FREEDOM OF EXPRESSION AND 
DEFAMATION OF RELIGION: 
MOHAMMEDI V SABC3

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I INTRODUCTION

Since its onset, the idea of defamation of religion in international law has been wrapped in controversy. Mohammedi v SABC3 is one of the first cases in South Africa to deal with the issue of defamation of religion, resulting in Islamophobia and its possible influences on the right to freedom of expression. Although this case has been heard by a tribunal (Broadcasting Complaints Commission of South Africa, BCCSA) and does not amount to jurisprudence from the Constitutional Court or Supreme Court of Appeal, it serves as one of the first South African cases to address the difficult issue of defamation of religion and the right to freedom of expression.

In this note, I analyse and consider the decision of the tribunal in Mohammedi. This is set against a background where I explore the origins and concept of defamation of religion as developed in international law instruments. Included in this discussion is the scope of expression allowed in international law as well as the permissible restrictions that are placed on freedom of expression. The possibility that defamation of religion, as used in the case of Mohammedi, can fall within these restrictions to freedom of expression is investigated. The boundaries of defamation of religion within the South African context are then considered. Finally, the case of Mohammedi is compared to the cases of Van der Merwe v Radio Rossetad and Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd. These cases provide for instances where harmful speech concerning religion does amount to hate speech. In light of these cases, the differences between a legitimate concern relating to hate speech and the broadly defined notion of defamation of religion are discussed. I shall argue that the BCCSA correctly decided that the overly-broad concept of defamation

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1 Unreported decision of the BCCSA, case no 45/2013 (Mohammedi).
2 The term could reasonably be applied to any setting in which people hate Muslims or fear Islam. The word is most frequently used when describing a sentiment that flourishes in contemporary Europe and North America. A Shryock (ed) Islamophobia (2010) 2.
3 Unreported decision of the BCCSA, case no 04/2014 (Van der Merwe).
4 Unreported decision of the South Gauteng Local Division, case no 1127/2006 (Jamiat-Ul-Ulama).
of religion does not fall within the ambit of one of the legitimate restrictions
to freedom of expression, both within South African and international law.

II  **MOHAMMEDI v SABC3: FACTS AND FINDING**

The complainant (Mohammedi) complained about the use of the term
‘Islamist militants’ in a news item on SABC3. SABC3 apologised for the
error and admitted that it had no justification for using such a term. The
complainant was not satisfied with this apology since, in his opinion, there
can ‘never, in any circumstance, be a justification for combining the term
Islam with the idea of militancy’. The complaint issued by Mohammedi
indicated that Islam should not be placed on trial for the actions of a few
and that media outlets should be accurate and fair. It was argued that the
names of groups associated with militant activity should be used, for example
‘Al-Qaeda militants’. The use of the phrase ‘Islamist militants’ is a way of
branding Islam as a militant religion. The complainant further indicated
that the term ‘Islamist militants’ had become the norm within news media
outlets and was offensive as it portrayed Islam as an especially militant faith,
whilst all religions have militant factions that use religion as a means to try to
justify an extremist political cause. The imposition of a blanket ban on the
mentioned terminology was asked for since Mohammedi indicated that ‘[t]he
media purposefully engages in defamation of Islam by labelling Islam as a
militant religion to incite hatred, fear and cause Islamophobia’. Mohammedi
also stated that: ‘We want a blanket ban on religious connotations being made ...
...’. The media does not say ‘Buddhists are terrorists for killing hundreds
of thousands of Muslims in Burma’ or ‘[a]nother Muslim murdered due
to Islamophobic violence in Schauderville Port Elizabeth ...’. It was then
argued that ‘it is not the fault of religion but rather that religion is where
militants find solace and use or misuse religious texts to justify their actions.
This is relevant to all religions’.

