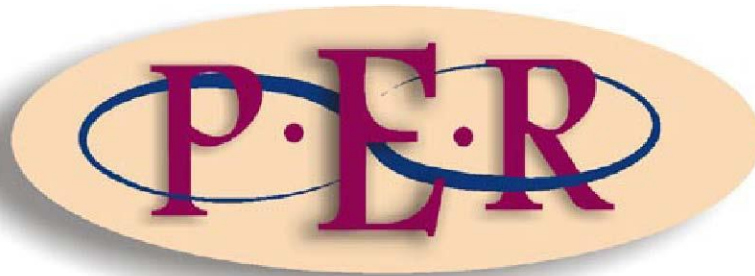


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A CONTEXTUAL ANALYSIS OF THE HATE SPEECH PROVISIONS OF THE *EQUALITY ACT*

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1 Introduction

Section 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (*Equality Act*) prohibits "hate speech" in the following terms:

Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

The proviso reads as follows:

Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

Section 10 of the *Equality Act* is often criticised for unduly extending the scope of so-called "hate speech" as defined in section 16(2)(c) of the *Constitution*.¹ However, while it is true that both sections are concerned with discriminatory expression based on group characteristics, and while the expression contemplated by section 16(2)(c) of the *Constitution* indeed falls within the ambit of section 10, a context-sensitive analysis of section 10 calls for a different interpretive frame of reference than the right to freedom of expression only.

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¹ See Roederer "The Prohibition of Hate Speech, Harassment and Dissemination or Publication of Information that Unfairly Discriminates" 93; Teichner 2003 *SAJHR* 353-357; Currie and De Waal *Bill of Rights Handbook* 378-379; Kok 2001 *TSAR* 299-300.

Section 10 of the *Equality Act* clearly does not essentially describe, and is not primarily aimed at effectively regulating the extreme expression that falls within the narrow ambit of section 16(2), in particular section 16(2)(c), of the *Constitution*. Section 16(2) categorically excludes (a) propaganda for war, (b) incitement of imminent violence and (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm, from the constitutional right to freedom of expression. In effect, therefore, subject to the rule-of-law requirement of a rational relationship between legislation and its legitimate purpose, the state may combat the aforesaid forms of expression in an unfettered manner.² These forms of expression are clearly regarded as a threat to constitutional democracy. Borrowing from Rosenfeld, they can be described as

... extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets.³

Section 16(2)(c) in particular contemplates only expression of the most severe and deeply felt, group-related contempt that constitutes incitement to harm and imperils democracy. Any extension of this ambit should therefore be approached with extreme caution to solely serve the specific aims of the exclusion.

The more directly applicable context within which to interpret section 10 is the requirement in terms of sections 9(3) and (4) of the *Constitution* to enact legislation that would prevent and prohibit unfair discrimination. In satisfying this constitutional requirement, section 10 acknowledges the hurt and harm that discriminatory expression may cause. It condemns the reinforcement of systemic discrimination by means of expression, particularly in the broad societal context. Its primary aim is the restorative promotion of equality.

Against this backdrop, this article analyses section 10(1) in the light of sections 9(3) and (4) of the *Constitution*. By prohibiting unfair discrimination subject to a fairness assessment against the constitutional standard, section 6 of the Act in principle covers discriminatory expression, including hate speech. This implies that the categorical

² Rautenbach 2001 *TSAR* 618 fn 3.

³ Rosenfeld 2002-2003 *Cardozo L Rev* 1549, with reference to a 18 of the *German Basic Law*.

prohibition of hate speech will comply with sections 9(3) and (4) and, for that matter, section 16 of the *Constitution* only if it strictly covers expression with no reasonable prospect of meeting the fairness standard. Put differently, the prohibited expression may in no way potentially promote rather than jeopardise the achievement of equality. In view of this, the article firstly considers the reason for the separate categorical hate speech prohibition.

A systematic, contextualised and interrelated purposive interpretation of each of the terms and phrases of section 10, as well as the forms of expression that the section 12 proviso excludes from the application of section 10, then follows. The condition that the prohibited expression may in no way potentially promote equality is considered as a guideline for purposive interpretation. By specifically mentioning certain forms of expression, it is argued, the proviso acknowledges the special challenges associated with the protection of the freedoms of expression explicitly stipulated in section 16(1) of the *Constitution*.

Considering the potential risk that a purposive interpretation of section 10(1) may still cover expression that does not jeopardise equality, the proposed interpretation is then tested against the constitutional fairness standard. The notion that the value of a particular form of expression determines the level of constitutional protection it should receive, constitutes a significant component of this assessment. This value is determined based on the values and interests that are generally acknowledged as informing the protection of the right to freedom of expression. The assessment ultimately leads to the conclusion that a purposive interpretation of section 10 covers only low-value expression that unfairly discriminates and that has no potential of promoting equality in any context.

Finally, the justification of the limitation of the right to freedom of expression in terms of section 36 of the *Constitution* is addressed. In the light of the outcome of the fairness assessment, and assuming that unfair discrimination cannot be justified, the impact of the prohibition of hate speech on the right to freedom of expression clearly does not carry substantial weight compared to the compelling purpose of the limitation. That leaves for consideration the means by which section 10 achieves its

aims. As lenient restorative means are used to enforce compliance, it is concluded that the section 10 limitation of the constitutional right to freedom of expression is justified in terms of section 36 of the *Constitution*.

Frequent reference is made to legislation, case law and related academic views in foreign jurisdictions, especially the United States, Canada and Germany, as well as international law. Although this is not a comparative study, the South African Constitutional Court has recognised some perspectives relating to these foreign jurisdictions' approaches in regulating expression in general, and expression that can be described as "hate speech" in particular. In this regard, the article takes into account the difference in the approach to freedom of speech in American jurisprudence and the jurisprudence of Canada, Germany and South Africa. Whilst the American approach is individualistic, the other jurisdictions follow a more "communitarian approach ... which seeks to balance freedom of expression with other values, such as multi-culturism, equality and dignity".⁴

2 The constitutional aims of section 10(1)

Subsections 9(3) and (4) of the *Constitution* require the state to enact national legislation to prevent or prohibit unfair discrimination. As stated in its preamble, the *Equality Act* approaches this requirement with a focus on

... systemic inequalities and unfair discrimination (that still) remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

It endeavours to

... facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

It is in this light that the different aspects of section 10(1) will be interpreted.

⁴ Milo, Penfold and Stein "Freedom of Expression" 42-78 - 42-79. *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) paras 29-35.

Section 6 of the Act prohibits unfair discrimination, subject to a fairness assessment in terms of section 14. The question therefore arises as to why it was necessary to enact a categorical hate speech prohibition instead of merely pursuing hate speech claims under section 6.⁵ The answer lies in the reality that a categorical provision undoubtedly has a better chance of effectively achieving the reformative societal goals, particularly the preventative goals, required by the *Constitution* than a case-by-case development that is complaints-driven, retrospective and requires evidence of the detrimental effects of an incident.⁶ According to the Act, a complainant of unfair discrimination bears the onus to make out a *prima facie* case of discrimination.⁷ In terms of section 1, disadvantage, whether direct or indirect, is a definitive element of discrimination. Section 10 is primarily concerned with disadvantage in the form of the reinforcement or promotion of inequality in society when expression as described in the provision is tolerated. Expecting a complainant to prove that a specific incident relates to the broader effect of hate speech on society will be an overwhelming evidential burden. This challenge is, however, removed by the categorical recognition that the prohibited expression does constitute unfair discrimination. In this provision, therefore, those who are marginalised and deprived of self-confidence due to systemic humiliation based on their group identity find assurance that they do have a claim.⁸ In addition, it assists in sensitising South Africans to the dignity-impairing consequences of discriminatory utterances. Noteworthy in this regard is that the remedies provided by the Act include the facilitation of empathy, which can lead to an apology and to forgiveness and healing.⁹ In the final instance, section 10 acknowledges and, to some extent, gives effect to international commitments to prohibit hate speech, in particular the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).¹⁰

⁵ Kok 2008 *Stell LR* 128.

