
Freedom of expression and the survival of democracy: has the death knell sounded for democracy in South African Schools?

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Abstract

In this article we argue that the right to freedom of expression is viewed internationally as a core right in a democracy. Since critical thinking is a prerequisite for democracy, this skill needs to be developed in South African schools. Critical incidents in schools, however, indicate that school authorities are not yet ready to develop this skill, as they still feel threatened by new, non-traditional meanings and opinions of authorities, learners and parents on human rights and leadership issues. We conclude that democracy is being suppressed in South African schools, since the right to freedom of expression, as a core right in a democracy, is not currently nurtured in the school system.

Introduction

It is not uncommon to see headlines in newspapers indicating that learners' right to freedom of expression has been violated, for example: "School bans girl for heeding the Koran" (Govender, 1998) concerning Mariam Adam who was sent home for wearing a head scarf to school. One could argue that the right to freedom of expression of learners was violated by school authorities, because the ". . . teachers were victims of an education system that did not recognise freedom of speech" (Mazibuko, 2002, p.6). Educators unknowingly and unintentionally violate the right to freedom of expression and need to be educated in regard to implementing human rights in schools (Anon., 1998). This is in line with the view of Van Staden and Alston (2000, p.302) who deduce from their research that there is a "considerable measure of uncertainty about learners' rights".

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

The purpose of this paper is to focus on the way this right is implemented in South African schools. If the right to freedom of expression is at the core of a democracy, then surely democracy is in danger when this right is not respected and balanced in schools.

An international protected right

The right to freedom of expression, seen as a pillar of democracy, is clearly addressed in article 19 of the International Covenant on Civil and Political Rights (ICCPR) of 1976. The freedom of expression, opinion and information is also protected in article 19 of the Universal Declaration of Human Rights (UDHR) of 1948, which is a clear indication that freedom of expression is viewed internationally as a fundamental right in a democracy.

In recent years, the focus on the protection of children's human rights has resulted in the adoption of the Convention on the Rights of the Child (CRC), which has become the most widely accepted human rights treaty in history. This has brought to an end the uncurbed violation of children's fundamental rights. The Convention clearly stipulates that everyone is born with human rights and that "children are neither the property of their parents nor are they helpless objects of charity" (UNICEF, 2003). A human right is something that one has automatically from birth, not something that one gains because of one's age, wealth or intelligence. The right to freedom of expression of the child is also protected in Article 13 of the CRC.

The fundamental right to freedom of expression is protected not only under international law, but also by South African legislation.¹

The rights of children

The fundamental rights of children in South Africa are protected under section 28 of the Constitution. It would be an infringement of this right and degrading to view the child (a person under the age of 18²) as having no *iudicium*³ and therefore no right to freedom of expression. In viewing learners as human

¹ Section 16 of the Constitution of the Republic of South Africa of 1996 (the Constitution)

² Section 28(3) of the Constitution

³ Judgement, discretion

beings with dignity,⁴ their point of view should also be considered in matters that concern them. Children have the right to speak out as well as to be consulted in accordance with their ability, for example on such matters as the Code of Conduct for Learners.⁵

In defining the concept ‘expression’ it is also necessary to focus on the choice of the word. Expression is a broader concept than speech, and includes amongst others, activities such as painting, sculpting, displaying posters, dancing and the publication of photographs. Symbolic acts such as flag burning, the wearing of certain items of clothing and physical gestures are also aspects of the right to freedom of expression (Bray, 2000; De Waal and Currie, 2005; Malherbe, 2001; Malherbe, 2003; Marcus, 1994; Van der Westhuizen, 1994; Wood, 2001). De Waal, Currie and Erasmus (2001, p.311) view expression as “. . . every act by which a person attempts to express some emotion, belief or grievance”, and they believe it “should qualify as constitutionally-protected ‘expression’”. Freedom of expression also includes one’s freedom of belief and opinion as well as freedom of association and vocational freedom, because it is within the ambit of these fundamental rights that the right to freedom of expression is exercised.

