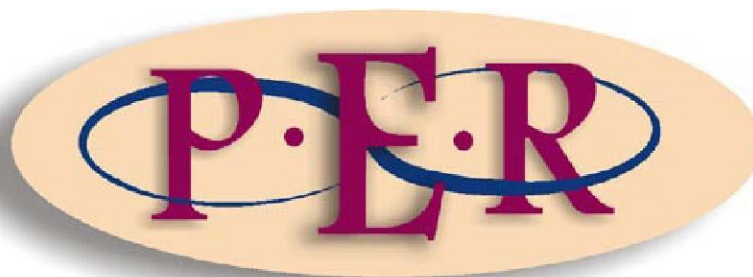


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## THE RIGHT TO FREEDOM OF EXPRESSION: THE MOTHER OF OUR DEMOCRACY

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### 1 Introduction

The right to freedom of expression, viewed as a pillar of democracy, is clearly addressed in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) of 1976.<sup>1</sup> The freedom of expression, opinion and information is also protected in Article 19 of the *Universal Declaration of Human Rights* (UDHR) of 1948<sup>2</sup> – which is a clear indication that freedom of expression is viewed internationally as a fundamental right and a prerequisite in any democracy. Moreover, it is universally accepted that freedom of expression creates a marketplace of ideas and ensures individual development and self-fulfilment.<sup>3</sup> In South African courts, too, this right is viewed as central to a constitutional democracy given the extent to which it supports other rights. Before we continue with the argument; it is necessary to define "democracy" at this point.

Du Toit<sup>4</sup> defines "democracy" as "rule by the people", which he interprets as

...all citizens shall participate on an equal basis in public decision-making on vital aspects of all common affairs, including social life, the economy, morality and education.

The core of a democracy is that all citizens have a right to participative decision-making.<sup>5</sup> Similarly, Coetzee and Le Roux<sup>6</sup> agree that:

...democracy can be regarded as a system of government in which the ruling power of the State is legally vested in the people: government of the people, by the people, for the people.

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<sup>1</sup> Article 19 of the *International Covenant on Civil and Political Rights* (1966).

<sup>2</sup> Article 19 of the *Universal Declaration of Human Rights* (1948).

<sup>3</sup> *Abrams v United States* 1919 US 250 616; Clayton and Tomlinson *Privacy and Freedom of Expression*; Currie and De Waal *Bill of Rights Handbook*.

<sup>4</sup> Du Toit 1993 *Suid Afrikaan* 5.

<sup>5</sup> Morrow *Chains of Thought*.

<sup>6</sup> Coetzee and Le Roux 1998 *Tydskrif vir Christelike Wetenskap* 5.

In an article published in the *Journal of Education*, Van Vollenhoven, Beckmann and Blignaut<sup>7</sup> argue that democracy is being suppressed in SA schools because the right to freedom of expression, as a fundamental right in a democracy, is not nurtured in the schooling system. Furthermore, according to Van Vollenhoven's findings, learners have a very poor understanding of the right to freedom of expression – let alone the educational implications thereof.<sup>8</sup> It seems that school authorities with their authoritarian leadership styles – a direct consequence of the power such a position previously yielded – are still violating the right to freedom of expression. Given this situation and the desire to instil the right to freedom of expression and, in so doing, to develop the principles of democratisation, the question is raised as to how a balance can be struck between this right and lived educational practice. Unfortunately, current practices counter the development of the right to freedom of expression and, in so doing, also the development of democracy. If critical and independent thinking amongst both the leadership and the followers in education is to be encouraged, respect for freedom of expression will have to be instilled. Crucially, student-teachers need to acquire the knowledge and develop the skills to apply the right to freedom of expression in their training and, eventually, in their school praxis.

In an NRF-funded project, "Human Rights Literacy: A Quest for Meaning",<sup>9</sup> the research team set out to explore what human rights literacy entails with the intention of establishing and developing an improved transformative curriculum and teaching-learning approaches.<sup>10</sup> Using a rhizomatic design, qualitative and quantitative research data was collected by means of three different methodological processes: a walk-about, a survey, and small focus-group discussions.<sup>11</sup>

Arguing that if education is to be the custodian of a democratic society in which the fundamental right to freedom of expression is a prerequisite, this paper will focus on the data collected during focus-group discussions where student-teachers responded to a scenario dealing with the right to freedom of expression.

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<sup>7</sup> Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

<sup>8</sup> Van Vollenhoven *Learners' Understanding of their Right*.

<sup>9</sup> Roux *Human Rights Literacy*.

<sup>10</sup> Roux and Du Preez 2013 <http://hroid-hrlit.blogspot.com>.

<sup>11</sup> Becker, De Wet and Parker 2014 *JSR*; Roux *Human Rights Literacy*.

It was indicated above that during the first ten years of the new democracy, this was clearly not the case. Now, 20 years after the institution of a democratic dispensation in South African schools, the aim of this article is to attempt to establish whether this core right is better understood and implemented.

## **2 Background**

In 1994 South Africa became a democracy with an advanced Constitution which entrenched human rights in its Bill of Rights. When South Africa's young democracy brought an end to years of systematic discrimination and oppression,<sup>12</sup> the expectation was that education would play a major role in the process of moving the country towards a culture of human rights. Twenty years later, as South Africans are still battling to instil or even define the concept "democracy", and given that teachers have a professional duty to promote democracy in schools as well as in broader society, an interrogation of the role teachers perform in ensuring the survival of democratic principles is warranted.<sup>13</sup>

It is against this background that this paper will explore student-teachers' internalisation and application of the right to freedom of expression, which is viewed as a core right in any democracy. This article draws from data elicited in a research project titled "Human Rights Literacy: A Quest for Meaning",<sup>14</sup> that explored South African student-teachers' conceptualisation of human rights. The article starts with a theoretical overview, whereafter the focus will shift to a conceptual framework which explores freedom of expression as a core right in a democracy, which will be followed by an explanation of the empirical study's methodology and an analysis of the data.