⁶ Kok 2008 *Stell LR* 128.

⁷ S 13(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (the *Equality Act*).

⁸ Kok 2008 *Stell LR* 130-131.

⁹ There are a number of forums that make provision for mediation processes to which a presiding officer of the Equality Court may refer a matter. These include the Human Rights Commission and the Commission on Gender Equality. See s 20(3)(a) of the *Equality Act*.

¹⁰ *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).

3 A contextual analysis of section 10(1), read with the proviso in terms of section 12

Section 10(1) and the proviso in section 12 are interrelated and have to be interpreted as such. This analysis will show that, when read together, they describe a very particular form of expression that essentially does not constitute *bona fide* engagement in any of the forms of expression protected in terms of section 16(1) of the *Constitution*.

3.1 Section 10(1)

In the following paragraphs, the different terms and phrases used in section 10(1) will be considered, followed by those of the proviso.

3.1.1 "no person may publish, propagate, advocate or communicate words"

The term "words" should be understood as, or replaced with, "expression" or "expressive content". This is because a textual interpretation results in the paradox that the prohibition covers only certain forms of extreme hate speech that fall within the ambit of section 16(2)(c) of the *Constitution*, while fully covering less extreme hate speech that falls outside the ambit of section 16(2)(c).¹¹ Such an interpretation would be contrary to the stated purpose of the Act, to prohibit expression contemplated in section 16(2)(c).¹² This approach is further supported by the fact that "speech" in the context of "hate speech" is generally accepted to include symbolic expression also. Even the American Supreme Court prohibited the burning of the American flag under the *First Amendment*, which explicitly protects "speech".¹³

The term "words" also does not fit comfortably into the contextual construction of this phrase. Words can be published and used to advocate or propagate ideas, feelings, opinions and knowledge, but cannot be advocated or propagated themselves. Hence, the phrase should be purposively interpreted or, if such an interpretation is not viable,

¹¹ Roederer "The Prohibition of Hate Speech, Harassment and Dissemination or Publication of Information that Unfairly Discriminates" 92.

¹² Section 2(b)(v) of the *Equality Act*.

¹³ See *Texas v Johnson* 491 US 397 (1989); *United States v Eichman* 496 US 310 (1990).

be amended to convey that no person may publish expressive content that propagates, advocates¹⁴ or communicates¹⁵ ideas or views as further described in the section.¹⁶

The restriction of the relevant expressive act to "publish"¹⁷ implies that expression in private conversation is not included. This is in accordance with the guarantee of the right to privacy in terms of section 14 of the *Constitution*. In addition, it recognises and appropriately responds to the risk that a categorical prohibition of expression in private conversation may hamper rather than promote equality. Realistically speaking, legislation cannot remove feelings of hatred and detestation from people's hearts, homes and personal social environments. These emotions may originate from deep psychological hurt relating to personal experiences. It may even have a healing effect when people verbalise these feelings in private.

Hate speech prohibitions in comparable jurisdictions, even those relating to extreme forms of such speech, support the protection of privacy. For example, the court in *R v Keegstra*,¹⁸ the leading Canadian hate speech case, remarked that the fact that section 319(2) of the Canadian *Criminal Code* does not prohibit views expressed with an intention to promote hatred if they are expressed privately, indicated Parliament's concern not to invade individuals' privacy.¹⁹ In the same vein, in *R v Ahenakew*,²⁰

¹⁴ Robinson and Davidson *Chambers 21st Century Dictionary* defines "advocate" as "to recommend or support (an idea, proposal, etc), especially in public".

¹⁵ Robinson and Davidson *Chambers 21st Century Dictionary* defines "communicate" as "1. to impart (knowledge) or exchange (thoughts, feelings, or ideas) by speech, writing, gestures, etc. 2. (transitive; usually followed by 'to') to allow (a feeling, emotion, etc.) to be sensed (by), willingly or unwillingly; transmit (to): the dog communicated his fear to the other animals. 3. (intransitive) to have a sympathetic mutual understanding".

¹⁶ Robinson and Davidson *Chambers 21st Century Dictionary* defines "idea" as "any content of the mind" or as "a thought, image, notion or concept formed by the mind, a plan or intention, a main aim, purpose or feature, and an opinion or belief".

¹⁷ Kirkpatrick *Bloomsbury Thesaurus* defines "publication" as "publishing, dissemination, circulation, ventilation, divulgence (or divulgency), divulgation, disclosure, promulgation, broadcasting, public-address system, ... spreading the word, spreading abroad, broadcast, announcement, declaration, proclamation, pronouncement, public notice, speech, statement, sermon, notification, official notice, report, communiqué, bulletin, manifesto, pronunciamiento, edict, decree, encyclical, ukase, ban, unconfirmed report, rumour, hearsay, gossip".

¹⁸ *R v Keegstra* [1990] 3 SCR 697.

¹⁹ *R v Keegstra* [1990] 3 SCR 697 para VII D (iii)(a); *Criminal Code* (RSC, 1985, c C-46).

²⁰ *R v Ahenakew* 2006 SKQB 110. The case concerned an individual who expressed allegedly hateful statements to a reporter during an interview.

"conversation" in terms of section 319(2) was interpreted as "a conversation not open to, or intended for, the public". It was held that the number of persons present is irrelevant in determining whether or not a conversation is private.²¹ Similarly, the setting should not be regarded as the determining factor either, as public conversation too can occur in private settings. The obvious reasoning is that a meeting, for instance at a private residence of one of the attendees, may involve the planning and initiation of a process to promote hatred in society, or may be the forum for incitement to disturb the public peace, and should thus not be protected based on its private setting. In *R v Noble*²² and *R v Elms*,²³ the principle was laid down that it is not about "whether the statement is communicated in a setting that is private", but rather whether it is conveyed "other than in private conversation".²⁴

It then follows that the sharing in private, amongst friends or between a husband and wife, of discriminatory feelings of hatred or of feelings of detestation towards others based on their group identity does not fall under section 10. On the other hand, a discussion by a group of people who plan to harass their homosexual neighbours would certainly be the business of society and the state, and would not qualify as a private conversation, even if the meeting is closed and takes place at the private home of one of the attendees.

Lastly, it is noted that even though the term "communicate" encompasses the terms "propagate" and "advocate", the latter two terms have been explicitly included. This may be explained with reference to the aims of the Act²⁵ to give effect to article 4 of the ICERD and section 16(2)(c) of the *Constitution* respectively, which are specifically concerned with racist "propaganda" and the "advocacy" of hatred.

²¹ *R v Ahenakew* 2006 SKQB 17-18. See also *R v Bahr* 2006 ABPC 360 para 30.

²² *R v Noble* 2008 BCSC 215.

²³ *R v Elms* 2006 CanLII 31446 (ON CA).

²⁴ *R v Elms* 2006 CanLII 31446 (ON CA) paras 12-13; *R v Noble* 2008 BCSC 215 para 12-19.