As minors, children need to be guided in the school situation to exercise not only their fundamental rights but also to deal with their obligations and responsibilities in a democracy. It is therefore the purpose of education to develop the necessary skills to enhance a democracy.

A democracy requires critical thinking

Democracy is underpinned by critical thinking. The public school as mentor for children in a democracy becomes the forum through which children are guided to adulthood and to fulfilling their place in a democratic society (Clayton and Tomlinson, 2001; Gordon, 1984; ‘Handyside’, 1976). One of the central purposes of schools in a democratic society is to encourage the critical and independent thinking necessary for effective participation in society (Alston, 2002).

Critical thinking can be defined as the ability to use high-level thinking. It is used to critique ideas and “is associated with rationality, reasonableness, reflective thinking and the scientific inquiry process” (Collins and O’Brien,

⁴ Section 10 of the Constitution

⁵ Section 8(1) of the South African Schools Act, Act 84 of 1996a (SASA)

2003, p.431). As such, the ability to think critically protects citizens against indoctrination and misinformation. It empowers people to select views they are comfortable defending rationally. Therefore, people who employ the skill of critical thinking will be inquisitive and will continuously examine alternatives in the process of forming conclusions (Higgs and Higgs, 2001). One can argue that the skill of critical thinking is aimed at problem-solving. Similarly, James Madison, one of the American 'founding fathers', pointed out that "Republican government presupposes the existence of these qualities [of civic virtue] in a higher degree than any other form" (Mill, Hamilton, Madison and Jay, 1952, p.207). Critical thinking is viewed by many theorists as central to the aims of education and has become the focus of educational reform (Chambliss, 1996).

After establishing a South African democracy in 1994, it was necessary to change school curricula in order to develop citizens' skills for participation in that democracy, as the old curriculum was based predominantly on the retention of information and theory. Since the South African government was aware of the need to develop critical thinking, the entire education process has been changed from an educator-centred to a learner-centred approach. The purpose of the new curriculum is to develop skills that are applicable in practice. One of the outcomes of the new methodology is to develop critical thinking *per se* (Anon., 1997; Jansen and Christie, 1999; SAQA, 2000; Schoeman, 2003; Tiley and Goldstein, 1997; Van der Horst and McDonald, 2003).

A prerequisite for critical thinking

It is necessary to enhance and respect freedom of expression in order to develop and encourage critical and independent thinking. Freedom of expression creates a marketplace of ideas and ensures individual development and self-fulfilment ('Abrams', 1919, at 630; Clayton and Tomlinson, 2001; De Waal *et al.*, 2001). De Waal and Currie (2005) argue that the denial of this right would be inhuman, because expressing oneself is an essential human activity.

The right to freedom of expression enables human beings to express new ideas and underpins discoveries that enhance scientific, artistic or cultural progress. This can be regarded as the foundation of the 'quest for truth' paradigm. As De Waal and Currie (2005) point out, if everyone who believes that the world is round is silenced, there would still be a misconception about the shape of the earth. In other words, even the right to freedom of false expression of ideas should be protected because it provokes further discussion through which the truth may be discovered.

The core human right?

The right to freedom of expression is viewed internationally as a core right in a democracy (Clayton and Tomlinson, 2001; ‘Palko’, 1937; Türk and Joinet, 1999). One can argue that freedom of expression is essential to the right of citizens to participate in a democratic process (Clayton and Tomlinson, 2001; Gordon, 1984; ‘Handyside’, 1976). A democratic society is not static and has restrictions on rights and freedoms that will be questioned persistently. Castoriades (Türk and Joinet, 1999, p.38) argues that a democracy may be conceptualised as a “tragic” political system. He refers to democracy as “. . . the only regime that openly faces the possibilities of its self-destruction by taking up the challenges of offering its enemies the means of contesting it” (Türk and Joinet, 1999, p.38). People must, among other things, be able to make political choices and they therefore need access to information and different points of view.

