

equality and expression



Both rights are fundamental for a third right: the right to participate in a democracy, argues Lynette Steenveld.

The subpoena debacle that preceded the HRC Inquiry into Racism in the Media raised the problem of the relative weighting of 'freedom of expression/the press' versus 'the right to dignity/equality'.

It is arguable that the hegemonic view is that freedom of expression is sacrosanct in a democracy – indeed that one of the ways of judging whether a society is democratic or not, is whether the state upholds freedom of expression and freedom of the press.

The reasons for the believed primacy of this right are:

■ Firstly, that speech is an expression of self and is thus an essential human characteristic. Preventing or limiting this right would thus be a violation of human dignity, freedom and autonomy.

■ Secondly, freedom of expression is necessary for a 'search for truth' in a 'marketplace of ideas' from whence the most valuable ideas or views could emerge.

■ Thirdly, for democracy to function, citizens must have access to a range of views.

But, argues Johann van der Westhuizen, in his contribution to the book, *Rights and Constitutionalism: The New South African Legal Order*: "Freedom of expression is not only abused by overstepping the limits of decency or good taste, or by spreading half-or untruths. It is also abused by those who are bent on destroying or undermining democracy instead of enhancing it, and on eradicating the equality and liberty of others, rather than on fostering tolerance and discourse".

In sum, he argues that "freedom of expression ... has to be interpreted within the context of appreciating where our country comes from and where we want to go". In other words, Van der Westhuizen explores the very notion of 'freedom of expression', and what its potential limits might be, by pointing to both its social context, and to the potential continuum of speech which might 'undermine democracy'.

The problem that is being grappled with is the right to an absolute notion of freedom of expression, versus the right to equality and dignity.

The argument for an absolute notion of freedom of expression is that sharing/contesting/debating ideas is the basis of a democracy. One of the premises here is that all people are equally powerful. It eschews the view that some people have more power than others, and are therefore more able to exercise their right to free speech.

But this view does not take into account historical circumstances, such as the power relations of colour, gender, sexual preference or age, which operate in South African society. Denise Meyerson writing in the *South African Journal of Human Rights* takes note of inequalities, but suggests that power relations in society should not justify the imposition of limitations of free speech. Rather, in her view, efforts should be made to extend the access of people currently/previously disempowered.

There is the fear that limiting freedom of expression in some way opens up a loophole for governments to prevent speech/ideas that they disapprove of. But it could equally be argued that having no limitations on free speech, privileges those with power to speak.

This view is held by Charles R. Lawrence who writes in connection with the limitation of hate speech in America: "If we are truly committed to free speech, First Amendment doctrine and theory must be guided by the principle of anti-subordination. There can be no free speech when there are still masters and slaves".

In other words, proponents of hate speech legislation see it as enabling the speech and participation of groups who might otherwise be silenced by those who use the unqualified free speech argument to inhibit/limit the freedoms of (weaker) groups to participate in a democracy.

Laura Lederer, for example, writes: "... the purpose of racist speech is to keep selected groups in subordinated positions. Racist speech functions as a sophisticated form of hate propaganda that both creates and props up a system of inequality and exclusion".

In support of this view, Raymond Suttner argues in the *South African Journal of Human Rights* that one must "understand the 'good' which forms the rationale for freedom of speech", and if some utterances are deemed to be inimical to the rationale or existence of the freedom, then "in suppressing them one is not suppressing a freedom, but a threat to that freedom".

He further argues that suppression of racist views (for example) is as much a part of freedom, as the expression of democratic views. In other words, he also argues for the distinction between different social content of various utterances, which should affect the decision of what should be allowed to be expressed.

Suttner's (and Van der Westhuizen's) argument is that "there can be no absolute criterion for determining the scope and limits of freedom of speech ... The justifiability or otherwise will depend on the application of 'principles' to concrete conditions".

In sum, the HRC's Inquiry into Racism in the Media has thrown into relief two questions. First, why, and for whom, does freedom of expression matter so much? And second, why, and for whom, does the right to dignity and equality matter so much?

Drawing on the civil rights tradition, American commentator John A Powell identified the problem rather well when he described the two questions as "two narratives that describe different worlds".

The free speech tradition, he writes, tells the story of "people asserting their autonomy through participation, free thought, and self-expression in the polity ... wary of government constraint ... such constraint [being] an evil to be avoided in society".

The equality tradition, on the other hand, tells the story of "people whom communities and government conspired to exclude from any meaningful participation in the polity or public institution. It tells the story of a government that until very recently actively engaged in efforts to exclude, and now passively stands by while private actors and powerful social forces continue to shut the door to persons seeking full membership in society".