## **3 The right to freedom of expression**

The *Constitution* of 1996 brought about a move away from an authoritarian culture to one of openness or transparency, accountability and justification of actions. Freedom

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<sup>12</sup> Parker 2014 *JSR*.

<sup>13</sup> Smit and Oosthuizen *Fundamentals of Human Rights* 74.

<sup>14</sup> Roux *Human Rights Literacy*.

of expression is one of the civil freedoms guaranteed in section 16 of the *Constitution*.<sup>15</sup>

- (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.

The word "includes" indicates that although mention is made of only four aspects of this right, it could encompass other aspects as well. The Guidelines for Consideration of Governing Bodies in Adopting a Code of Conduct<sup>16</sup> define freedom of expression as more than freedom of speech, thus including also the right to seek, hear, read and wear. It therefore extends to encompassing all forms of outward or nonverbal expression, eg the selection of clothing and hairstyles.<sup>17</sup>

In essence, section 16(1) protects freedom of expression, including the contents thereof and those to whom it is addressed.<sup>18</sup> The protection of this right is important in South Africa. For many years, the majority of citizens were denied this right to freedom of expression, and they could even be sued for speaking out against government.<sup>19</sup> In this bureaucracy, even learners were taught not to differ and not to question anything educators or authorities told them.<sup>20</sup> Therefore, all citizens – even educators – were not taught to think critically, to question whatever they were told, or what was happening to them. The authoritarian culture withheld them from speaking out or differing from authorities.

Subsections 16(1)a-d particularly include protection for the freedom of the press and media (1a), the freedom to receive or impart information and ideas (1b), artistic creativity (1c) and academic freedom and scientific research (1d). Section 16(2)

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<sup>15</sup> Section 16 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

<sup>16</sup> Section 4.5.1 in GN R776 in GG 18900 of 15 May 1998.

<sup>17</sup> Van Vollenhoven *Learners' Understanding of their Right*.

<sup>18</sup> Malherbe "Draft Chapter".

<sup>19</sup> Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

<sup>20</sup> Mazibuko *Sowetan* 6.

specifies under which circumstances the right afforded in section 16(1) can be excluded. According to section 16(2), this right can be limited when it is used as propaganda for war (2a), to incite imminent violence (2b) or as a form of hate speech (2c). It is important to realise that even though certain ways of expression are mentioned in section 16(1), they are definitely not singled out for greater protection than other forms of expression.<sup>21</sup> Although the right to freedom of expression is internally limited in section 16(2), it can also (like any other right) be limited under the limitation clause.<sup>22</sup>

#### **4 Limitation of the right to freedom of expression**

In South Africa, which is characterised by a multicultural diverse society, hate speech – as excluded by section 16(2)(c) – needs to be addressed. In line with this, the publication of words or behaviour will be *prima facie* wrongful where the publication is contrary to the *boni mores* of society.<sup>23</sup> In this regard, international law could guide South African courts in implementing legislation, an example being the Canadian Supreme Court, which has also accepted the legitimacy of controls to hate speech.<sup>24</sup> Section 16(2) of the *Constitution* excludes the advocacy of hatred based on race, ethnicity, gender and religion from the ambit of the right to freedom of expression when this amounts to incitement to cause harm. Hate speech or defamation can cause emotional damage and will be a violation of the individual's right to human dignity.<sup>25</sup> Elements of an action for defamation are the wrongful and intentional publication of a defamatory statement.<sup>26</sup> It is, therefore, important to guide young learners in executing their right to freedom of expression so that they do not infringe upon the fundamental rights of another person by using hate speech. This right is not mentioned in the *South African Schools Act* 84 of 1996 (SASA). Freedom of expression will hence be viewed directly via the *Constitution* as well as through the value system that underpins the *Constitution* and the South African democracy.

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<sup>21</sup> Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

<sup>22</sup> Section 36 of the *Constitution*.

<sup>23</sup> Neethling, Potgieter and Visser *Law of Personality*.

<sup>24</sup> *R v Keegstra* 1990 3 697 (SCR).

<sup>25</sup> Section 10 of the *Constitution*.

<sup>26</sup> *Cele v Avusa Media Limited* 2013 2 All SA 412 (GSJ).

## 5 A pillar of democracy

The right to freedom of expression, viewed as a pillar of democracy, is clearly addressed in Article 19 of the ICCPR of 1976, which has been ratified by South Africa.<sup>27</sup> Freedom of expression, opinion and information is also protected in Article 19 of the UDHR of 1948,<sup>28</sup> which is a clear indication that freedom of expression is viewed internationally as a fundamental right and a prerequisite in any democracy. The intention of the UDHR, which has also been ratified by South Africa, is to ensure that all human beings "shall enjoy freedom of speech and belief and freedom from fear" as common people of the world<sup>29</sup> and that their human rights should be protected by the rule of law. With this preamble, the nations of the world agree that the right to freedom of speech is the core of a democracy and individual freedom.