²⁵ In terms of subss 2(b)(v) and 2(h).

3.1.2 "against any person"

The reason why expression under section 10 must be aimed "against" someone is that the prohibition is not concerned with the *bona fide* communication of information or viewpoints, but with expression used as a tool to hurt or harm people directly or indirectly by violating their human dignity, or to incite others to do so. This point will be argued in more detail later.

3.1.3 "(a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred"

Section 10 is concerned with both the hurt suffered by the members of a protected group, and the harm caused by the spreading of hateful views and the instilling of hateful attitudes in respect of certain groups in society.²⁶ Its primary purpose is not to use means such as criminal sanctions to protect society against hateful utterances that incite audiences to harm others. Rather, it firstly aims to enhance empathy and facilitate healing in line with the commitment contained in the preamble to the *Constitution*. It also recognises that inequality may be promoted by different means of expression, some of which may not constitute incitement or may not be as extreme. Langton uses the example where a copy of *Der Stürmer* featuring the "Holy Hate" is deliberately left where a Jewish colleague will find it, to illustrate how propaganda that advocates or incites hatred can be used as an "assault" on an individual based on his or her group membership.²⁷ An example of the potential effect of less extreme discriminatory speech is the effective reinforcement of unfair gender discrimination, such as through the consistent use of patriarchal innuendos disguised as affection.

Milo and colleagues argue that the harms contemplated by the term "hurtful" in particular are open to such wide interpretation that expression in the form of robust opinions on racial issues or gender-insensitive jokes may also be prohibited.²⁸ This concern will be addressed in the discussion of the *bona fide* qualification in the proviso.

²⁶ Moon 2008-2009 *Fla St U L Rev* 79.

²⁷ Langton "Beyond Belief" 77.

²⁸ Milo, Penfold and Stein "Freedom of Expression" 42-87. The decisions of the BCTSA in *Maraïs v Jacaranda* 94.2FM 40/A/2012 (BCTSA), and the CBSC in *SRC re Bye Bye* 08/09-0620/2008 (CBSC) are noteworthy in this regard.

3.1.4 "that could reasonably be construed to demonstrate a clear intention to"

The reasonableness standard is similar to the standard applied in the law of defamation. In this regard, the court in *Delange v Costa*²⁹ stated that the test is objective and requires the conduct concerned

... to be tested against the prevailing norms of society, that is, the current values and thinking of the community.³⁰

The Constitutional Court interprets these norms of society to be informed by the values of the *Constitution*.³¹

In addition, defamation law judgments have shown that the natural and ordinary meaning of words have to be considered. In determining the meaning of words, the court must take into account not only what the words expressly say, but also what they imply.³² Where persons with knowledge of special circumstances attribute an innuendo or secondary defamatory meaning to a publication, such meaning is relevant.³³ In *Afri-Forum v Malema*, for example, the court endorsed the approach taken in defamation law cases and pointed out that words can have different meanings to different people.³⁴

While the above findings in defamation law disputes are relevant in hate speech matters, it is crucial also to consider the different objectives of the respective inquiries. In the case of defamatory speech, the focus is on compensation for actual damage to reputation, specifically in relation to the addressees' interpretation of the speech concerned.³⁵ On the other hand, the issue at stake in section 10(1) is the speaker's intention as reflected by his or her expressive conduct. Therefore, not only does

²⁹ *Delange v Costa* 1989 2 All SA 267 (A).

³⁰ *Delange v Costa* 1989 2 All SA 267 (A) para 16-17.

³¹ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 43.

³² *Sindani v Van Der Merwe* 2002 1 All SA 311 (A) para 11; *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 20E-21B.

³³ *Burchell Personality Rights and Freedom of Expression* 94-95 paras 1-4, 9-17; *Sindani v Van Der Merwe* 2002 1 All SA 311 (A) para 9; *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 3 All SA 511 (SCA) paras 25-26; *Mohamed v Jassiem* 1996 1 SA 673 (A) 702; *Milo Defamation and Freedom of Speech* 18.

³⁴ *Afri-Forum v Malema* 2011 6 SA 240 (EqC) paras 41, 99.

³⁵ *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 3 All SA 511 (SCA) para 98; *Milo Defamation and Freedom of Speech* 35-37, 78; *Van der Walt and Midgley Principles of Delict* 48.

reasonable audience members' interpretation need to be considered, but also the reasonable speaker's.³⁶

The above approach to the understanding of the meaning of words should equally be applied to interpret what the speaker could have reasonably intended to communicate. Silencing *prima facie* discriminatory expression solely because a particular audience may reasonably understand it as demonstrating a certain intention may create a chilling effect, smothering opportunities to expose stereotypes and thereby jeopardising the promotion of equality. The requirement of a "clear" intention points to an element of deference to the speaker, as well as caution not to prohibit seemingly discriminatory expression that may in fact serve to promote rather than jeopardise equality. Significantly, though, the *Constitution* endorses a substantive understanding of the right to human dignity, which also includes the right to be respected by others.³⁷ This entails that every citizen may be expected to display a reasonable level of societal consciousness and empathy as far as the effect of discriminatory expression on others is concerned.

3.2 The proviso

The focus now shifts to a discussion of the terms of the proviso,³⁸ which will show that the proviso ensures that certain forms of expression, or engagement in expression, are indeed permitted.³⁹

3.2.1 "provided that ... is not precluded by this section"

Similar to the relationship between subsections 16(1) and (2) of the *Constitution*,⁴⁰ the proviso serves as an internal modifier of section 10. It explicitly states that the forms of expression it describes fall outside the scope of the prohibition. Those relying on section 10 will therefore have to establish that their claims fall within its ambit,

³⁶ It seems that the court in *Afri-Forum v Malema* 2011 6 SA 240 (EqC) followed the former approach. See paras 93, 103 and 109.

³⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC). See Liebenberg 2005 *SAJHR* 5; Woolman "Dignity" 35-8 - 35-10.

³⁸ The proviso was quoted in the first para of the article.

³⁹ Bronstein 2006 http://da.wwc.co.za/docs/548/Censorshipvictoriabronstein_document.pdf 26.

⁴⁰ Woolman and Botha "Limitations" 34-30.

including, where *prima facie* applicable, that the expression concerned is not excluded by the proviso.

3.2.2 "*in accordance with section 16 of the Constitution*"

According to Bronstein, this section qualifies the phrase "publication of any information, advertisement or notice" only.⁴¹ However, interpreting the phrase as qualifying engagement in every form of expression mentioned in the proviso seems more correct, as the following discussion of the contextual sense and significance of the phrase will show.

The phrase firstly underscores that expression within the ambit of section 16(2) of the *Constitution* falls outside the scope of the proviso. It also supports the approach that a link should be made between the forms of expression mentioned in the proviso and the types of free expression listed in section 16(1).⁴² By expressly listing the relevant categories, it is acknowledged that the protection of these particular freedoms calls for special consideration in the context of both section 16(1) and section 10.⁴³ This interpretation does not require that a specific form of expression stipulated in the proviso should necessarily be related to a specific freedom stipulated in section 16(1). Therefore, while engagement in "fair and accurate reporting in the public interest" obviously concerns "freedom of the press and other media", all the other forms of expression stipulated in the proviso can also function in, and be linked to, the media context. Subject to the *bona fide* qualification and the extent of the freedom guarantee in terms of section 16(1), the proviso thus excludes from section 10 engagement in any form of expression listed in the proviso.