"This tradition also tells of a long struggle for status, not just as members of the polity, but as complete and respected human beings. Indeed the great evil to be avoided, as seen from this framework, is discrimination that undermines or destroys someone's humanity".

In short, the free speech constituency could be seen as representing those who already have access to an existing system that is organised in a way that they are familiar with, and that suits them.

The equality constituency represents those who are newcomers, and who do not only want to participate, but also want to have a say in the rules and conventions governing participation.

Powell suggests that in a democracy, participation is central to both the right to freedom of expression, and to equality.

The importance of freedom of expression, as noted above, is that it enables citizens to participate in the governance of society as a whole. But this assumes that all people have an 'equal' voice. Thus the right to equality is a means of 'ensuring' this right, so that ultimately, the participation can be truly democratic.

In Powell's words, "It is from membership and the right to participation that all other goods are produced and take on meaning".

This leads him to proposing the following criterion in a possible legal framework: "if the speech activity injured participation by excluding others, this would weigh toward proscribing it, or would at least weaken the court's protection".



CHRISTINE DIXIE b.1966

Reflect

reflect, v.t. re-flekt. To throw back, esp. after being struck; to consider mentally; to bring reproach or discredit on; to censure on.

reflection, n. reflek-shon. The state of being reflected; thorough consideration; attention to states of self-consciousness or mental operations; the expression of thought; censure; rep.

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The South African Human Rights Commission believes, in the words of the 1993 Vienna Declaration, that "all human rights are universal, indivisible, interdependent and interrelated".

We believe that our Constitution has sought to treat human rights holistically and to eschew the bogey of a hierarchy of rights. The Vienna Declaration goes on to state that "the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis".

Kofi Annan captures the current mood in international human rights theory when he says: "One cannot pick and choose among human rights, ignoring some while insisting on others. Only as rights equally applied can they be rights universally accepted. Nor can they be applied selectively or relatively, or as a weapon with which to punish others. Their purity is their eternal strength ..." (Tehran, December 1997).

One cannot deal adequately with human rights without contextualising them. It is clear to us that racism has been the defining characteristic of South Africa from the moment European settlers set foot on its shores. Racism has defined the relationship between black and white people from time immemorial.

The manifest purpose of the struggle for liberation was to address the culture of racism and inequality that had become embedded in South African society. That is why the first substantive set of rights in the Bill of Rights deals with Equality.

That is why American human rights jurisprudence emphasises freedom, because it speaks to the very heart of the history of America. To us, racism has the same or comparable significance. For others, the delivery of basic needs as in economic and social rights is what gives content to the rights

■ Lynette Steenveld is Chair of Media Transformation at Rhodes University's department of Journalism and Media Studies



Somerset and Ngqika were two major forces in the Battle of Grahamstown. Their images have been cropped as if they are being viewed through a gunsight or telescope. Inextricably part of each other's history, they are visually linked by their red badges. Badges are symbols of status, while the colour is associated with the blood issuing from the Egazini battle. Red was also the colour used on the maps of the time to indicate conquered British territory. In the centre of the print is a mirror with a red circle. The viewer becomes drawn into this history, to become both a target and participant in history's unfolding.

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rights balance



South Africa has no reason to place freedom of expression on a pedestal above other rights, says Barney Pitjana, in these excerpts from the HRC's interim report.

Barney Pitjana is chairperson of the South African Human Rights Commission.

culture we all espouse.

What the Commission seeks, however, is to understand these societal forces that cause different groups of South Africans to emphasise different rights. Not to end there, but to use that to express and define the need for South Africa to have a balanced understanding of human rights.

What is vital for us is the understanding that no rights are absolute, and that the exercise of all rights should promote the values espoused by the Constitution: "human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism..."

The national Human Rights Conference sponsored by the Commission in 1997 stated that: "Conference believes that freedom of expression is a central tenet of democracy. Conference believes that freedom of expression is best promoted when it upholds the values established by the Constitution and the law."

South Africa has no reason to place freedom of expression on a pedestal above other rights. The media in South Africa cannot justify why they must be treated any differently from any other structures of society which have to abide by our Constitutional principles.

The Commission wishes to place on record that it is mindful of the implications of this exercise for press freedom. We believe, however, that the best guarantor of press freedom is a society that respects human rights. The press has the same responsibility to respect human rights as everyone else in society.

A study of racism in the media, hopefully, will heighten the sensitivity of all South Africans to the issue of racism and will ensure a greater respect for freedom of expression. We believe that these matters are interrelated.

A cursory glance at the list of fundamental rights listed in chapter two of our constitution will instantly suggest that it is very easy for some of them to collide.

The tension among the rights is both inter- and intra-rights. In other words, there may arise a tension between two separate rights – for example, when one person asserts her right to free expression against another who asserts his right to dignity.