Given that freedom of expression is regarded as a prerequisite to and one of the core rights in a democracy,<sup>30</sup> this right is treated as if it were a constitutionally protected freedom even in countries without a constitutionally entrenched Bill of Rights. Beatty<sup>31</sup> concurs and describes freedom of expression as the value that underpins liberal-democratic government. For example, Clayton and Tomlinson<sup>32</sup> as well as Türk and Joinet<sup>33</sup> indicate that freedom of expression was regarded as a "core right" even before the advent of the *Canadian Charter of Rights and Freedoms* in 1982 – currently Part 1 of the Constitution of Canada.<sup>34</sup>

However, a democratic society is continuously in the process of change, will have restrictions on rights and freedoms, and its procedures will frequently be questioned. This is ensured by the right to freedom of expression, which is therefore viewed as a prerequisite to democracy. Consequently, democracy can be viewed as a "tragic" political system. As Castoriadis says, democracy is "the only regime that openly faces

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<sup>27</sup> *International Covenant on Civil and Political Rights* (1966) (ICCPR).

<sup>28</sup> *Universal Declaration of Human Rights* (1948) (UDHR).

<sup>29</sup> Preamble of the UDHR.

<sup>30</sup> Van Vollenhoven *Learners' Understanding of their Right*.

<sup>31</sup> Beatty *Constitutional Law*.

<sup>32</sup> *Abrams v United States* 1919 US 250 616; Clayton and Tomlinson *Privacy and Freedom of Expression*; Currie and De Waal *Bill of Rights Handbook*.

<sup>33</sup> Türk and Joinet "Freedom of Expression" 38.

<sup>34</sup> Para 1 of the *Constitution of Canada*, 1982.

the possibilities of its self-destruction by taking up the challenges of offering its enemies the means of contesting it".<sup>35</sup> Similarly, Wood<sup>36</sup> argues that freedom of expression is regarded as an essential pillar of a free and democratic society. In line with this, Shyllon<sup>37</sup> argues that the free exercise of this right is important in highlighting poor service delivery and exposing corruption, maladministration and the mismanagement of public funds. Although freedom of expression is regarded as a core human right in a democratic society, even this right can be limited.

## **6 A prerequisite, yet not absolute**

In the USA, for example, the First Amendment's guarantee of free speech has never been absolute. Although the United States 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.

Locally, the value system that underpins the Constitution was developed from South African history. When interpreting the Bill of Rights, one must be guided by this value system. This thought was expressed by Judge Ismail Mahomed<sup>38</sup> in the *Makwanyane* case:

...the South African Constitution retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos.

Against this background to freedom of expression, which is seen as crucial in a democracy but not absolute, it is imperative to determine whether student-teachers in South Africa as a young democracy understand and have internalised this right so that they can apply it in praxis in order to guide young nation builders to develop the skill and competency to use and respect their right to freedom of expression, as intended in a free democracy.

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<sup>35</sup> Türk and Joinet "Freedom of Expression" 38.

<sup>36</sup> Wood 2001 *SAJE* 142-146.

<sup>37</sup> Shyllon 2012 *ESR Review* 7-10.

<sup>38</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 262.



Freedom of expression is not the entitlement of any political system or ideology, but a general human right guaranteed in international law. It is regarded widely as one of the core rights and essential foundations and freedoms of a democracy.<sup>39</sup> In *Lehman v. Shaker Heights*<sup>40</sup> the court held that freedom of expression invites dispute. This is vital for developing a democracy.

Judge Cardozo defined this concept as "... the matrix, the indispensable condition of nearly every other form of freedom".<sup>41</sup> In *Palko v Connecticut*,<sup>42</sup> freedom of expression is viewed as a prerequisite for a democratic society and for participation in the democratic process,<sup>43</sup> and also as necessary for the development of the individual,<sup>44</sup> a notion which also features in McIntyre's summation of the case the Retail, Wholesalers and Department Store Union brought against Dolphin Delivery Ltd in the Canadian Supreme Court in 1986.<sup>45</sup> Freedom of expression is not, however, a creature of the Canadian Charter of Rights. It is one of the fundamental concepts that have formed the basis of the historical development of the political, social and educational institutions of Western society. Representative democracy, which is by and large the product of the free expression and discussion of varying ideas, depends on the maintenance and protection of freedom of expression.

Türk and Joinet<sup>46</sup> indicate that the right to freedom of expression is a right tending towards the absolute. In fact, the right to freedom of expression enables human beings to express new ideas and discoveries which promote scientific, artistic or cultural progress.<sup>47</sup>

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<sup>39</sup> *Handyside v United Kingdom* 1976 24 A 737 (EHRR) para 51; Marcus 1994 *SAJHR* 140-148; McQuoid-Mason *et al Human Rights for All*; Sachs *Advancing Human Rights*; Tribe *American Constitutional Law*. Also see Preamble of the UDHR.

<sup>40</sup> *Lehman v City of Shaker Heights* 1974 418 US 298.

<sup>41</sup> *Lehman v City of Shaker Heights* 1974 418 US 298.

<sup>42</sup> *Palko v Connecticut* 1937 302 US 319 para 327.

<sup>43</sup> Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

<sup>44</sup> Alston *Constitutional Right to Freedom of Expression*.

<sup>45</sup> *RWDSU v Dolphin Delivery Ltd* 1986 18720 Canada 580 (BC).

<sup>46</sup> Türk and Joinet "Freedom of Expression" 38.

<sup>47</sup> Coetzee and Le Roux 1998 *Tydskrif vir Christelike Wetenskap* 5.