⁴¹ Bronstein 2006 http://da.wwc.co.za/docs/548/Censorshipvictoriabronstein_document.pdf 25. See also Roederer "The Prohibition of Hate Speech, Harassment and Dissemination or Publication of Information that Unfairly Discriminates" 101.

⁴² See Roederer "The Prohibition of Hate Speech, Harassment and Dissemination or Publication of Information that Unfairly Discriminates" 93.

S 16(1) of the *Constitution* reads as follows: "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.

⁴³ Milo, Penfold and Stein "Freedom of Expression" 42-57; Tănăsescu *RJCL* 25-26.

3.2.3 "*bona fide* engagement in"

Black's Law Dictionary defines *bona fide* as "made in good faith, without fraud or deceit, sincere, genuine".⁴⁴ Sealy believes that, in the context of corporate decisions, "in good faith" is more often used in the sense of "honestly, with the best of intentions". In a more objective sense, a *bona fide* act, activity or state of affairs may be described as "genuine". For example, a shareholder's resolution can be described as a *bona fide* expression of corporate opinion if it has not been distorted by some irregularity, such as the manipulation of votes or the bribery, intimidation or improper bias of some of the members.⁴⁵ A decision by a corporate organ is normally disputed only by impugning the integrity or regularity of the decision-making process and not the reasonableness of the result. However, a result may be so unreasonable that it leads the court to infer that it has not been reached through a proper process. In this way, an element of objectivity may be introduced into an inquiry that is determined by subjective considerations.⁴⁶ In view of this, it is suggested that the *bona fide* requirement in the proviso should be interpreted to include a subjective conviction that the expressive act or activity concerned will achieve its intrinsic purpose. The act or activity should also maintain the character of the form of expression used. Both these issues should be objectively assessed in terms of the reasonableness standard described above.

Of course, establishing intention in terms of section 10(1) and determining *bona fide* engagement in terms of the proviso are two sides of the same coin. A finding in terms of section 10(1) that discriminatory expression cannot reasonably be understood as demonstrating the required intention implies that it constitutes *bona fide* engagement in constitutionally protected expression, and *vice versa*.

The *bona fide* condition should be interpreted as qualifying engagement in all the relevant forms of expression. Bronstein agrees, although with the exception of the "publication of any information, advertisement or notice".⁴⁷ In the light of the relation

⁴⁴ Brown *Shorter Oxford English Dictionary* 215; Waite *et al Concise Oxford Thesaurus* 91.

⁴⁵ Sealy 1989 *Mon LR* 269.

⁴⁶ Sealy 1989 *Mon LR* 269.

⁴⁷ Bronstein 2006 http://da.wwc.co.za/docs/548/Censorshipvictoriabronstein_document.pdf 25.

between the proviso and section 16(1) of the *Constitution*, this exception is not supported. The significant effect of the phrase when read as a condition applicable to each of the different forms of expression, particularly the "publication of any information, advertisement or notice", will be illustrated in the following sections.

3.2.4 "*publication of any information, advertisement or notice*"

The term "publication" implies that the proviso does not exclude engagement in private conversation from the ambit of section 10. This complements the view expressed above, namely that section 10 is not concerned with conversation in private. After all, it would be illogical to exclude engagement in the *bona fide* communication of information in public, while prohibiting the very same communication in private.

"Information" is defined as

... knowledge gained or given, facts, news and the communicating or receiving of knowledge⁴⁸

and as

... particulars, facts, figures, statistics, data, knowledge, intelligence, instruction, advice, guidance, direction, counsel, enlightenment and news.⁴⁹

To "inform someone about or of something" means "to give them knowledge or information about it" or "to tell them about it".⁵⁰ "Knowledge" can be defined as including "understanding".⁵¹

A noteworthy observation in this regard is that the right to inform includes the right to "offend, shock or disturb".⁵² Free expression is also generally understood to include the dissemination of incorrect information or of an understanding or view that is based on a misconception. In this regard, the United Nations Human Rights Committee (UNHRC) in *General Comment 34* on the ICCPR reiterates that the ICCPR does not

⁴⁸ Robinson and Davidson *Chambers 21st Century Dictionary*.

⁴⁹ Waite *et al Concise Oxford Thesaurus*.

⁵⁰ Waite *et al Concise Oxford Thesaurus*.

⁵¹ Robinson and Davidson *Chambers 21st Century Dictionary*.

⁵² *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 49. Also see Milo, Penfold and Stein "Freedom of Expression" 42-34.

permit general prohibitions on expression of historical views, nor does it prohibit a person's entitlement to be wrong or to interpret past events incorrectly.⁵³ The German Federal Constitutional Court also held that the protection of opinion extends to

... the subjective attitude and personal judgment of the person expressing himself with regard to the object of the statement [independently] of whether the statement is rational or emotional, well founded or groundless, or regarded by others as useful or harmful, valuable or valueless.

Generally, both the terms "information" and "ideas" are included in other, comparable hate speech formulations.⁵⁴ Therefore, the question arises whether the absence of the latter term in the *Equality Act* proviso affects the meaning of the phrase and, if so, to what extent.

The Chambers 21st Century Dictionary defines an idea as "a thought, image, notion or concept formed by the mind". In order for an idea to become the subject of adjudication, it needs to materialise in some discernible form. A distinction can be made between the manifestation of an idea through the dissemination or communication of information about or inspired by it, and the manifestation of an idea through an onslaught based on group identity. The section 10 prohibition is concerned with the latter. For example, if someone were to express the *bona fide* view that homosexuality is a psychological condition that can and should be cured, the expression would not fall within the ambit of section 10, although, in a specific context and subject to a section 14 analysis, it may conceivably be said to constitute unfair discrimination. In contrast, the expression of hatred, scorn or derision against homosexual people not with the aim of being "primarily informational, but [as an] instrumental means of keeping others down" is not excluded in terms of the proviso.⁵⁵ In this regard, Delgado and Stefancic point out that so-called "demeaning remarks" cannot readily be improved by further communication. Consider for example a racist

⁵³ *ICCPR General Comment 34 - Article 19: Freedoms of Opinion and Expression* (2011) 14.

⁵⁴ See, for example, a 19 of the *Universal Declaration of Human Rights* (1948); a 19 of the *ICCPR*; and a 10(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).

⁵⁵ Delgado and Stefancic 1996 *U Colo L Rev* 104. See also Wright 2000-2001 *Chi-Kent L Rev* 999.

insult. The statement "Nigger, go back to Africa, you don't belong on this campus" conveys little information and invites no meaningful response.⁵⁶

A further example can be found in the matter of *Visser, Thomson and Others v 94.7 Highveld Stereo*,⁵⁷ which was heard by the *Broadcasting Complaints Commission of South Africa* (BCCSA). During a broadcast on Highveld Stereo on 11 April 2012, the presenters had an exchange about the Miss Universe pageant. One of the contestants, a certain Jenna, had been born a man, but became a woman after undergoing gender reassignment surgery. The presenters went on to make the following comments:

About the Miss Universe competition ... now allows transgender ... Jenna was a man is now a woman. Has changed her name. She still has some parts down there. Extra parts girls don't have ... They first were upset and they took her out of the competition and now ... they have decided to let her back in ... Did she have to disclose her extra bits or did someone see them? ... You can't hide that. She hid it in the beginning ... And then she was hey guys guess what? ... She is beautiful ... She looks like a woman. There isn't a committee that checks out everyone's nether regions ... They believe you are a woman. They believe they have already been checked ... She could even win. Balls to the wall. Good luck to "It".⁵⁸

These remarks were undeniably discriminatory and crude, and invaded the core privacy of the target. In addition, these negative effects were enhanced by having been published in the form of a radio broadcast. At least some of the remarks appear to have been primarily aimed at hurting and harming Jenna based on her group identity, rather than offering an opinion on the Miss Universe pageant's approach to transgender contestants. Clearly, the derogatory remarks were not necessary to effectively communicate an opinion in this regard. All these aspects contradict the essential characteristics of *bona fide* comment, opinion or even humour, and lead one to conclude that the intention required in terms of section 10 can be reasonably construed.

