic freedom has to be a close one.

Flekkoy (1993: 102), discussing needs as a basis for children's rights, refers to Maslow's hierarchy of needs, the last of which is self-actualisation. He lists the characteristics of self-actualisation as including spontaneity, problem-solving ability, a democratic character and a frequency of peak experiences. In the present context, one is led to wonder what effect academic freedom, or the lack of it, would have on the development of such characteristics and the need for self-actualisation. A stifling, rigidly controlled "academic" school environment would seem to be counter-productive in this regard.

Meyerson (1997: 80) describes as a trivial a freedom which protects only those whose views and opinions do not dissent from mainstream or orthodox values, or do not "threaten" anyone's comfort. Govender (1997: 21) adds a positive touch in describing academic freedom protections as necessary since they contribute in a profound way to the healthy, robust exchange of ideas.

### 5.3 Academic freedom — some statements from USA cases

The term "academic freedom" was first used in the USA Supreme Court in *Adler v Board of Education* (1952) 342 US 485. In a dissenting judgment Justice Douglas stated:

The constitution guarantees freedom of thought and expression to everyone in our society [...] none needs it more than the teacher.

Referring to New York's Feinberg Law, which permitted teachers to be dismissed, *inter alia* for refusing to take an oath of loyalty, Justice Douglas stated further:

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 pipeline for safe and sound information. A descending dogma takes the place of free enquiry. 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].



One of the strongest judgments ever given in favour of academic freedom was in *Keyishan v Board of Regents* (1967) 385 US 589. This judgment has application to both university lecturers and school teachers, and the following excerpt has been quoted in several subsequent cases:

Our nation is deeply committed to safeguarding academic freedom and not merely the teachers concerned. That freedom is therefore a special concern of the First Amendment [dealing with Freedom of Expression], 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)]. The classroom is peculiarly the marketplace of ideas.

In the later case of *Parducci v Rutland* (1970) 316 F.Supp 352, in which a teacher challenged her dismissal for teaching a particular short story to her high school class, the court referred to academic freedom as follows:

Although academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court has on numerous occasions emphasized 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 to 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 cases mentioned above serve as examples of the tough line taken by some USA courts in defence of academic freedom, although the concept has not been stated as a separate right within the USA Constitution and its amendments. In South Africa, it is stated as a right for everyone. In the section which follows, the right to academic freedom will be discussed in the South African context, and arguments will be presented in favour of the view that the right belongs within schools as well as universities.

#### 5.4 Academic freedom in the school context

While a great volume of the literature on academic freedom focuses on this right within universities, it is argued here that such a view has serious limitations and is based on an artificial view of education as being neatly divided into little boxes through which children pass until they reach the top box, labelled "University". It is further argued that

education is a continuum from its inception up to post-doctoral research. While this lengthy process takes place in different settings appropriate to the age and development of the child, it is further argued that the development of independent thinking, the preparation for research and publication, are all part of a process that begins, or should begin, within the school context. It is on this basis that it is argued that academic freedom, rather than being confined to universities, is an essential element of the educational continuum with particular significance in secondary schools.

The contention outlined above may well be challenged by evidence that demonstrates that many first-year students lack independence of thought, are unprepared for research, and often behave as sponges, merely absorbing the educational material which lecturers offer. But I would suggest that this state of affairs is due precisely to the way schools operate and the belief that schools are places only for the transmission of knowledge and culture, not for in-depth exploration and boundary-breaking. The situation is further exacerbated by teachers whose limited experience or opportunities to broaden their own horizons severely restrict their learners' ability to do so. This is not a circular argument but rather highlights the need to challenge teachers and learners to make use of their right to academic freedom in a responsible manner.

Wherever educators are confined to the transmission of knowledge, restricted to a single textbook, and forbidden to venture outside the prescribed curriculum or into anything controversial in content or methodology, their academic freedom may be deemed to have little or no meaning. Uniformity also arises where the "educational" focus falls on strict "discipline", or where silence in classrooms is highly valued as a sign of good educator control. It is further reinforced by the view of the educator as the fount of all knowledge.

Both Meyerson (1997: 80) and Govender (1997: 21) identify the importance of classrooms designed to be free from deliberate uniformity and conformity. One of the functions of education is to develop a sense of responsible citizenship in young people. Such responsibility must involve making choices and coping with the confrontations inherent in controversial and difficult issues, which may require the individual to have the courage to take a personal stand. In a classroom free from choices and marked by uniformity, everyone "learns" (or is forced) to

think in the same way — which means no-one is actually doing any real, independent thinking — and there is no challenging of opinions or information.