In a similar vein, Clayton and Tomlinson<sup>48</sup>, Van Vollenhoven<sup>49</sup> and Mawdsley, Smit and Wolhuter<sup>50</sup> are of the opinion that the right to freedom of expression enjoys special protection on three different grounds: it serves as the marketplace for ideas, which promote the search for the truth; it ensures individual development and self-fulfilment, which can be derived from the right to human dignity and to equality of concern and respect; and it secures the right of the citizen to participate in the democratic process. Emerson,<sup>51</sup> a former professor at the Yale Law School, put forward a fourth premise, namely that freedom of expression is also a prerequisite for maintaining the balance between stability and change in society. It is specifically with regard to this that teachers should understand how the right to freedom of expression should be balanced in school and in wider society.

These four premises, which enhance the claim that freedom of expression seems to be a core right in a democracy, will now be discussed.

### **6.1 A market place of ideas**

Freedom of expression creates a marketplace of ideas and ensures individual development and self-fulfilment.<sup>52</sup> The right to freedom of expression enables human beings to express new ideas and discoveries which enhance scientific, artistic or cultural progress. This can be seen as the foundation of the "quest for truth" paradigm. Clayton and Tomlinson<sup>53</sup> define the marketplace of ideas as a collection of ideas used to promote the search for truth. The epistemic function of education, as confirmed by Judge Holmes in *Abrams v. US*,<sup>54</sup> is realised in this search for truth:

[C]ompetition among ideas strengthens the truth and rules 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 valuable than our own deeply held convictions ...

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<sup>48</sup> Clayton and Tomlinson *Privacy and Freedom of Expression* 112.

<sup>49</sup> Van Vollenhoven *Learners' Understanding of their Right*.

<sup>50</sup> Mawdsley, Smit and Wolhuter 2013 *De Jure* 132-161.

<sup>51</sup> Emerson *System of Freedom of Expression*.

<sup>52</sup> Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

<sup>53</sup> Clayton and Tomlinson *Privacy and Freedom of Expression* 112.

<sup>54</sup> Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

One should be able to think, speak and create ideas, even if what is expressed is "wrong". Unpopular views must be uttered and, as postulated by Alston,<sup>55</sup> will either be enhanced or defeated by public opinion (education) rather than by censorship, which would impair creativity, ideas, individual development and democracy.

## **6.2 Individual development**

The creation of a marketplace of ideas<sup>56</sup> helps individuals to attain self-fulfilment.<sup>57</sup> As such, Currie and De Waal<sup>58</sup> argue that the denial of this right would be inhuman because the ability to express oneself is an essential human activity. As people become involved in the "marketplace of ideas" in the search for truth, they become involved in their individual development, which underpins freedom of expression and *vice versa*. The right to express own opinions, even if these differ from the opinions of others, is essential for individual self-fulfilment.<sup>59</sup> In this regard, Sachs<sup>60</sup> states that the right to freedom of expression allows individuals to be who and what they are. If persons' right to express themselves is violated, they will be restrained from developing to their fullest potential. The right to freedom of expression of the individual person should outweigh the interests of society<sup>61</sup> but may be limited if it poses a potential risk to society.

The balance between individual development and participation in democratic society is achieved through education in schools.<sup>62</sup> Schools need to teach all learners about their right to freedom of expression to maximise not only their personal potential but also the fullest potential of their society. It is necessary to enhance and respect freedom of expression in order to develop and encourage critical and independent thinking.

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<sup>55</sup> Alston *Constitutional Right to Freedom of Expression*.

<sup>56</sup> Clayton and Tomlinson *Privacy and Freedom of Expression* 112.

<sup>57</sup> Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

<sup>58</sup> Currie and De Waal *Bill of Rights Handbook*.

<sup>59</sup> Van Vollenhoven *Learners' Understanding of their Right*.

<sup>60</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 262.

<sup>61</sup> *Palko v Connecticut* 1937 302 US 319 para 327.

<sup>62</sup> Wielemans 1999 *Themanummer Pedagogisch Tijdschrift* 369-373.

### **6.3 Self-fulfilment: Participation in the democratic process**

Clayton and Tomlinson<sup>63</sup> and Gordon<sup>64</sup> regard freedom of expression as a prerequisite for participation in the democratic process. This notion was established by the European Court in the case *Handyside*, brought against the United Kingdom.<sup>65</sup> One could argue that freedom of expression is essential to the right of citizens to participate in the democratic process. People must be able to make political choices and, therefore, they need to have access to information and to different viewpoints. The right to freedom of expression is related to freedom rights, as well as political rights. Türk and Joinet<sup>66</sup> also 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.

Alston<sup>67</sup> describes the democratic process as political and asserts that the political process can never be democratic without the openness to hearing everything and allowing differing views to be expressed. The accommodation of different views is socially acceptable and creates stability in a society. Different and even unpopular views enhance critical thinking, which is a prerequisite for a democratic society. The public school, as the education mentor for learners in a democracy, becomes a forum where children are guided to adulthood and to fulfil their place in a democratic society. Prinsloo<sup>68</sup> and Albertyn and Davies<sup>69</sup> aver that the Bill of Rights and its implication ought to guide both legislation and the application thereof in a democracy. Section 7(1) of the *Constitution* provides the Bill of Rights as a cornerstone of democracy in South Africa.<sup>70</sup> It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.

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<sup>63</sup> Clayton and Tomlinson *Privacy and Freedom of Expression* 112.

<sup>64</sup> Gordon 1984 *J L & Educ* 523-579.