⁵⁶ Delgado and Stefancic 1996 *U Colo L Rev* 104-105; *R v Keegstra* [1990] 3 SCR 697 para VI.

⁵⁷ *Visser, Thomson and Others v 94.7 Highveld Stereo* 27/2012 (BCTSA).

⁵⁸ *Visser, Thomson and Others v 94.7 Highveld Stereo* 27/2012 (BCTSA) para 1.

3.2.5 "artistic creativity"

Over the years, numerous attempts have been made to define art. One such definition describes "art speech" as

... the autonomous use of the artist's creative process to make and fashion form, color, symbol, image, movement or other communication of meaning that is made manifest in a tangible medium.⁵⁹

Eberle points out that art does not by nature propagate, constitute incitement, or threaten.⁶⁰ Art depicts the artist's vision, expresses his or her personality, or conveys meaning through creative ideas, forms and images.⁶¹ Art is generally acknowledged as "integral to human culture" and "part of individual and social self-definition".⁶² It frequently addresses themes and issues that are painful to or difficult for society or are ignored through social prejudice or routine.⁶³ It also offers "a fuller conception of the human person" by providing "a portal" to non-rational, non-cognitive, non-discursive dimensions of human life. It functions as a private sphere of freedom within which

... a person can contemplate and muse over elements of the human condition free from the pressures or sanctions of normal social forces.⁶⁴

Humour can be seen as a form of art. As Oring said,

Some jokes are truly beautiful, and those who create them, reshape them, and orally purvey them are often genuine artists.⁶⁵

The essential characteristic of *bona fide* humour is the intention to be funny.⁶⁶

Case law reflects these notions. In the *Street Theater* decision,⁶⁷ the German Federal Constitutional Court concluded that the street performance at issue constituted art

⁵⁹ Farley 2005 *Tul L Rev* 842-845; *The Street Theater decision* BVerfGE 67, 213 1 BvR 816/82 (17 July 1984) para B.1.3(a).

⁶⁰ Eberle 2007-2008 *U Pa J L & Soc Change* 25.

⁶¹ Eberle 2007-2008 *U Pa J L & Soc Change* 7.

⁶² Eberle 2007-2008 *U Pa J L & Soc Change* 13.

⁶³ Milo, Penfold and Stein "Freedom of Expression" 42-52.

⁶⁴ Eberle 2007-2008 *U Pa J L & Soc Change* 6; Salzman 1999 *Harv CR-CL L Rev* 438-439; *Mephisto decision* BVerfGE 30, 173 (24 February 1971) para C. III.5.

⁶⁵ As quoted by Little in Little 2011 *S Cal Interdisc L J* 114 fn 100.

⁶⁶ Little in Little 2011 *S Cal Interdisc L J* 109.

⁶⁷ *Street Theater decision* BVerfGE 67, 213 1 BvR 816/82 (17 July 1984)

based on the presence of creative elements, such as the manner in which it was performed and the inclusion and interpretation of a famous poem. The special form of street theatre also included some distancing from the audience, such as through the use of placards, puppets and costumes. Spectators were therefore aware that they were witnessing a "play". Finally, the message of the performance remained open to various interpretations, despite the organiser's principal and undisputed political intentions.⁶⁸ In this regard, the Supreme Court of Canada in *R v Sharpe*⁶⁹ also held that artistic merit includes any expression that may reasonably be viewed as art, even though an objective party may find it crude or immature.⁷⁰ Numerous factors play a role, including the creator's subjective intention, the form and content of the work, its connections with artistic conventions, traditions or styles, subject experts' opinions and the mode of production, display and distribution, none of which is conclusive on its own.⁷¹

"Artistic creativity" may involve the production, presentation, display or employment of art.⁷² The use of art may affect the interpretation of a communication. However, the involvement of art does not automatically render the expression *bona fide* artistic creativity. This is illustrated by the findings in the *Strauss Caricature* decision. The German Constitutional Court had to consider whether drawings portraying the Bavarian Minister-President Franz Josef Strauss as a pig engaged in sexual activity constituted criminal defamation. The court was satisfied that the drawings represented art in terms of the fundamental right guaranteed by the first sentence of article 5(3) of the *Basic Law*.⁷³ This finding was based on the observation that the drawings were the result of free creative action through which the creator directly displayed his impressions, observations and experiences.⁷⁴ Having acknowledged that the message

⁶⁸ *Street Theater* decision BVerfGE 67, 213 1 BvR 816/82 (17 July 1984 B.1.3(a); Salzman 1999 *Harv CR-CL L Rev* 445-452.

⁶⁹ *R v Sharpe* [2001] 1 SCR 45 para 5.

⁷⁰ *Publications Control Board v Gallo (Africa) Ltd* 1975 3 SA 665 (AD).

⁷¹ *R v Sharpe* [2001] 1 SCR 45 para 61-67.

⁷² Milo, Penfold and Stein "Freedom of Expression" 42-52. See Tănăsescu 2011 *RJCL* 12-21 for an evaluation of the effect of legal documents explicitly protecting artistic freedom as an object of the protection of freedom of expression, and those that do not. Also see the *Mephisto* decision BVerfGE 30, 173 (24 February 1971) para C. III.1.

⁷³ *Strauss Caricature* decision BVerfGE 75, 369 (3 June 1987) para C.I.2.

⁷⁴ *Strauss Caricature* decision BVerfGE 75, 369 (3 June 1987) para C.I.2. Also see *Mutzenbacher*

of the drawings should therefore rather be interpreted as aimed at social commentary and not at humiliating an individual, the court concluded that it was nevertheless clear that the drawings were intended as an assault on the caricatured person's dignity. The aim was to show that he had distinct "bestial" characteristics and behaved accordingly. The court held that this deprived him of his dignity as a human being in a way that could not be justified by artistic freedom, and that

... a legal system that takes the dignity of man as the highest value must disapprove of.⁷⁵

Viewed through the lens of section 10, the argument would be that the "art speech" could reasonably be construed to demonstrate a clear intention to violate human dignity and that the drawings did not constitute *bona fide* engagement in artistic creativity.

A good example in the "hate speech" context is the decision by a major Danish newspaper in 2005 to publish a series of controversial cartoons under the headline "The Face of Mohammed". The publication caused an international outcry, which was soon dubbed the "cartoon wars" or the "cartoon controversy".⁷⁶ An application for an interdict against the publication of the cartoons in the *Sunday Times* and other newspapers was granted in the matter of *Jamiat-Ul-Ulama of Transvaal and Johncom Investment*.⁷⁷ The finding was based on the greater weight attached to human dignity as opposed to the right to freedom of the press. No mention was made of artistic creativity, despite the fact that the cartoonist, Westergaard, defended even the most controversial of the cartoons, the depiction of Mohammed with a bomb-shaped turban, as being an "incendiary but dignified drawing".⁷⁸ Commentators argue that the offending cartoons themselves were not the real issue. Instead, they were being misused by right-wing groups to assert that a Muslim could never be a democrat, as

decision BVerfGE 83, 130 1 BvR 402/87 (27 November 1990) para B.I.(a).