The right to freedom of expression is related to freedom rights as well as political rights. Türk and Joinet (1999) argue that the case law of the European Court of Human Rights confirms that this right constitutes one of the basic foundations of a democratic society. One of the earliest constitutional rights provisions is the First Amendment to the Constitution of the United States, which provides that:

Congress shall make no law . . . abridging the freedom of speech, or of the press
(‘Amendments to the Constitution of The United States of America’, 1791).

In Canada freedom of expression was regarded as a ‘core right’ even before the advent of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (The Charter). This indicates that freedom of expression may sometimes be treated as a constitutionally protected freedom, even in countries without a constitutionally entrenched Bill of Rights. It thus follows clearly that freedom of expression is protected globally as a prerequisite for democracy.

The global importance of freedom of expression was realised when the United Nations Commission on Human Rights proposed a study on the right to freedom of expression. The report held that the right to freedom of expression and information should be at the core of inalienable rights. In this way, even in a state of emergency, this right would not be subjected to restrictions beyond those permissible in a democratic society. Türk and Joinet (1999) argue that the right to freedom of expression is indeed a right tending toward the absolute. In line with this view, Judge Cardoza pointed out that freedom of expression in the USA is a pre-eminent right in its society, viz. “it is the matrix, the indispensable condition of nearly every other form of freedom”

(‘Palko’, 1937, at 327). As is the case in the USA, South Africans also view the right to freedom of expression as fundamental to their constitutional democracy. South Africans, however, do not always view this right as the pre-eminent right in their Bill of Rights as stated by Judge Kriegler in *S v. Mamabolo 2001 (3) SA 409*:

With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims an unequivocal and sweeping commandment; section 16(1) the corresponding provision in our Constitution is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection. Moreover, the Constitution, in its opening statement, and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. What is clear though and must be stated is that freedom of expression does not enjoy superior status in our law (‘Mamabolo’, 2001, at 41).

We disagree with this opinion, as later judgments show that the right to freedom of expression is indeed pre-eminent, also in South Africa (‘South African National Defence Force Union v. Minister of Defence and Another’, 1999). However, the principle stated by Judge Kriegler, that even the right to freedom of expression is underpinned by the values of dignity, equity and freedom, is of vital importance. In other words, although the right to freedom of expression is pre-eminent in a democracy, it is underpinned by a value system (as are all other rights). Therefore, the value system balances the right to freedom of expression with all the other rights entrenched in the Bill of Rights.

The right to freedom of expression is also viewed by South African courts as central to a constitutional democracy to the extent to which it supports other rights, as stated by Judge O’Regan:

Freedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognize the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the

public airing of disagreements and the refusal to silence unpopular views ('South African National Defence Force Union v. Minister of Defence and Another', 1999, at 8).

The outcome of disputes regarding the guarantee of freedom of expression will depend on the value the Constitutional Court places on freedom.

Limiting the right to freedom of expression

In the United States of America, the guarantee of free speech in the First Amendment has never been absolute. Although the US Supreme Court has characterised freedom of expression as a 'preferred right', some forms of speech such as defamation, fighting words and obscenity, fall outside the protection of the First Amendment.

As is the case with all fundamental rights, the right to freedom of expression is therefore not absolute and must be balanced against other freedoms and rights. According to Rautenbach and Malherbe (1999, p.345) all rights can be limited "... under specific circumstances and in a particular way for the protection of some public interest or the rights of others". It was agreed at the Sixth International Symposium on the European Human Rights and Freedom of Expression Convention "... that no democratic society has yet removed the obstacle to full freedom of expression, and it is improbable that any will do so in the near future" (Türk and Joinet, 1999, p.37).

The article will now focus on the implementation of this right in South African schools.

South African legislation

Section 16 of the Constitution provides for the protection of freedom of expression as an entrenched human right:

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

2. The right in subsection (1) does not extend to
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or

- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm ('Constitution of the Republic of South Africa', 1996, section 16).