<sup>65</sup> See n 39.

<sup>66</sup> Türk and Joinet "Freedom of Expression" 37.

<sup>67</sup> Alston *Constitutional Right to Freedom of Expression*.

<sup>68</sup> Prinsloo 2013 *De Jure* 178-205.

<sup>69</sup> Albertyn and Davis 2010 *SAJHR* 188-216.

<sup>70</sup> Section 7(1) of the *Constitution*.

Wielemans<sup>71</sup> points out that education attempts to solve problems in society. There is a movement back to a holistic approach where the school, instead of being a mere institution of learning, takes the shape of an educational society.<sup>72</sup> Similarly, the DoE set out the purpose of a General Education and Training Certificate (GETC) as equipping "learners with knowledge, skills and values that will enable meaningful participation in society ..."<sup>73</sup> Such participation is feasible only if one has developed the skill of critical thinking or reflection.

In a democracy, people listen to and tolerate opinions with which they disagree.<sup>74</sup> Freedom of expression ensures that governments are unable to abuse democratic or fundamental rights. In the case *Holomisa* brought against *Argus Newspapers Limited* in 1996, Cameron J stated that "[t]he success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens".<sup>75</sup>

Wielemans<sup>76</sup> refers to this participation in the democratic process as the instrumental task of the school. This implies that the school aims to guide learners to their fullest potential in order to enhance the optimal functioning of society. For this to occur, the right to freedom of expression should be respected. He contends that since the contemporary school tends to be the only entity in modern society that still has the role of disciplining; it functions as a public forum where the youth (learners) are challenged to agree or disagree. The school increasingly becomes a social forum for learners in which to interact with one another and to share experiences.<sup>77</sup> When they do so they simultaneously shape their own lives as individuals and strive toward a democratic society.

Although Gordon<sup>78</sup> concurs that the "epistemic" function of (public) education is to enable learners to acquire the skills necessary to become knowledgeable and

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<sup>71</sup> Wielemans 1999 *Themanummer Pedagogisch Tijdschrift* 369-373.

<sup>72</sup> Wielemans 1999 *Themanummer Pedagogisch Tijdschrift* 369-373.

<sup>73</sup> SAQA 2000 <http://www.saqqa.org.za/docs/pol/2003/getc.pdf>.

<sup>74</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 262.

<sup>75</sup> *Holomisa v Argus Newspapers* 1996 2 SA 588 (W) para 615.

<sup>76</sup> Wielemans 1999 *Themanummer Pedagogisch Tijdschrift* 369-373.

<sup>77</sup> Wielemans 1999 *Themanummer Pedagogisch Tijdschrift* 369-373.

<sup>78</sup> Gordon 1984 *J L & Educ* 523-579.

productive participants in a democratic society, he also contends that it is the duty of government to provide education so as to furnish citizens with the requisite facts relevant to political decision making and to train them to draw conclusions from those facts.<sup>79</sup> The epistemic function of education is to develop self-controlled citizens who can participate actively in a common system of discourse.<sup>80</sup> Gordon concludes that citizens who have developed to their fullest capacities and fulfilled their own interests are less likely to call for political change, will be economically productive and will maintain a higher standard of living. Hence the government's economic interest in education.

South African court cases that dealt with freedom of expression in the school or in an educational context (Antonie, Pillay, Hamata, Ngubo and Le Roux) can be categorised into two factual variants, namely instances where the expressions have not been harmful, and instances where the expressions have been harmful.<sup>81</sup> If the exercise of freedom of expression neither harms nor interrupts school discipline, it should be respected. Conversely, schools may limit the right to freedom of expression if the expression has infringed a person's right to dignity or has caused harm to others or the school.

#### **6.4 *Maintaining the balance between stability and change in society***

If persons are not allowed to air their point of view, that viewpoint will never be tested. It is in free discussion, which prevents society from becoming stagnant, that people's own prejudices and pre-conceptions are tested.<sup>82</sup> Freedom of expression is balanced in societies in order to protect other values such as public order, justice and the personal rights of others.<sup>83</sup> The right to freedom of expression may also be limited in terms of the ICCPR<sup>84</sup> and in the interest of national security, public order, safety, health and morals.

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<sup>79</sup> Gordon 1984 *J L & Educ* 523-579.

<sup>80</sup> Yudof *When Government Speaks*.

<sup>81</sup> Mawdsley, Smit and Wolhuter 2013 *De Jure* 132-161.

<sup>82</sup> Emerson *System of Freedom of Expression*.

<sup>83</sup> Dugard *Human Rights*.

<sup>84</sup> The *International Covenant on Civil and Political Rights* (1966).

In a democracy, the population must be included in civic life. The right to freedom of expression is related to freedom of association and assembly, and these three freedoms are essential in a democracy.<sup>85</sup> In the Turrell case, which arose out of learner protest, Van Zyl J emphasised the importance of freedom of expression in a democracy, stating: "freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously ..."<sup>86</sup> It is significant that this statement was made before South Africa had a new Constitution or democratic government. The right to freedom of expression as the core of democracy and human rights was therefore acknowledged by the courts even before South Africa became a democracy.

Given this importance of the right to freedom of expression in a democracy, it is crucial to teach learners how to use this right so that they may be enabled to develop optimally as individuals and to fulfil their societal responsibilities. Buckingham<sup>87</sup> suggests that "educators must ... prepare [learners] for a participatory form of citizenship which can function across a whole range of social domains". This is the schools' instrumental task.<sup>88</sup> If freedom of expression is important to ensure the fulfilment of every individual, it is vital to educate toward that end. Andsager and Ross<sup>89</sup> aver that courses in freedom of expression enhance people's understanding of their right to freedom of expression. Such courses could also enhance a citizenry, making it more supportive of democratic and expressive rights.