⁷⁵ *Strauss Caricature* decision BVerfGE 75, 369 (3 June 1987) para C.I.4(a).

⁷⁶ The article drew attention to recent incidents in which authors had engaged in self-censorship to avoid provoking Muslims. See Pillay 2010 *SALJ* 464-466.

⁷⁷ *Jamiat-Ul-Ulama of Transvaal and Johncom Investment* 2006 ZAGPHC 12 para 10.

⁷⁸ Keane 2008 *Hum Rts Q* 858.

well as by Islamists and Muslim extremists to further their aims by alleging that they (the cartoons) attacked Islam in order to exacerbate the clash of civilisations.⁷⁹

In contrast, in response to a complaint that the cartoonist Shapiro defamed South African president Jacob Zuma, or violated his right to dignity, the South African Human Rights Commission (SAHRC) held that the cartoonist had engaged in artistic creativity. The cartoon depicted Mr Zuma with his pants undone, apparently preparing to rape a blindfolded "Lady Justice", who was being held down by the secretary-general of the African National Congress (ANC), the ANC Youth League president, the South African Communist Party general secretary and the general secretary of the Congress of South African Trade Unions (COSATU). Lady Justice was wearing a sash displaying the words "Justice System". A speech bubble showed the ANC secretary-general urging Zuma: "Go for it, boss!" The SAHRC reasoned that it was common knowledge that Zuma's allies in the tripartite alliance were calling for a "political solution" to the corruption charges he was facing at the time. The cartoonist acted with "*bona fide* artistic creativity, in the public interest", the SAHRC found, and his cartoon did not discriminate against Zuma, women or rape victims, as some claimed, but was "satirical and metaphorical". In addition, the cartoon was seen as

... a political expression, published in the public interest and, as such, deserved heightened protection.⁸⁰

Recently, the display and eventual removal by the Goodman Art Gallery of a painting titled *The Spear*, depicting Mr Zuma in the posture of Vladimir Lenin on a famous poster, but with his genitals exposed, elicited a heated debate on the constitutionality of the painting and, thus, its display in the gallery.⁸¹ The painting certainly had the essential characteristics of art, and its display in an art gallery constituted artistic creativity. It was generally acknowledged that the artistic nature of the painting had a bearing on the interpretation of the core statement it most probably made. Rather

⁷⁹ Isenson 2006 http://www.dw.de/dw/article/0,,1891671_page_0,00.html; Rosenfeld "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" 280.

⁸⁰ *Manamela, Buti v Shapiro* GP/2008/1037/E (SAHRC) 2008 para 5.

⁸¹ See Barnard-Naudé and De Vos 2012 *LitNet Akademies* 176-201.

than being aimed at the personal humiliation of Zuma, it commented on Zuma's conduct and views as a political leader.

A final example in this regard is the matter of *Afri-Forum v Malema*, where it was argued on the ANC's behalf that

... [s]ong is a form of verbal art which people use both for emotional release and also for manipulation of others.⁸²

While this may be true, engagement in the singing of a song does not necessarily constitute *bona fide* artistic creativity. Considering the extreme lyrics of the song in question, "Kill the Farmer, Kill the Boer", combined with the fact that those who engaged in singing it knew that many members of the audience did not have the frame of reference to perceive it as a freedom song, the primary objective was clearly to spread and promote a message of hatred rather than to serve any of the typical aims of art.

3.2.6 "academic and scientific inquiry"

Freedom of expression is a "key component" of the individual's right to conduct and publish research and to disseminate knowledge through teaching without government interference.⁸³ Research has been described as "a serious and systematic attempt in terms of content and form to find the truth" and includes all research-related activities, such as the dissemination of results through publication.⁸⁴

(A)cademic freedom unlocks our intellectual potential to serve humanity with ever-increasing understanding and skill. Academics are thus in the service of society and may be held accountable by society.⁸⁵

Examples of discriminatory academic views on historical events that have been categorically restricted include the so-called Holocaust denial and expression of support for Nazi ideology based on a combination of scientific ideas. These ideas include Darwinism, which contends that to survive, a superior race must not only

⁸² *Afri-Forum v Malema* 2011 6 SA 240 (EqC) para 54.

⁸³ Currie and de Waal *Bill of Rights Handbook* 370.

⁸⁴ Alston and Malherbe 2009 *TSAR* 105.

⁸⁵ Alston and Malherbe 2009 *TSAR* 104.

separate itself from lesser ones, but also continue to suppress and dominate those who threaten to overtake it.⁸⁶

Context plays an important part in establishing the boundaries of acceptable and non-acceptable academic expression. Alston and Malherbe point out that an educational environment that confines educators, for example by prescribing single textbooks and requiring syllabus conformity that excludes contentious issues, not only prevents teachers from sharing their views or introducing controversial subjects, but also, and equally, denies learners the opportunity to fulfil their potential in a world of diverse ideas.⁸⁷ Braun, on the other hand, highlights that the right not to listen is a corollary of the right to speak. This choice is denied a

... captive audience of schoolchildren who could either listen and "learn" or suffer the consequences.⁸⁸

Where hate speech is concerned, these contextual aspects are relevant in the reasonableness assessment to determine the speaker's intention. The publication in an academic journal of a scientific article that argues that females are genetically less intelligent than males would *prima facie* constitute *bona fide* engagement in academic and scientific inquiry. However, this may not be the case when the article contains sexist remarks that are not essential in substantiating the contention. The presentation of the article to a class of schoolgirls, without also presenting other perspectives, may also be found to be aimed at the reinforcement of stereotypes that humiliate women, rather than to constitute *bona fide* engagement in scientific inquiry.⁸⁹

⁸⁶ Meinecke *Nazi Ideology and the Holocaust* 11-13.

⁸⁷ Alston and Malherbe 2009 *TSAR* 111-112.

⁸⁸ Braun *Democracy off Balance* 27.

⁸⁹ In this regard, it is noteworthy that two of the leading "hate speech" cases in Canada, *R v Keegstra* [1990] 3 SCR 697 and *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 873-874, involved teachers. In *Ross*, the court noted that "young children are especially vulnerable to the messages conveyed by their teachers ... [since] they are unlikely to distinguish between falsehood and truth and more likely to accept derogatory views espoused by a teacher". See Moon 2008-2009 *Fla St U L Rev* 88-91.

3.2.7 "fair and accurate reporting in the public interest"

The phrase "fair and accurate reporting⁹⁰ in the public interest" is reminiscent of the American common law privilege known as the "fair report" or "record" privilege. This privilege initially applied to reports of proceedings within its ambit, provided that the report constituted an (a) accurate and complete or a fair abridgment of such proceedings, and (b) was not made solely to cause harm to the person defamed.⁹¹ Section 611 of the *Second Restatement of Torts* removed the latter requirement. The privilege applies

... even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false.⁹²

One could lose the privilege through a

... showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgment.⁹³

The purpose of the "fair and accurate reporting" privilege is to ensure that the public interest is served by the dissemination of information about events occurring at official proceedings and public meetings.⁹⁴

In *National Media Limited v Bogoshi*, the Supreme Court of Appeal described "matters of public interest to the community" as "matters relating to the public life of the community and those who take part in it ... but excluding matters which are personal and private, such that there is no public interest in their disclosure".⁹⁵ The matter of *Jersild v Denmark*⁹⁶ in the European Court of Human Rights (ECHR) illustrates the application of these principles with respect to hate speech. The case dealt with the

⁹⁰ Robinson and Davidson *Chambers 21st Century Dictionary* defines "report" as "to bring back (information, etc.) as an answer, news or account; to give a formal or official account or description of (findings, information, etc.), especially after an investigation; to give an account of (some matter of news, etc.), especially for a newspaper, or TV or radio broadcast; to act as a newspaper, TV or radio reporter; to make a complaint about someone, especially to a person in authority; to take down or record the details of a legal case, proceedings, etc".