At high schools where learners are denied the opportunity of developing critical thinking and being exposed to the market place of ideas, or raising pertinent, if controversial, issues, or writing essays or articles which conflict with school policy or the establishment, their academic freedom, likewise, has no meaning. In such an educational climate, reasoning and debate in the “search for truth”, for both educators and learners, is deeply “chilled” — if not frozen.

Such unjustified restrictions may infringe on rights such as those of 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 the 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) expresses the same concept in a different way when he states that educators and learners “... 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”.

In the school environment, the multiple strands of academic freedom concern what is taught and learnt, its relevance and relation to the prescribed curriculum and the right to go beyond the prescriptions. Furthermore, they concern access to materials, including a range of texts, and the rights of educators to use various methodologies and of learners to be exposed to such methodologies.

The secondary school learner’s claim to academic freedom is to the right to exposure to a variety of information, evidence and opinion, and the freedom openly to debate such differences, no matter how controversial they may be. Moreover, it is a claim to the 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 held by educators or propagated by the school community at large. Squelch (1993: 238) suggests that learners should have the right to express their opinions, thoughts and ideas, even if these are controversial. At the same time, learners must recognise the right of other learners, educators and the

school community to differ from them, and respect their differing standpoints. As Thomas Jefferson states: "If a book be false in its facts, disprove them; if false in its reasoning, refute it; but, let us freely hear both sides" (Suttner 1990: 375). Academic freedom is not a safe haven from controversy but a ship on a journey, often in stormy waters. Moreover, it does not provide a passport to academic licence. It will always have limitations.

Against this background, the section which follows will offer an examination of specific aspects of academic freedom in schools operating under the South African Schools Act (RSA 1996b) and of the possible implications for the various members of the school community at large.

### 5.5 Some South African examples relating to academic freedom in schools

In South Africa there is little evidence to determine how the courts might rule in academic freedom cases involving secondary school learners or their educators. The following are descriptions of incidents which have already occurred in the country and which indicate the kind of problems to be expected in the future.

The first concerns a primary school in Gauteng where a Grade 6 educator used a passage from a short story by Herman Charles Bosman for a comprehension test. The excerpt contained the word *kaffir*, and the teacher said that he had explained Bosman's use of the word to the class. The school authorities attempted to dismiss the teacher, whose post was a governing body appointment. While the details are sketchy, the school reached an out-of-court settlement with the educator, who challenged his dismissal.<sup>1</sup>

This example raises the critical issue of an educator'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? Or should such a word and its connotations be dealt with openly rather than ignored? Is the classroom to be bathed in antiseptic? If so, the world of the school classroom becomes increasingly distant from the real world outside the school walls, instead of being the place

1 Principal, personal communication on dismissal of teacher (2001).

where learners are exposed to debate on such controversies, and thereby prepared for the world beyond the school gates.

The second case concerns a private high school where a learner wrote a strongly pro-Palestinian essay which she pinned to the school notice board. This incurred 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.<sup>2</sup> This case raises crucial issues about the right of learners to hold and express divergent, and even very controversial, opinions which do not always fit in with the community's religious, political or cultural values. To broaden the picture one might ask what would happen if a learner, orally or in writing, were to present a strongly pro-Azapo view in a right-wing Afrikaans community, or outline "The benefits of apartheid to the Black community of South Africa" in a strongly pro-PAC school environment.<sup>3</sup>

How teachers react to such expressions of views so contrary to the environmental climate will be a real test of the authenticity of the right to academic freedom in South African schools.

The issue of learners' unwillingness to be a member of a captive audience is illustrated in a case where secondary learners objected to an educator's choice of the novel *Catcher in the rye* as a prescribed text on account of its content and offensive language. Instead, they insisted on being allowed to study the alternative prescribed work, *Shades*.<sup>4</sup> How far does the right of a learner extend in regard to the selection of texts? Can they object to books on the grounds of their experiencing them as offensive? Does this constitute academic freedom, or does true academic freedom consist in having the liberty to study the selected book and challenge its content and message in open debate in the classroom, while taking a stand in the form of defending one's views to one's peers? The case may well be a strong case to be made for either viewpoint. There appears to be no legal ruling on which to judge whether a refusal to accede to the learners' request would or would not have been overturned in a court of law.<sup>5</sup>