## 7 Research process

In a project titled "Human Rights Literacy: A Quest for Meaning",<sup>90</sup> the research team explored what human rights literacy entails and aimed to establish and develop an improved transformative curriculum and teaching-learning approaches.<sup>91</sup> Using a rhizomatic design, qualitative and quantitative research data was collected by means

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<sup>85</sup> Emerson *System of Freedom of Expression*.

<sup>86</sup> *S v Turrell* 1973 1 SA 248 (CC) para 257.

<sup>87</sup> Buckingham 1997 *IJMCS* 78.

<sup>88</sup> Wielemans 1999 *Themanummer Pedagogisch Tijdschrift* 369-373.

<sup>89</sup> Andsager and Ross 1995 *JMCE* 54.

<sup>90</sup> Roux *Human Rights Literacy*.

<sup>91</sup> Becker, De Wet and Parker 2014 *JSR*.

of three different methodological processes: a walk-about, a survey, and small focus-group discussions.<sup>92</sup> This article focuses only on the qualitative data collected in the focus-group discussions, explaining the process followed for this strategy in the paragraphs to follow.

As a first step in the selection of the participants, the research team borrowed from stratified and cluster sampling to purposively select six university sites (campuses) that we considered best suited to provide information for the purpose of the research objectives.<sup>93</sup> The six sites represented a mixture of rural and metropolitan campuses and reflect the linguistic, religious, ethnic and cultural diversity of student-teachers across South Africa.

First- and fourth-year students enrolled for B Ed programmes at the six sites (n=4,953) were invited to participate in the survey. A total of 1,086 students (551 first years and 535 fourth years) participated in the survey, during which they could indicate whether or not they were willing to participate in follow-up focus-group discussions.<sup>94</sup> A snow-ball sampling strategy was employed to recruit participants for the focus groups. We issued invitations to students on each of the six survey sites who had, during the survey, indicated their willingness to participate in focus groups. Some of these students, in turn, invited other B Ed students from their year-groups, who voluntarily joined the discussions.<sup>95</sup>

Group size varied between three and nine participants. Larger groups were avoided since the topics of discussion were complex and sometimes sensitive.<sup>96</sup> Sixty-eight students participated in the focus-group discussions. Twenty-nine participants were first years while 39 were fourth-years. Twenty-seven out of the total 68 participants were male (14 first years and 13 fourth years), while 41 females (15 first years and

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<sup>92</sup> Roux *Human Rights Literacy*; Becker, De Wet and Parker 2014 *JSR*.

<sup>93</sup> Roux *Human Rights Literacy*.

<sup>94</sup> Becker, De Wet and Van Vollenhoven "Human Rights Literacy" 35.

<sup>95</sup> Roux *Human Rights Literacy*.

<sup>96</sup> Roux *Human Rights Literacy*.



26 fourth years) participated.<sup>97</sup> Participants were between 18 and 28 years old and spoke six of the 11 official South African languages.<sup>98</sup>

The purpose of the small focus groups was to elicit dialogue about human rights, probe participants' conceptions and ontology and disrupt their fixed meanings and understandings.<sup>99</sup> The unstructured nature of focus-group discussions allows for conversation to flow and develop, supporting lively discussion, free expression and dialogue on conflicting ideas or complex issues as they arise.

Three teams of researchers visited different sites to conduct the focus group interviews. A total of 21 focus-group sessions with 13 different groups of students were held. Seven of the groups met twice, five met only once and one group (S6Y1) met three times.<sup>100</sup> Separate focus groups were held with first years and fourth years, except for one meeting (S6Y1&4M2) on Site 6, which combined first and fourth years.<sup>101</sup>

Pre-selected scenarios were used as a form of probing in follow-up meetings. Four different scenarios drafted by the research team sketched fictitious events regarding diverse socio-cultural, gender and religious contexts, including possible human rights violations within an educational context. This paper reflects only on the data from the scenario dealing with freedom of expression.

The focus-group discussions were audio-recorded and transcribed before being analysed by making use of Atlas Ti. By examining the data through the lens of a legal framework for applications of the right to freedom of expression, the data was allowed to crystallise as it was brought into conversation using our theoretical lens.

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<sup>97</sup> Roux *Human Rights Literacy*.

<sup>98</sup> Roux *Human Rights Literacy*.

<sup>99</sup> Roux *Human Rights Literacy*; Van Vollenhoven, Beckmann and Blignaut 2006 *Journal of Education* 119-140.

<sup>100</sup> Roux *Human Rights Literacy*.

<sup>101</sup> Roux *Human Rights Literacy*.

## **8 Student-teachers' application of the right to freedom of expression**

This section focuses on one of the scenarios discussed in the focus-group interviews to illustrate participants' perceptions, knowledge and attitudes in their application of the right to freedom of expression in practice. The enquiry focused on the way student-teachers understand and apply the right to freedom of expression as internalised to enhance a market place of ideas, individual development, participation in the democratic process and maintaining the balance between stability and change in society and schools.

The paper will indicate that although the participant student-teachers had knowledge about human rights and the challenges of applying it in practice, the knowledge was at times superficial and uncertainties about the praxis still existed.