⁹¹ Cox and Callaghan 2002-2003 *Creighton L Rev* 21-46.

⁹² Cox and Callaghan 2002-2003 *Creighton L Rev* 35-36.

⁹³ Cox and Callaghan 2002-2003 *Creighton L Rev* 35.

⁹⁴ Cox and Callaghan 2002-2003 *Creighton L Rev* 37.

⁹⁵ *National Media Limited v Bogoshi* 1998 4 SA 1196 (SCA) 24.

⁹⁶ *Jersild v Denmark* 15890/89 (1993) (ECHR).

conviction in terms of Danish hate speech legislation of a Danish journalist who had interviewed several members of an extremist youth group, the Greenjackets, on a news programme. In the course of the interview, the Greenjackets made extreme racist remarks and were subsequently also convicted. The court confirmed that there could be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy protection under article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁹⁷ However, the conviction of the journalist was found to be in violation of article 10. The court held as follows:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁹⁸

The related term "fair comment" has been purposively interpreted in the media context.⁹⁹ In *The Citizen 1978 (Pty) Ltd v McBride*,¹⁰⁰ the Constitutional Court stated that the defence of protected or "fair" comment required, at the outset, that the facts be "truly stated". A commentator is not protected if he or she "chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact before the reader".¹⁰¹ The comment or criticism will be protected "even if extreme, unjust, unbalanced, exaggerated and prejudiced". However, it has to relate to a matter of public interest and must express an honestly held opinion without malice.¹⁰² In the context of the *Equality Act* proviso, non-compliance with these conditions will render the comment not *bona fide*.

⁹⁷ A 10(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) protects freedom of expression in the following terms: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

⁹⁸ *Jersild v Denmark* 15890/89 (1993) (ECHR) para 35.

⁹⁹ See for example clauses 35 and 12 respectively of the previous and new broadcasting codes of the BCCSA 2009 and 2011 http://www.bccsa.co.za/index.php?option=com_content&view=article&id=915.

¹⁰⁰ *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC).

¹⁰¹ *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 88; *Khumalo v Holomisa* 2002 5 SA 401 (CC) 401 para 24.

¹⁰² *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 83; *Delta Motor Corporation (Pty) Ltd v Van Der Merwe* 2004 4 All SA 365 (SCA) para 84.

At this point, it has to be reiterated that while the inclusion of this phrase explicitly correlates with the guarantee of media freedom in terms of section 16(1)(a) of the *Constitution*, other forms of expression under the proviso may be similarly related. This approach addresses Bronstein's concern that the proviso may be interpreted to give narrow protection to the press.¹⁰³

The Constitutional Court highlighted the special challenges in relation to the media in *Khumalo v Holomisa*. The court described the media as "primary agents" of the dissemination of information and ideas¹⁰⁴ and, as such, "extremely powerful institutions in a democracy" with a "constitutional duty to act with vigour, courage, integrity and responsibility".¹⁰⁵ These attributes will have to be considered in all instances where engagement in a form of expression mentioned in the proviso occurs in the media context.

4 Does section 10 strictly accomplish its essential aims?

The potential risk that a categorical prohibition of discriminatory expression, in this instance section 10, may jeopardise the promotion of equality by preventing the exposure of stereotypes and their condemnation by means of response¹⁰⁶ warrants consideration. While the general prohibition of unfair discrimination in terms of the *Equality Act* meets the challenge of not prohibiting fair discrimination by requiring a case-by-case contextual fairness analysis, section 10 has to achieve this in terms of its definitional scope. In order to determine whether this is indeed achieved, the provision as interpreted above will now be subjected to a fairness analysis against the constitutional fairness standard.¹⁰⁷

Such an analysis requires a balancing of the potential effect of the prohibited expression on equality, and the impact of the prohibition on other constitutional rights,

¹⁰³ Bronstein 2006 http://da.wwc.co.za/docs/548/Censorshipvictoriabronstein_document.pdf 24.

¹⁰⁴ *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 22. See also *Print Media South Africa v Minister of Home Affairs* 2011 ZAGPJHC 149 para 40; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 5 SA 540 (SCA) para 22.

¹⁰⁵ *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 24.

¹⁰⁶ See *R v Keegstra* [1990] 3 SCR 697 para VII C. (i).

¹⁰⁷ The approach that unfair discrimination cannot be justified in terms of the *Constitution* is followed. See Pretorius 2010 *SAJHR* 552-553.

particularly the right to freedom of expression. Different levels of speech value require different standards of protection of the right to freedom of expression.¹⁰⁸ The South African Constitutional Court endorsed this idea in *De Reuck v Director of Public Prosecutions* when it concluded that the expression at issue was

... expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of the freedom of expression in many democratic societies.¹⁰⁹

The interests and values that are generally acknowledged to underpin the protection of the right to freedom of expression are the discovery of truth and the advancement of knowledge,¹¹⁰ the establishment and maintenance of "representative democracy",¹¹¹ and human dignity in the sense of personal autonomy in the pursuance of self-fulfilment and development.¹¹² If, when assessed against these values and interests, the value of the expression covered in terms of section 10 is categorically low, the risk that its prohibition will unduly violate the right to freedom of expression will be substantially less.

However, such an assessment has to take into account the tension inherent in the respective values and interests involved. For example, freedom of expression may be crucial for knowledge, but may in certain circumstances also jeopardise truth and

¹⁰⁸ *RAV v City of St Paul* 505 US 377 (1992) 386; Wright 2000-2001 *Chi-Kent L Rev* 998-999, 1008; *Miller v California* 413 US 15 (1973) 24, 31; Sullivan and Gunther *Constitutional Law* 1076-1081.

¹⁰⁹ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 59. Also see *R v Keegstra* [1990] 3 SCR 697 para VII D (i); *Auschwitz Lie* decision BVerfGE 90 (13 April 1994) para II 1; *Soldiers Are Murderers* decision BVerfGE 93, 266 (10 October 1995) para III 1-2; *Wunsiedel* decision BVerfG 1, BvR 2150/08 (4 November 2009) para 71-79; Payandeh 2010 *German L J* 929-942; Kommers and Miller *Constitutional Jurisprudence* 493-497.

¹¹⁰ Van Wyk *et al Rights and Constitutionalism* 267-268; Chemerinsky *Constitutional Law Principles* 955; Mill *On Liberty* 10, 1; Dworkin *Freedom's Law* 200; Ducat *Constitutional Interpretation* 775; Sullivan and Gunther *Constitutional Law* 959-960; Milo *Defamation and Freedom of Speech* 56; Hogg *Constitutional Law of Canada* 272.

¹¹¹ See the discussion of the concept "representative democracy" by Roux "Democracy" 10-11. Also see *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 21; *National Media Limited v Bogoshi* 1998 4 SA 1196 (SCA) para 24, 42; *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) para 7; *S v Mamabolo* 2001 3 SA 409 (CC) para 37; and *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) paras 25-30.