2 Personal communication (2001).

3 Legal advisor to the school, personal communication on expulsion of girl (2001).

4 Furman, personal communication (1999).

5 Furman, English teacher, on the objection to the suitability of the setwork book (1999).

The learners' right to academic freedom must, at the same time, include the right to have educators with a similar right to academic freedom and thus to be exposed to their thinking, however different it may be from their own, from their text books, from other sources of information, or even from the prevailing views and values of the school community. Learners are aware that their educators have their own views. An environment which confines educators by dint of rigid regulations, single textbooks, syllabus conformity, and an official or unofficial gagging of differing opinions, prevents a teacher from sharing his or her views or broaching any controversial matters. It likewise denies learners access to the very world for which education is supposed to be preparing them — one of diverse ideas which need to be heard and debated.

The educators' right to academic freedom should allow them to go beyond the prescribed, although they must remain mindful of the proviso that they must work within the intellectual capacity and maturity of their learners. An equally important part of the educators' academic freedom is their crucial right to select what they perceive to be the most appropriate methodology for presenting the subject matter to the particular group of learners. Although their preferred methods might be described by others as "way out" or "controversial", and might give rise to emotional responses or sharply divided opinions amongst learners, it is the right of every educator to make such choices. Moreover, for an education department or a school to impose one methodology on all educators would be to deny them their personal dignity, their autonomy and their right to make professional judgments. Such an action would constitute a denial of educators' academic freedom, thereby also denying their learners the opportunity of exposure to a variety of teaching methodologies.

### 5.6 Educators' academic freedom and teaching methodology

In the South African context, the format of Curriculum 2005 and now of the Revised National Curriculum Statements (RNCS), with its methodology focused on group work activities, and the pressure on educators to integrate "outcomes" has every appearance of being too close to a prescribed methodology. Such a prescription may be totally out of tune with the personality of the educator and/or the needs of his/her learners, or even with the requirements of the specific aspects of the

content. Malherbe & Berkhout (2001: 11), although referring to academic freedom at the university level, provide a comment which is applicable to schools:

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 of, 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 the teacher's constitutional academic freedom will have been breached.

These demands for rigid conformity appear to contradict the spirit of the critical and developmental outcomes of Curriculum 2005. How can learners “reflect and explore a variety of strategies to learn more effectively” when their teachers are being advised not to venture outside the prescriptions? Likewise, how can teachers and learners “organise and manage themselves and their activities responsibly and effectively” when the assessment format does not allow any breaking away from the severely criticised original Curriculum 2005 system to the revised curriculum, for fear of disadvantaging oneself or one's learners? Bearing in mind that Grade 9 learners are not officially allowed to use the RNCS until 2008 and that Grade 9 assessment will be based on the original Curriculum 2005 until the end of 2007, many teachers are “locked in” for a considerable period. The possibility remains that the same type of tight assessment restrictions could apply long beyond 2008 when the RNCS is finally fully implemented.

Whether action has been or will be taken against an educator who refuses to use the original Curriculum 2005 or OBE or other prescribed methodology, the pressure to conform remains. It is accepted that the state has the right to set broad curriculum parameters. However, any attempt to prescribe or pressure educators into using a particular methodology raises serious questions about the infringement of a professional educator's right to academic freedom.

The rights of both learners and educators to academic freedom are restricted when a syllabus or learning plan defines what may be taught

and learnt in exact terms and either does not allow, or strongly discourages, any deviation or addition. Van der Westhuizen (1994: 267) highlights this in the statement: "... 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 prescribed academic programmes restrict learners and their educators to the mediocrity of the "lowest common denominator", such programmes need to be challenged as infringing on the academic freedom of educators and learners alike.

### 5.7 The limits and abuse of academic freedom

Academic freedom is neither a licence for chaos, nor an attribute without limits. The educators' right to academic freedom in the sense of what they are permitted to teach should be exercised in a way that does not exceed the intellectual capacity of their learners, bearing in mind their age and maturity. Those who teach learners in the early grades have a higher degree of responsibility to care for their learners on account of their immaturity (Oosthuizen 2003: 75). What the young learner may be exposed to may be of greater concern for his wellbeing at such an early stage. The school authorities may therefore rightly impose certain limits on the academic freedom of the young learner's educator to prevent such an educator from presenting unsuitable or harmful material. The reality, though, is that the same young, immature learners are, through the medium of television, exposed to violence, sex, drugs and other powerful negative material almost without limit, but nevertheless restricted in terms of exposure to different ideas in the classroom.