In terms of section 16(1)c and 16(1)d this right protects scientific, artistic or cultural progress and enhances self-fulfilment in a democracy. Section 16(1) of the Constitution protects freedom of expression, which is important in South Africa, since for many years the majority of citizens were denied this right to freedom of expression and could be prosecuted for speaking out against the government. Furthermore, learners were taught not to argue and not to question educators or authority. Therefore, all citizens, even educators, were not taught to think critically, to question what they were told or what happened to them. They could not speak out openly or question authority. Subsections 16(1)a–d provide for the protection of the freedom of the press and media (1a), the freedom to receive or impart information and ideas (1b), artistic creativity (1c), academic freedom and scientific research (1d). Section 16(2) specifies when the right in section 16(1) can be limited, e.g. when it is used as propaganda for war (2a), in regard to incitement of imminent violence (2b) and some forms of hate speech (2c). It is important to realise that certain modes of expression mentioned in section 16(1), are not afforded greater protection than other forms of expression (De Waal and Currie, 2005).

In South Africa and other countries, e.g. Canada ('Keegstra', 1990), which are characterised by a multicultural diverse society, hate speech is expressly excluded from the scope of the right. Section 16(2) of the Constitution excludes advocacy of hatred based on race, ethnicity, gender and religion from the ambit of the right to freedom of expression when it amounts to incitement to cause harm. Hate speech causes emotional damage and violates the individual's right to human dignity.⁶ It is therefore important to guide young learners in the process of exercising their right to freedom of expression, not to infringe the fundamental rights of others through hate speech.

The South African Schools Act, Act 84 of 1996 (SASA) does not expressly refer to the right to freedom of expression, although it requires, in its preamble, the upholding of the 'rights of learners'. It is therefore necessary to view freedom of expression directly through the Constitution as well as through the value system that underpins the Constitution and South African democracy.

⁶ Section 10 of the Constitution

South African critical incidents

Two relatively recent critical incidents involving the effective implementation of this concept in schools are relevant in the context of freedom of expression (Van Vollenhoven and Glenn, 2004).

Layla Cassim

The first critical incident concerns Layla Cassim, a 14-year-old Muslim teenager in Grade 10 at Johannesburg's exclusive Crawford College. Layla wrote an essay espousing a Palestinian view of the conflict with Israel and then pinned it on the school notice board in October 1998. She did this in reply to an article expressing the Israeli view, which had also been put on the notice board. Layla's school is attended predominantly by Jewish pupils, and she was suspended a month later for 'escalating behavioural problems'.

The Cassims took the matter to the Human Rights Commission (HRC), arguing that several of Layla's human rights had been violated, one of these being her right to freedom of expression. They also argued that her suspension was unprocedural in that the *audi alteram partem*⁷ principle had not been applied. After the HRC had revealed its findings to the Cassims and the school, an interdict was granted, preventing the Cassims and the HRC from disseminating their findings. According to the *Sunday World* (Sukhraj, 1999, p.6) the HRC found that Layla's essay was not racist, anti-Semitic or anti-white. It found that the reaction by the school exhibited a lack of respect for her right to freedom of expression of a minority opinion. In this case, there is clear evidence that one's freedom of expression includes one's freedom to religion, belief and opinion.⁸ While exercising one's fundamental right to freedom of religion, belief and opinion, one's fundamental right to freedom of expression needs to be upheld.

The school raised no concern when the religious point of view of the majority of the students was displayed on the notice board, but when Layla, as a member of a minority group, did the same, her right to freedom of expression was violated. This suggests that, at times, school authorities in South Africa find it difficult to accept the freedom of expression of views that differ from their own, and as a result they fail to act in accordance with South African legislation and may even be guilty of unfair discrimination as defined in

⁷ The other side must be heard.