¹¹² Milo *Defamation and Freedom of Speech* 55-79; Hogg *Constitutional Law of Canada* 272-273. Milo, Penfold and Stein "Freedom of Expression" 42-14 - 42-30; Burchell *Personality Rights and Freedom of Expression* 1-4, 9-17; Devenish *Commentary* 189-190; Neisser *SAJHR* 344-345; Van Wyk *et al Rights and Constitutionalism* 269.

knowledge.¹¹³ Freedom of expression may be essential for the maintenance of democracy, but may also be instrumental in destroying it.¹¹⁴ Freedom of expression may facilitate autonomy and the development of the personality, but may at the same time break down these attributes to the extent that it jeopardises freedom and equality. Of considerable importance with respect to the value of human dignity is the fact that the South African *Constitution* endorses a substantive concept of human dignity, also including respect for and the self-esteem of others. In the words of Sachs J,

The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons.¹¹⁵

Alexy's "second law of balancing" may also prove useful in the analysis.¹¹⁶ This law, as interpreted by Bilchitz, requires only relatively conclusive evidence to be accepted as the basis for limiting a constitutional right.¹¹⁷ Therefore, if it is not clear that discriminatory expression does or will violate the right to equality, the right to freedom of expression should not be categorically limited to protect it. Using the terminology of the ICCPR, it should be "necessary" to limit the right to freedom of expression in order to protect the right to equality. It follows that any categorical prohibition of "hate speech" should cover a narrow ambit where such necessity can be substantiated.

In this respect, the following must be taken into account:

The preamble to the *Constitution* contains a positive commitment to "(h)eal the divisions of the past". This perspective on equality requires a societal awareness of and an enhanced level of empathy with respect to hurt and suffering relating to group identity.¹¹⁸

¹¹³ Chemerinsky *Constitutional Law Principles* 956; Burchell *Personality Rights and Freedom of Expression* 10-11; Milo, Penfold and Stein "Freedom of Expression" 42-18 - 42-21; Sullivan and Gunther *Constitutional Law* 960; Weinberg *California Law Review* 1141-1164; Weinrib 2009 *U Toronto Fac L Rev* 175-176; *Virginia v Black* 538 US 343 (2003) 388, 392; Kupenda and Paige 2009 *T Marshall L Rev* 70.

¹¹⁴ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) para 31; Roux "Democracy" 10-36; Rosenfeld 2002-2003 *Cardozo L Rev* 1549; Krotoszynski 2004 *Tul L Rev* 1590. Brugger 2003 *German Law Journal* 5.

¹¹⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 126.

¹¹⁶ Bilchitz 2010 *SA Public Law* 433.

¹¹⁷ Bilchitz 2010 *SA Public Law* 433.

¹¹⁸ *Afri-Forum v Malema* 2011 6 SA 240 (EqC) para 94.

The recommended interpretation of section 10 entails that it cover a narrow ambit of discriminatory expression that can reasonably be construed as clearly aimed at causing hurt or harm based on group characteristics. Explicitly excluded from this ambit is *bona fide* engagement in the constitutionally protected forms of expression stipulated in terms of section 16(1) of the *Constitution*.

Obviously, the forms of expression contemplated in section 10 may deepen the feelings of inferiority and disempowerment experienced by groups and group members who have been, or still are, humiliated and disempowered by systemic discrimination on any of the relevant grounds. This type of expression may also create new stereotypes that intimidate and marginalise based on historical guilt and "rekindle the divisions of the past".¹¹⁹ The failure to prohibit it may send out an unfortunate message, namely that the legislature and society do not regard vulnerable groups' dignity as imperative. As a result, people may experience disrespect, inferiority, frustration and marginalisation and may consequently be deprived of the opportunities to gain knowledge, participate in the democratic process, develop their personalities and be truly free and equal.¹²⁰

On the other hand, there is no significant potential risk that section 10 might eliminate opportunities to expose stereotypes by means of response. It does not prevent speakers from using legitimate forms of expression to bring to light the very views and ideas that underlie the desire to utter or display the hateful remarks section 10 prohibits. As a matter of fact, those who feel so strongly about an issue that they experience emotions of hatred and a desire to humiliate those they hate, or to provoke such hatred in others, will probably use all the legitimate means at their disposal to disseminate these views. The fact is that the respectful presentation of these views is much more likely to elicit meaningful response than the expression contemplated by section 10. It should be noted that *bona fide* engagement in expression under the proviso may include expression that incidentally hurts or harms, based on group characteristics. In addition, the risk that the condemnation of the expression may

¹¹⁹ Rautenbach 2007 *TSAR* 551-560.

¹²⁰ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

enhance hatred and frustration is minimised by the exclusion of private conversation and by the provision of appropriate measures and orders in terms of the Act, to facilitate reconciliation and empathy.¹²¹

It is therefore concluded that section 10 covers a narrowly defined ambit of low-value expression that unfairly promotes inequality in society. It follows that the hate speech prohibition gives effect to the obligation in terms of sections 9(3) and (4) of the *Constitution*.

5 Justification of the limitation of the right to freedom of expression

In the light of the conclusion above,¹²² all that remains is to consider the means employed to enforce compliance with the prohibition. As lenient restorative remedies are provided for, the prohibition of the expression contemplated by section 10 is clearly justifiable in terms of section 36 of the *Constitution*.

6 Conclusion

This analysis has shown that the prohibition found in section 10 of the *Equality Act* is not restricted to words, but includes other forms of expression also. It does not apply to private conversations. In the reasonableness assessment to determine whether discriminatory expression could be understood as demonstrating the required clear intention, the reasonable meaning of the expressed content to members of the audience as well as to the speaker should be considered. The same objective reasonableness assessment applies to the determination of the *bona fides* provided for in the proviso. The condition of *bona fide* engagement applies to all the forms of expression listed in the proviso, which in turn relate to the freedoms mentioned in section 16(1) of the *Constitution*. These observations lead one to conclude 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. *Bona fide* expression in accordance with the essential characteristics of the freedoms

¹²¹ Sections 21(2) and (3) of the *Equality Act*.

¹²² See Pretorius 2010 *SAJHR* 552-553.

of expression listed in section 16(1) of the *Constitution* does not constitute the intention required by the prohibition.

Ultimately, it is suggested that section 10(1) prohibits discriminatory expression that will manifestly obstruct the constitutional quest to heal 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*.

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LIST OF ABBREVIATIONS

ANC	African National Congress
BCCSA	Broadcasting Complaints Commission of South Africa
BCTSA	Broadcasting Complaints Tribunal of South Africa
Cardozo L Rev	Cardozo Law Review
CBSC	Canadian Broadcast Standards Council
Chi-Kent L Rev	Chicago-Kent Law Review
COSATU	Congress of South African Trade Unions
Creighton L Rev	Creighton Law Review
ECHR	European Court of Human Rights
Fla St U L Rev	Florida State University Law Review
German L J	German Law Journal
Harv CR-CL L Rev	Harvard Civil Rights-Civil Liberties Law Review

Hum Rts Q	Human Rights Quarterly
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
Mon LR	Monash University Law Review
RJCL	Romanian Journal of Comparative Law
S Cal Interdisc L J	Southern California Interdisciplinary Law Journal
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
T Marshall L Rev	Thurgood Marshall Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
Tul L Rev	Tulane Law Review
U Colo L Rev	University of Colorado Law Review
U Pa J L & Soc Change	University of Pennsylvania Journal of Law and Social Change
U Toronto Fac L Rev	University of Toronto Faculty of Law Review
UNHRC	United Nations Human Rights Committee
UDHR	Universal Declaration of Human Rights