However, some of the greatest experiences brought about by learning may occur as a result of the introduction of and debate on current issues, or an educator's having a specialised interest outside the confines of the prescribed curriculum. To deny learners access to such knowledge and experience would be to limit their learning and development. At the same time, for educators to misuse their positions and side-track their classes to other issues without fulfilling the requirements of their teaching position, or to put across their theories about an issue without allowing learners the right to dissent, debate or reject those theories would constitute an abuse by the educator of his professional position.



The latter kind of abuse is most clearly demonstrated in the very long-running Canadian case of Keegstra.<sup>6</sup> Keegstra, a Social Studies teacher, denied the Holocaust, describing it as a Jewish-perpetuated myth, and refused his high school students the right to differ with his views — to the point of failing any student who presented a differing perspective.

While Keegstra's may appear to be an extreme case, the use of a single textbook is one of the easiest ways of engaging in apparently legitimate forms of classroom indoctrination. This is particularly the case at times when a particular text book is selected for its specific slant on a subject and when learners are thereby denied access to a range of perspectives. History is perhaps the subject which has been open to most abuse in this respect, but it is not the only such area. Moshman (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 own opinions". Stifling learners with just one view would seem to work against such intellectual development.

Section 36 of the Constitution concerns the limitation of rights. Clearly there are such limitations but there is also a limit on limitations, as indicated by the type of questions that need to be asked in applying the limitation clause. The issues of indoctrination and of working beyond the intellectual capacity of learners have been mentioned as imposing limits on educators. The learners' right to disagree with or challenge what is taught must be matched by equal respect for the educators' right to dignity.

While it is not the purpose here to provide a lengthy elaboration of the limitations clause, one must ask whether restrictions on academic freedom are "reasonable and justifiable". Mureinck (1994: 40) suggests that a limitation cannot be justifiable unless a plausible reason is given as to why a particular decision should be preferred to an arguably superior alternative. There must be a rational connection between the reasoning and the decision itself. Justice Kate O'Regan emphasises that

6 Keegstra v Lambton County 25 Alta L R (2d) 370 (1988); R v Keegstra 19 C C C (3d) 254 (Alta Q B) (1984), 87 A R 177 (1988), 3 S C R 697 (1990), 114 A R 288 (1991).

such a limitation must be justifiable in an “open and democratic society based on dignity, equality and freedom” (Meyerson 1997: vii-viii).

This writer suggests that placing a limitation on academic freedom may offend against both educators’ and learners’ dignity and freedom, since intellectual freedom in learning and in the expression of what is learnt is critical to the development of the totality of the individual. If this dictum is accepted it follows that the limitation of academic freedom would be offensive to what Chaskalson (2000: 195-6) refers to as the “foundational value of respect for human dignity”. The same author goes on to refer to human dignity as an attitude to life itself; not merely a privilege granted by the state.

The second question concerns the nature and extent of the limitation. When the limitation is imposed, its costs to the “rights holder” should not be greater than its benefit to the broader society, e.g. the school or education department. It would be extremely difficult to claim that any benefit to education officials and institutions would ever weigh more heavily than the loss of the benefits of academic freedom to the individual.

Any limitation of academic freedom by either the State or education officials has to be justified in terms of Section 36. No lesser standard may be applied.

## 6. Conclusions

In a changing and developing South Africa it is vital that education avoid not only unacceptable rules and regulations that inhibit the academic freedom of learners and educators alike, but also those “chilling” factors which cause educators and learners to refrain from controversy, from being different, and from challenging, simply in order to remain on the right side of the authorities. In the long run the “chilling” effect of rules, regulations, public statements by senior officials and other “hidden” pressures, while often far less evident than outright legal action, may be far more damaging to the academic freedom and intellectual development of learners and their educators. Such restrictions deprive society at large of the benefit of new thinking and new ideas.

So much that is of value in this world has emerged from the radically different and even wild ideas of mavericks, young and old.

Denying academic freedom and access to the wider marketplace of ideas and innovations while demanding conformity may develop a school-educated citizen; however, it risks the possibility of denying the development of a person capable of bold new ideas, and depriving the world of access to ideas which could change it for the better.

Section 7 of the Constitution demands not just that the State and its organs respect the Bill of Rights, but that such rights should be promoted and fulfilled. This makes public schools responsible for promoting academic freedom within the school context.