⁸ Section 15 of the Constitution

section 9 of the Constitution. Layla's right to freedom of expression was protected by legislation and she should have been allowed to display her point of view on the notice board, seeing that other students in the school had been allowed to do so. Nonetheless, in terms of section 16(2)(c) of the Constitution, the material that Layla posted could have been prohibited if it engaged in anti-Semitic statements because it would then have extended to advocacy of hatred based on religion. It would have violated the right to dignity⁹ of Jewish learners. In such a case it would be prohibited in terms of the general limitation clause in section 36 of the Constitution. If one bears in mind that Crawford College sometimes experiences tension between Islamic and Jewish learners, one could argue that the school authority could have prohibited the pinning of the material on the notice board, because this action could have resulted in disruption in the school.

Courts in the USA have determined that the right to freedom of expression in schools may be limited if such expression could result in material and substantial interference at school ('Blackwell', 1966; 'Burnside', 1966; 'Drebus', 1970; 'Stull', 1972; 'Tinker', 1969). In this case, however, an opposite point of view should then also be prohibited for the very same reason. Another legal principle developed from USA jurisprudence is that the right to freedom of expression cannot be limited merely because the expression is unpopular ('Brown v. Louisiana', 1966; 'Burnside', 1966; 'Cox', 1969; 'Edwards', 1963; 'Garner', 1961; 'Stull', 1972; 'Taylor', 1975; 'Thornhill', 1940; 'Tinker', 1969). One can therefore argue that Crawford College was biased and inconsistent in respecting Layla's fundamental right to freedom of expression, and in the process enhanced the hidden curriculum, i.e. that only the traditional and popular opinion of the majority is acceptable and therefore allowed to be openly displayed.

Yusuf Bata

The second critical incident involved Yusuf Bata, another Muslim teenager who attended Hoërskool Vorentoe, also in Johannesburg. Acting according to his religion, he declined to shave his beard as a sign that he knew the Qur'an by heart. As a result he was refused admission to the school in 1998. Although this was viewed mainly as an infringement of his right to freedom of religion (Eshak, 1998; Pretorius, 1998) or the right to attend a school of his choice,¹⁰ it could also be seen as an infringement of his right to freedom of expression.

⁹ Section 10 of the Constitution

¹⁰ Section 18 of the Constitution

From his perspective, growing a beard was a symbolic act through which to express his fundamental and protected right to religion, belief and opinion, as well as expression. In terms of section 16(1)(b) of the Constitution everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas.

According to section 9 of the Constitution everyone is equal before the law and may not be unfairly discriminated against, *inter alia* on grounds of race, ethnic or social origin, religion, conscience and belief. The fact that Yusuf was denied admission merely because his beard constituted part of his religious expression, amounts to an infringement of his fundamental rights to equality,¹¹ freedom of religion and opinion,¹² and freedom of expression,¹³ thus supporting a hidden curriculum as in the Cassim case.

South African case law

The manner in which case law balances the right to freedom of expression in schools will now be illustrated by means of a recent Supreme Court decision.

In *Antonie v Governing Body, Settlers High School and others (4) SA 738 (C)* ('Antonie', 2002) the applicant, a 15-year-old grade 10 female learner who embraced the principles of the Rastafarian religion, grew dreadlocks and wore a cap to cover her hair. Although she had asked the principal several times for permission to wear this style to school, he forbade it. Believing that her rights to freedom of religion and expression were being infringed, she attended school wearing a black cap that matched the prescribed school colours, to cover her dreadlocks. She was suspended from school for five days for serious misconduct because she had disrupted the school by disobeying its code of conduct for learners. Although the basic rule in the code of conduct specifies in ten specifically detailed subsections that learners' hair must be neat and tidy, it does not prohibit the growing of dreadlocks and the wearing of headgear. One could argue, then, that no legal misconduct had occurred.