Two themes emanated from the data: The first theme related to student-teachers' understanding and perceptions about the right to freedom of expression; the second related to the tension between the school as custodians of the democracy and the image of the school. Selected *verbatim* quotes from focus-group transcripts will be used to illustrate how these themes were defined and to compare them to the theoretical understanding of human rights literacy with regards to the right to freedom of expression as the core right in a democracy. The reference style of these quotes is as follows: S1Y4M1, where S refers to the site number (1 to 6), Y refers to the year group (first or fourth years) and M refers to the meeting number of a specific group (first or second meeting).

## **9 Understanding the right to freedom of expression**

In line with the literature, the participants acknowledged that the right to freedom of expression was a prerequisite for individual development and self-fulfilment. This sentiment was echoed amongst participants. One participant stated that "...the right to be heard is also the right to be taken seriously". (S2Y4M2) Therefore, it was of vital importance that schools need to create an environment where learners are allowed to express themselves. According to this participant, "...the school was supposed to listen to them, and allow the learner[s] to express themselves". (S2Y4M2) Student-teacher

participants also understood that if learners were guided and allowed to give their own opinions, critical thinking – which is one of the building bricks of a democracy – would be enhanced:

...at university level learners are encouraged to be critical of things and not take things at face value. Even if you read it, you don't just read and take it as it is. Even if it is someone's view. (s2y4m2)

While the student-teachers acknowledged the fact that any opinion has the potential to offend someone, they did not clearly understand the discourse that everyone has the right to freedom of expression even if what is said is untrue, and that freedom of expression can be limited the minute what is said defames another:

She was just honest in saying how the school really is. (s1y1m2)

So, when do you truly have freedom of speech, when you say something about yourself? And ... I mean, I will criticise myself, sometimes, but I will not talk bad about myself when I am with other people. So I will open my mouth when something is not right and if you want to punish me for it, then I feel where is that right, because then that right doesn't count? And then I get angry, ... (s3y4m2)

Many of the student-participants argue that as long as what you say is the truth, it would be acceptable.

You should investigate and see whether the learner is speaking the truth. If the learner is not speaking the truth, then you are allowed to give some sort of punishment. (s1y1m2)

This indicates that these student-teachers might not yet have comprehended the nature of the market place of ideas. The fact that they thought that unpopular or untrue views would be "punished would prevent creativity, the formation of ideas, individual development and the flowering of a true democracy". In contrast with the notion that untrue expression might be punished, some participants were aware that the right to freedom of expression guarantees that there will be no punishment even if what one says differs from the opinions of others: "You should not penalise me if I say that I am not in support of this thing and provide valid arguments on it". (s1y4m2) In line with this, some participants understood the obligation this right imposes on learners in a democracy to speak-out if schools are not acting correctly – "It needs to be known. We need professionalism in the working environment" (s1y4m2) – and that learners should not be indoctrinated when speaking out: "So I think they were wrong

because they cannot channel my thinking". (S1Y4M2) Some student-teacher participants acknowledged the fact that freedom of expression implies the possibility of change:

Yes, how does change happen if something like this does not happen? So maybe she just wanted ... that something could happen and change could happen at the school. (s3y4m2)

The participating student-teachers understood that the right to freedom of expression would be balanced by the right to human dignity and that it was internally limited in terms of Article 16(2) if the expression boiled down to defamation or hate speech:

I did not bad mouth him. I did not use unpleasant words. I only gave my opinion. (s3y4m2)

But freedom of expression, you can only stop it when it's about racism or hatred or when it hurts people, but this didn't hurt anyone. (s4y4m2)

The latter quotation clearly illustrates that although the participants were aware of the inherent limitation to the right to freedom of expression if hate speech is used, the notion that any opinion does have the potential to hurt is not comprehended by everyone.

This right is also viewed by South African courts as central to a constitutional democracy to the extent to which it supports other rights.

## **10 The tension between the school as a custodian of democracy and the image of the school**

As custodians of democracy, schools are the places where all children, but particularly vulnerable learners, should be steered and guided in the process of critical thinking to develop the skills and competencies they need to fulfil their role as fully developed citizens. Learners should therefore be trained to think critically and to speak their mind if they disagree, even if what they say is not the truth. Unfortunately, so much emphasis is placed on the image of the school that the hidden curriculum or unintended message is that free expression needs to be limited in order to preserve the image of the school:

Most of the schools, it is about the school's image and the image that should be portrayed...but what people hear is never outside. Outside is clean, but it should only stay inside and people are not allowed to hear what is going on inside. (s3y4m2)

Then I tell them but there is violence; there is so much violence there that no one is allowed to say what is happening, and that is what it is all about. (s3y4m2).

Some of the student-teachers were therefore of the opinion that learners should first talk about negative things at school before revealing these in public media. They stressed loyalty to the school as a positive quality, thought the image of the school enjoyed priority, and failed even to raise the question of whether the expression would boil down to hate speech or not:

But the first thing she should have done is to go and speak to someone at the school, and if they were doing nothing about it, then go to the press. (s1y1m2)

On the other hand, some student-teacher participants understood that schools should not indoctrinate learners as this would work against the whole notion of critical thinking in a democracy. In this regard, one participant felt that the school could not punish learners if the school had asked for their opinion: "So I think they were wrong because they [the school] cannot channel my thinking." (s1y4m2) This student-teacher participant went on saying, "[y]ou should not penalise me if I say that I am not in support of this thing and provide valid arguments on it". (s1y4m2) Some student-teachers understood the role of the right to freedom of expression: "So the school was supposed to listen to them and allow the learner[s] to express themselves." (s1y4m2) In practice this is not the case, as indicated by another student-teacher participant: "Because they say it is your freedom of speech, but the moment you say something, they [the school] are out to get you." (s1y4m2)

Some student-teachers are aware of the fact that the school's reaction would depend on the platform that is used for free expression. The fact that they say that as a citizen one may speak one's mind but as member of the school not is an indication of how children at school are still indoctrinated into believing that the image of the school is supreme to the *Constitution*. This finding echoes the results from a study where learners' understanding of their right to freedom of expression was investigated.<sup>102</sup>

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<sup>102</sup> Van Vollenhoven *Learners' Understanding of their Right*.