## Bibliography

- BERLIN I  
1953. *The hedgehog and the fox: an essay on Tolstoy's view of history*. London: Weidenfeld & Nicolson.
- BYRNE J P  
1989. Academic freedom: a 'special concern of the first amendment'. *Yale Law Journal* 99(2): 250-340.
- CHAFEE J R  
1956. *The blessings of liberty*. Philadelphia: Lippincott.
- CHASKALSON A  
2000. The third Bram Fischer lecture: human dignity as a foundational stone of our constitutional order. *South African Journal of Human Rights* 16(2): 193-205.
- CHASKALSON M, J KENTRIDGE, J KLAAREN, G MARCUS, D SPITZ & S WOOLMAN (eds)  
1996. *Constitutional law of South Africa 1996 (as revised by the Revision Services 1 to 5 up to June 1999)*. Kenwyn: Juta.
- CLARICK G A  
1990. Public school teachers and the first amendment: protecting the right to teach. *New York University Law Review* 65: 693-735.
- CLARKE P T  
1999. Canadian public school teachers and free speech, Part 3: a constitutional law analysis. *Education and Law Journal* 9(3): 328-56.
- DEKKER E I & E M LEMMER (eds)  
1993. *Critical issues in modern education*. Durban: Butterworths.
- DE WAAL E  
2000. The educator-learner relationship within the South African public school system: an educational-juridical perspective. Unpubl PhD in Education Law. Potchefstroom: Potchefstroom University for Christian Higher Education (Vaal Triangle Campus).
- DE WAAL J, I CURRIE & G ERASMUS  
1999. *The Bill of Rights handbook*. Cape Town: Juta.
- FLEKKOY M G  
1993. Children as holders of rights and obligations. Gomien D (ed) 1993: 97-124.
- GOMIEN D (ed)  
1993. *Broadening the frontiers of human rights*. New York: Oxford University Press.
- GOVENDER K  
1997. The freedom of speech. *Human Rights and Constitutional Law Journal of Southern Africa* 1(6): 20-3.
- JOHANNESSEN L  
1994. Freedom of expression and information in the new South African constitution and its compatibility with international standards. *South African Journal of Human Rights* 10(2): 216-39.

MAJOLA B C

1990. Beyond the Bill of Rights in South Africa. *South African Public Law* 5(1): 36-49.

MALHERBE E F J & S BERKHOUT

2001. The national qualification framework and the unconstitutional limitation of academic freedom. *South African Journal of Higher Education* 15(2): 62-73.

MARCUS G & D SPITZ

1996. Expression. Chaskalson *et al* (eds) 1996: 20-1-20-63.

MEYERSON D

1997. *Rights limited*. Kenwyn: Juta.

MOSES J

1996. Hate speech: competing rights to freedom of expression. *Auckland University Law Review* 8(1): 185-203.

OOSTHUIZEN I J (ed)

1998. *Aspects of educational law*. Pretoria: Van Schaik.

REPUBLIC OF SOUTH AFRICA (RSA)

1993. *South African (Interim) Constitution Act 200 of 1993*. Pretoria: Government Printer.

1996a. *South African Constitution Act 108 of 1996*. Pretoria: Government Printer.

1996b. *South African Schools Act 84 of 1996*. Pretoria: Government Printer.

1996c. *National Education Policy Act 27 of 1996*. Pretoria: Government Printer.

1998. *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners*. Pretoria: Government Gazette 15 May 1998.

RICHARDS D A J

1986. *Tolerance and the constitution*. New York: Oxford University Press.

SIEGHART P

1983. *The international law of human rights*. Oxford: Clarendon Press.

SQUELCH J M

1993. Current issues in school law. Dekker & Lemmer (eds) 1993: 221-42.

SUTTNER R

1990. Freedom of speech. *South African Journal of Human Rights* 6(2): 372-93.

VAN DER WESTHUIZEN J

1994. Freedom of expression. Van Wyk *et al* (eds) 1994: 264-91.

VAN WYK D, J DUGARD, B DE VILLIERS & D DAVIS (eds)

1994. *Rights and constitutionalism*. Kenwyn: Juta.

WOOD N

2001. Freedom of expression of learners at South African public schools. *South African Journal of Education* 21(3): 142-6.

WOOLMAN S

1996. Limitation. Chaskalson *et al* (eds) 1996: 12-1-12-66.

Alston/The right to academic freedom in South African schools

YUDOF M G

1987. Three faces of academic freedom. *Loyola Law Review* 32(4): 831-60.

1993. Universal Declaration of Human Rights. *Human rights: a compilation of international instruments* 1(1). New York: United Nations.