When dealing with a code of conduct for learners, one should consider the guidelines issued by the Ministry of Education (Republic of South Africa, 1998) dealing with guidelines for consideration by school governing bodies in

¹¹ Section 9 of the Constitution

¹² Section 15 of the Constitution

¹³ Section 16 of the Constitution

adopting a code of conduct for learners.¹⁴ Freedom of expression is specifically provided for in Section 4.5.1 of the guidelines:

Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learners' rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited, as the disruption of schools is unacceptable. (Republic of South Africa, 1998, section 4.5.1)

The focus in the guidelines is on positive discipline¹⁵ and the need to achieve a culture of reconciliation, teaching, learning and mutual respect, and the establishment of a culture of tolerance and peace in all schools.¹⁶ These principles are underpinned by the democratic values of human dignity, equality and freedom as enshrined in section 1 of the Constitution.

The court ruled that the growing of dreadlocks was prohibited by the code of conduct for learners as underpinned in the Constitution, albeit hypothetically. Assessing this prohibition in a rigid manner, however, is in contrast with the values and principles of justice, fairness and reasonableness set forth in the guidelines as underpinned in the Constitution.¹⁷ Since adequate recognition must be given to the offender's need to indulge in freedom of expression, the growing of dreadlocks cannot be regarded as 'serious misconduct'. The school argued that the wearing of headgear and dreadlocks had caused 'disruption and uncertainty' at school, but the court found that the school had not acted in a spirit of mutual respect, reconciliation and tolerance, hence the rejection of its defence by the court.

It seems that school governing bodies and school managers are eager to manage schools and learners according to legislation, because it offers a clear guideline. In the process, they easily forget the values that underpin the Constitution, since to them these are still vague principles. The courts, however, already operate within the parameters of the values that underpin democracy. The right to freedom of expression will thus be balanced when it

¹⁴ Section 8(1) of South African Schools Act provides that a school governing body must adopt a code of conduct for learners after consulting all the stakeholders.

¹⁵ Section 1.4 and 1.6 of Notice 776 of 1998

¹⁶ Section 2.3 of Notice 776 of 1998.

¹⁷ Section 1 of the Constitution.

is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom¹⁸ in a spirit of mutual respect, reconciliation and tolerance as stipulated in the Constitution.

If the legal principles developed from USA jurisprudence were applied to this case, the right to freedom of expression could not be limited, as the wearing of the Rastafarian hairstyle had not led to disruption at school ('Blackwell', 1966; 'Burnside', 1966; 'Drebus', 1970; 'Karp', 1973; 'Stull', 1972; 'Tinker', 1969).

In the *Oloff v East Side Union School District 404 US 1042 (1972)* case ('Oloff', 1972), the school lost the case because the court regarded cultural attire as a family matter with greater authority than the school code of conduct. In terms of the *New Rider v Board of education, Pawnee County, Oklahoma 414 US 1097 (1973)* case ('New Rider', 1973), the *Hatch v Goerke 502 10th Cir 1189 (1974)* case ('Hatch', 1974) and the *Zeller v Donegal School District Board of Education 517 3d Cir 600 (1975)* case ('Zeller', 1975), however, the schools' cases had merit. In the *New Rider* case the court decided that one organisation (the school) could not accommodate the beliefs of many different groups, therefore the school code of conduct took precedence. The *Hatch* court followed a similar argument. The *Zeller* verdict was also in line with the aforementioned two verdicts as it regarded hairstyle as a private school matter. One could argue that the three verdicts correspond with Judge Sachs' judgment in *Christian Education South Africa v. Minister of Education (4) CC 2000*: ". . . believers cannot claim an automatic right to be exempted by their beliefs from the law of the land" ('Christian Education South Africa v. Minister of Education', 2000, p.779). However, the judgement states further that: ". . . the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".

To summarise, learners cannot claim an absolute right to freedom of expression, but school authorities should be tolerant in view of the values that underpin our democracy. In keeping with this line of argument, our view is that the plaintiff in the *Antonie* case could not demand an absolute right to freedom of expression. Yet, in light of her willingness to negotiate and to accommodate the school by wearing a black cap to cover the Rastafarian hairstyle, the school - by suspending a learner for wearing a hairstyle that did not disrupt the school - neglected to act according to the principles that underpin democracy (Van Vollenhoven, 2006).