And then the same right can give rise to tension when people assert it against one another at the same time. This might happen, for instance, where different people assert language and cultural rights against one another. Indeed, some rights have in-built tension – the right to equality, for instance, has crafted into its very fabric, affirmative action, which seems to negate the very notion of equality.

Cultural and linguistic rights are expressed in terms which allow people to organise themselves along cultural and linguistic indicators. They are, however, simultaneously directed not to violate any provision of the Bill of Rights in doing so. This seems to be a veiled admonition that they should not discriminate, even though in practice it might be very hard to do what the right permits and not discriminate.

The foundational international conventions are not a very helpful guide to how one must balance competing rights. Similarly, it would be fairly pointless to have recourse to the Constitution since, as the courts have said over and over again, it has no hierarchy and therefore imparts no information on which right should take precedence.

The courts have often said, when such conflict arises, that the question as to which right must prevail should be determined on a case-by-case basis by balancing the rights involved and the interests they protect.

My reading of the Vienna Declaration suggests that one must first try to make the rights work together as a system before seeking to choose one over another in any given set of circumstances. However, this is easy, and perhaps possible, only in respect of rights that are complementary.

So, for instance, in determining the meaning of the right to life in *S v Makwanyane*, the Constitutional Court invoked a number of other rights – viz. equality, human dignity and the freedom and security of the person. An examination of these rights would reveal that they are, however, complementary, rather than competing. Therefore the question as to what one does in the face of competing rights must remain open.

Then, as I understand the instruments and the judgments of the courts, one has to make a choice. But the choice is not to be made *a priori* or, to put it somewhat differently, the choice is not metaphysical. It is made with reference to concrete and specific circumstances and facts.

One listens to the evidence and to the argument and then decides that in this case right X must prevail over right Y. Consistency (the precedent system) then requires that, in all future conflicts involving the same rights and where the facts are materially the same, right X must prevail.

But this does not mean that right X is more important than right Y. Therefore it is possible that under different circumstances and with different facts, the opposite decision might be arrived at. National Media Ltd & Others v Bogoshi, for instance, was widely celebrated as a victory for freedom of expression. To the extent that it struck down the doctrine of strict liability, it was decidedly a victory for freedom of expression.

However, that does not mean that freedom of

weighty considerations



Our scales don't balance – for now, writes Mandla Seleane.

expression now takes priority over one's right to one's good name. Should Bogoshi (the plaintiff in the initial case) have succeeded in proving all the elements of defamation in terms of prevailing notions of justice, the question might be answered totally differently, as in *Gardener v Whitaker*.

The effect of this is that the rights in question remain of equal status. The facts in every case will determine the direction in which the scale must be tipped whenever there is a conflict between rights. But is it really so?

In the Bogoshi judgment, the Supreme Court of Appeals affirms the equality of freedom of expression and the right to one's good name. The court then cites authorities to underline the 'equal' importance of freedom of expression.

What is curious about the authorities that the court cites, is that they suggest that freedom of expression is foundational to other rights. (See at p1208.) One of the authorities goes so far, indeed, as to suggest that after the right to freedom of worship, freedom of expression is the most important right.

But there is a view in SA that is fairly established, namely, that we live in a regime that is characterised by constitutional core values. Equality, freedom and dignity are normally cited as the core values that inform our constitutional dispensation. Therefore, when a conflict of rights arises, it has to be resolved on the basis that these core values are allowed to prevail.

In large measure this view is already embodied in our constitutional text. Thus, in recognising our freedom of expression, section 16(2)(c) already directs that the freedom so recognised must not militate against equality, for instance. In recognising our right to establish schools funded out of our own resources, section 29(3)(b) already directs that we cannot discriminate on the basis of race at these schools.

When one considers the weight of these constitutional core values, and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, it seems clear that freedom of expression will hardly ever come out at the top. And this is despite the fact that some of the authorities cited by the Supreme Court of Appeals in Bogoshi appear to grant a foundational status to freedom of expression in relation to other rights.

Therefore, it seems to me, our scales are not truly amenable to a balance. As I read the situation, our courts are more likely to find in favour of equality than freedom of expression where the two rights collide.

Quite apart from the fact that freedom of expression comes to us already limited in the constitutional text in respect of equality, our history will predispose us to view with suspicion and hostility anything that smacks of a negation of equality and of human dignity.

One must, however, hope that all of this is only in the short term, and that in the longer term we shall come around to truly appreciate the equal status of all human rights. And that we will also deal with the conflict between civil and political rights on the one hand, and social and economic rights on the other.

Mandla Seleane is a researcher at the Human Sciences Research Council.