Schools then are surely working against the development of the skills and competencies essential to the exercise of the right to freedom of expression, and this phenomenon is a death knell for democracy and its developments:

...this learner operated in different levels, in different contexts. The learner wrote the article as a member of the community and she wrote the assignment as a member of the school. And one other thing – we should take into consideration if they say this thing the learner crossed the line. If we can go to reality. We know that the teachers and the principal's conduct in the school is superior to that of the learners. You know, the learners are inferior. Think back to when you were still a student – you will be afraid to say something in school. For example, I could not challenge my teachers and say: you are misconducting because of this and this. There will be a lot of things happening around that but if maybe she did this thing by intention, because she knew the community and the members of parliament, the minister will protect the child. But if this was a situation happening or dealing in the school level only. There will be a problem there... (s1y4m2)

Seemingly, student-teacher participants still experience a tension between speaking out as critical thinkers enhancing democracy and protecting the image of the school. There is also a fine line in praxis between "washing" factual "dirty laundry" and defamation. This tension in itself is the poison killing our democracy and is clearly visible when this participant states: *"So that the dirty laundry of this school, the so called perfect school, has been revealed."* (s1y4m2) In this sense, instead of enhancing democracy, this skewed tension throws doubt not only upon the survival of democracy but also upon the preservation of human rights and the integrity of those who apply them, as suggested by one participant:

But it is like I said: It gets applied when it wants to be applied. It is like when I am in a powerful position, I will apply the rights I want to apply, disregarding what you feel. (s3y4m2)

## 11 Conclusion

From the data presented it is evident that student-teachers have a superficial knowledge of the right to freedom of expression. They are aware of the fact that this right is not absolute and may be limited. It seems as if they have a sense of the importance of the right to freedom of expression in a democracy, but they have not yet internalised what they sense, and they struggle to balance the right in praxis. Interestingly, this data confirms that of Bronstein, Glaser and Werbeloff,<sup>103</sup> who found

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<sup>103</sup> Bronstein, Glaser and Werbeloff 2012 *SAJHR* 55-80.

the same phenomenon amongst law students. Their study found that while most student respondents support general statements in favour of free expression, their commitment to this value seems to buckle under the stress of hard test cases.

The mean levels of student support for free expression vary widely across items and mask wide variations of opinion amongst students. The fact that student-teachers, the custodians of democracy, are still not able to internalise and apply the right to freedom of expression in practice indicates that our school system still fails to be a market place of ideas, and is incapable of developing individuals as critical and individual thinkers to reach their fullest potential and to be citizens in a developed democracy. One can infer from the findings that the education system is failing to teach learners how to engage constructively in a democracy. In fact, the way that this core right, as a prerequisite for democracy, is still being misapplied after 20 years of democracy, seems to pose a threat to the survival of democracy in South Africa.

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## LIST OF ABBREVIATIONS

|            |   |
|------------|---|
| DoE        | Department of Education                                   |
| ESR        | Economic and Social Rights                                |
| GETC       | General Education and Training Certificate                |
| IAMCR      | International Association for Mass Communication Research |
| ICCPR      | International Covenant on Civil and Political Rights      |
| IJMCS      | International Journal of Media and Communication Studies  |
| J L & Educ | Journal of Law and Education                              |
| JMCE       | Journalism and Mass Communication Educator                |
| JSR        | Journal for the Study of Religion                         |
| NRF        | National Research Foundation                              |
| RWDSU      | Retail, Wholesalers and Department Store Union            |
| SAELPA     | South African Education Law and Policy Association        |
| SAJE       | South African Journal of Education                        |
| SAJHR      | South African Journal of Human Rights                     |

|      |                                       |
|------|---------------------------------------|
| SAQA | South African Qualification Authority |
| SASA | South African Schools Act             |
| UDHR | Universal Declaration of Human Rights |

## **THE RIGHT TO FREEDOM OF EXPRESSION: THE MOTHER OF OUR DEMOCRACY**

**WJ van Vollenhoven\***

### **SUMMARY**

This paper explores student-teachers' understanding of the right to freedom of expression in education. Analyses of case law and legal principles affirm that the right to freedom of expression is an essential prerequisite to protect and promote democracy. Based on qualitative research, the empirical evidence indicates that although student-teachers are aware of the fact that the right to freedom of expression is not absolute and may be limited, they have a superficial knowledge of the application of this right. Student-teachers have a sense of the importance of the right to freedom of expression in a democracy, but they have not yet internalised the mechanism or process of balancing the right in praxis. This does not bode well as the school system will fail to be a market place of ideas. In order to enable learners to reach their full potential as critical thinkers and autonomous citizens in a developing democracy, it is imperative that teachers should understand and master the application of the right to freedom of expression in schools.

**KEYWORDS:** Democracy, human rights, freedom of expression, transformative curriculum, teaching-learning approaches, student-teachers.

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