

## A CONTEXTUAL ANALYSIS OF THE HATE SPEECH PROVISIONS OF THE *EQUALITY ACT*

ME Marais\*  
JL Pretorius\*\*

### SUMMARY

The article presents a detailed contextual analysis of the categorical prohibition of hate speech in terms of section 10(1) of the *Equality Act*. It is argued that this provision is not primarily intended to describe and effectively regulate the extreme expression that falls within the narrow ambit of "hate speech" as defined in section 16(2)(c) of the *Constitution*. Rather, it is concerned with the promotion of equality in the broad societal context. It acknowledges the hurt and harm that discriminatory expression may entail and it condemns the reinforcement of systemic discrimination by means of expression. Therefore, the principal interpretive frame of reference for the analysis of section 10(1) of the *Equality Act* is the explicit constitutional obligation in terms of sections 9(3) and (4) of the *Constitution* to enact legislation to prevent and prohibit unfair discrimination, and not section 16(2)(c) of the *Constitution*. The fact that section 10(1) categorically prohibits hate speech, instead of premising its prohibition on the unfairness analysis generally applicable to discrimination in other contexts, however, implies that only expression with no reasonable prospect of meeting the constitutional fairness standard ought to be covered by section 10. Put differently, the prohibited expression may in no way promote rather than jeopardise the achievement of equality.

The interpretation takes into account that section 10(1) applies only to engagement in expression that, in terms of an objective reasonableness assessment, is clearly primarily aimed at hurting or harming others, or at inciting others to hurt or harm, or at promoting hatred based on group identity. Furthermore, *bona fide* expression in

---

\* ME Marais. BA LLB (US) LLM LLD (UFS). Senior lecturer, Department of Public Law, University of the Free State. This contribution stems from this author's LLD thesis entitled "The Constitutionality of Categorical and Conditional Restrictions on Harmful Expression Related to Group Identity". E-mail: Maraisme@ufs.ac.za.

\*\* JL Pretorius. B Com LLB BA (Hons) LLD (UFS). Professor of Law, Department of Public Law, University of the Free State. E-mail: pretorjl@ufs.ac.za

accordance with the essential characteristics of the freedoms of expression mentioned in section 16(1) of the *Constitution* is explicitly excluded from its ambit.

An analysis of the expression covered by section 10(1) leads to a conclusion that it prohibits only low-value discriminatory expression that obstructs the constitutional quest for the healing of our injured society. It manages to achieve this without jeopardising the constitutional guarantee of freedom of expression, construed in the light of the foundational values of the *Constitution*.

**KEYWORDS:** hate speech; unfair discrimination; categorical prohibition; freedom of expression; human dignity; *bona fide*; publish; information; harmful; heal.