18 Section 36 of the Constitution

Implementing the right to freedom of expression in schools

Although freedom of expression is recognized as a basic right because it is crucial in a democracy, “. . . total freedom of speech in the school situation is not feasible” (Joubert and Prinsloo, 2001, p.64). Joubert and Prinsloo argue that the right of learners to total freedom of speech must be limited in cases where:

- it will disturb the general order;
- vulgar language is used;
- it accuses falsely and maliciously; and/or
- it encourages another learner to behave in a disorderly manner, as in all of these circumstances, the fundamental rights of others will be violated.

We agree with this statement, but need to point out that vulgar language is not necessary legally incorrect, as only legally obscene words are not protected under the right to freedom of expression. Schools therefore need to prove that the vulgar language has jeopardised their educational mission before they can legally limit it. When examining the limitation of the rights of learners, one needs to look at the code of conduct for learners, which has to be adopted by a school governing body in terms of section 20(1)(d) of SASA. This code of conduct for learners must be adopted democratically by the school governing body after consultation with the learners, parents and educators of the school.¹⁹ In terms of section 8(2) of SASA, the aim of the code of conduct for learners is the establishment of a disciplined and purposeful school environment dedicated to the improvement and maintenance of the quality of the learning process. If this process is dealt with correctly, the code of conduct for learners becomes a subordinate legal document with which learners must comply. If learners do not comply, they will be breaking the law, which could lead to disciplinary action and punishment. If learners are punished, their rights or opportunities are limited.

The courts' attempts to determine how to balance the right to freedom of expression in schools led to decisions that at times contradicted one another (Alexander and Alexander, 1992). The literature assumes that freedom of expression can be limited by applying the 'material and substantive disruption' test, which was determined primarily in the *Tinker* case ('Tinker', 1969). Another variable that requires attention here is the notion of legal obscenity through vulgar, indecent or offensive expression. It needs to be acknowledged

¹⁹ Section 8(1) of South African Schools Act

that the right to freedom of expression is a constitutionally protected and guaranteed human right, which tends toward the absolute and is a core right in a democracy. Yet, no right is absolute. Freedom of expression can be limited if the expression is legally obscene, as it would constitute breaking the law and violating the fundamental human rights of others ('Roth', 1957). It is therefore necessary to define the term *legally obscene*.

Not all 'dirty' words and pictures are legally obscene. Something is legally obscene if, among other things, it is "patently offensive, appeals to the prurient interest, and, taken as a whole, lacks serious literary, artistic, political or scientific value" (Martinson, 1998, p.348). The manifestation of freedom of expression in a vulgar, indecent or offensive manner is a dilemma to the courts. It is important to note that the three descriptive terms are not synonymous with the expression 'legally obscene'. What might be vulgar, indecent or offensive to one person is acceptable to another. The dilemma increases when learners are involved as they are minors who lack *iudicium*. Furthermore, since schools have an educational purpose to achieve, they guide and lead learners to self-fulfilment and educate them for citizenship. The educational purpose cannot be achieved without being underpinned by a value system, which is adhered to by educators and authorities. Such a value system cannot be developed and enhanced in a school that tolerates lewd, indecent or offensive expression. This principle was established in the *Hazelwood* case by Judge White: "A school need not tolerate student speech that is inconsistent with its basic educational mission . . . even though the government could not censor similar speech outside the school" ('Hazelwood', 1988, at 567). One could further argue that since the educational purpose of primary and high schools differ, variables such as age would influence the limitation of the right to freedom of expression (Zirkel, 2003).

"Generally, it is recognized that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights" (De Waal *et al.*, 2001, p.144). All fundamental rights can thus be limited in terms of the general limitation clause in section 36 of the Constitution, which, according to Malherbe (2001), is a pivotal provision in the Bill of Rights. This general limitation clause applies to all rights in the Bill of Rights and is the most common form of limitation. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. There must thus be an appropriate balance between the limitation of the right and the purpose of the limitation of the right. All factors relevant to the issue must be taken into account ('Constitution of the Republic of South Africa', 1996, section 36).

A balance must be found between the legitimate interest of the learners and the duty of the school to maintain proper order and discipline in the school.

Schools need to be able to identify an appropriate balance and limit learners' right to freedom of expression only in cases where a legitimate interest of the school's educational mission is at stake or where fundamental rights of other stakeholders will be violated. School governing bodies should be pro-active in addressing learners' right to freedom of expression as part of their code of conduct and should develop a separate policy on this matter.

Van Vollenhoven and Glenn (2004) indicate that the balancing of constitutional rights must be exercised in accordance with the broader social interest in mind, for example whether it would be consistent with the professional responsibilities of a history educator to express racist views in a public forum outside the school. In such a situation the interest of the school leadership in ensuring that the school is able to fulfil its educational mission in a way consistent with the Constitution would justify disciplinary action against that educator despite the educator's right to freedom of expression of an individual opinion. In this matter, the right to freedom of expression in section 16(1) of the Constitution must be exercised consistently with section 16(2) of the Constitution.

The question then is, how school authorities can model respect for the right to free expression while ensuring that this right is not abused. While the same problem can arise in any sphere of public life, it is especially difficult in schools, where vulnerable young people are under the care and influence of educators, school managers and school governing bodies that are responsible for providing protection from hateful and harmful expression. The same young people, still 'green in judgment', are learning what it means to be citizens of a free society where differences of opinion are respected. How can limits be set without restricting expression to such an extent that the school becomes an anti-democratic environment?

In his recent empirical study Van Vollenhoven (2006, p.179) finds that South African schools are still characterized by an authoritarian leadership style: *Yes, but remember we are informed daily during assembly that we are soft targets if we are untidy*²⁰ 1:316 (1088:1089) and that learners view the Constitution as subordinate to the school code of conduct (Van Vollenhoven, 2006, p.174):

The school is against hair that stands like that. It must be tied and combed; cut behind the ears for boys, but the ends keep standing out. The school has the rule and she must obey. On the other side there is the Constitutional right to expression or religion which states that she may do it, but the school rule states that you are not allowed to do it. 1:309 (958:964)

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Afrikaans quotations were translated into English.

These findings seem to indicate that the right to freedom of expression is still not respected in the South African school system. A further article, based on these findings regarding learners' perspectives on freedom of expression, is envisaged. The findings correlate with the argument that learners do not understand what the right to freedom of expression entails and that this right is not enhanced or respected in South African schools. These findings also support the argument that the death knell may have sounded for democracy in South African schools, as freedom of expression as a core right in a democracy, is handled in a way that is not likely to support the development of a democratic culture in South African schools.

Conclusion

Not all managers are accustomed to the right to freedom of expression and this right is sometimes still violated in South African schools, resulting in tension between legislation and the implementation of the right to freedom of expression, not only at school level, but also among legislators and policy makers who are often unaware of the tension at school level. School authorities seem to violate the right to freedom of expression through authoritarian leadership styles, with which they feel comfortable. Unfortunately, this practice works against the development of the right to freedom of expression, thus suppressing the development of democracy.

The right to freedom of expression is not absolute and can be limited when it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²¹ Furthermore, it can be limited according to its inherent limitations.²² School authorities still fail to balance the right to freedom of expression according to the values that underpin the democracy²³ and thus work counter to democracy in South African schools.

The right to freedom of expression in schools is not implemented in a manner that does justice to this right as a core element of democracy. The hidden curriculum that evolved from the still authoritarian leadership style militates against democracy, as the skill of exercising this right in society is smothered, rather than developed, in South African schools.

²¹ Section 36 of the Constitution

²² Section 16(2) of the Constitution

²³ Section 1 of the Constitution

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