The BCCSA responded that the complainant’s concern about the
generalisation of any religion when terrorism is involved is fully understood.
The SABC also indicated that it did not subscribe to such a view and instructed
all staff to refrain from referring to the religion of militants in any action if
it is not justified. However, the BCCSA stated that the pre-control of any
words would amount to censorship, which would go against the basic precepts

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5  *Mohammedi* (note 1 above) para 1.
6  Ibid.
7  Ibid para 2.
8  Ibid.
9  Ibid para 2.
10 The quotation by the complainant may be unclear but amounts to the argument that there should
be a blanket ban on religious connotations being made to terrorist groups.
11 *Mohammedi* (note 1 above) para 2.
12 Ibid.
13 Ibid.
14 Ibid para 3.1.
15 Ibid para 3.2.
of our democracy. The Constitutional Court has also recently confirmed this in Print Media South Africa v Minister of Home Affairs. The BCCSA acknowledged that freedom of expression was the product of an arduous and centuries-old struggle against the tyranny of the state and indeed certain elements of, for example, Christianity. Both church and state have committed deeds against dissidents in the name of censorship. The history of religion also suggests that violence has, at times, been used to enforce compliance with perceived religious precepts. Based on these arguments, the BCCSA stated that the correct approach in law would be for the factual context to be all-important in deciding whether or not certain words might be included in a broadcast – one could not simply impose a blanket prohibition on the use of certain words. ‘If the factual context justifies a combination of the name of a religion and a term denoting violence, such a combination may be used.’ Each case should be decided on its own merits, as words have different meanings in different contexts.

The Tribunal further stated that:

If the SABC or another broadcaster is able to show convincingly that criminal acts have been linked to members of a certain religion, and that the deeds were committed in the name of that religion – albeit under a misconceived notion of that religion – it would be permissible to broadcast a phrase that makes such a link. Care should, however, be taken not to generalise, and if there is any doubt, a broadcaster should refrain from phrases where words are glibly combined in such a way. The mere fact that the persons concerned might be adherents of Islam or members of the Christian faith is of course irrelevant. It is only when the persons concerned have been clearly shown to have committed certain militant acts in the name of a religion, that it is permissible to add a reference to religion.

The BCCSA decided not to impose a blanket ban on the use of the phrase ‘Islamist militants’. The Tribunal stated that it would be unwise and in conflict with the current emphasis on context to categorically ban the use of certain words.

As this is one of the first cases in South Africa where the controversial argument relating to defamation of religion has been raised, the concept deserves further attention and analysis.

16 Ibid para 5.
17 2012 (6) SA 443 (CC) (Print Media).
18 Ibid para 5.
19 Ibid para 6.
21 Mohammedi (note 1 above) para 9.
22 Ibid.
23 Ibid para 1.
24 Ibid para 9.
III  Defamation of Religion and Freedom of Expression in International Law

From 1999 to 2005, the United Nations Commission on Human Rights (UNCHR) adopted resolutions on the combating of ‘defamation of religion’. Its successor, the Human Rights Council (HRC), continued this practice from 2007. These resolutions have also been successfully advanced in the General Assembly at the beginning of 2005 and mainly presented before these United Nations bodies by the Organisation of Islamic Cooperation (OIC). The resolutions make broad reference to defamation, negative stereotyping, intolerance, xenophobia, ethnic and religious profiling of Muslim minorities, economic and social exclusion and several other concepts – mostly within the context of Islam. Rather than defining defamation of religion, broad phrases are used. Resolution 16/18 is the first resolution that does not contain the concept ‘defamation of religion’ but still presents broad and sweeping statements. This is clear from the title of the resolution.

Although resolutions by the General Assembly are mainly non-binding and rather viewed as recommendations, many are concerned about the one-sided focus on defamation of Islam, as well as the overall tenor of these resolutions: the protection of religion against defamation in terms of international law, rather than the individual’s right to religious freedom. Another concern is the broad and sweeping statements and undefined terminology used in these resolutions, giving rise to misgivings that they advocate a blanket restriction on certain forms of expression without taking into account the scope of the right to freedom of expression in international law. On the other hand, the definition and implications of defamation of religion as provided by Julian Rivers should also not be ignored. Rivers describes defamation of religion as a social and cultural phenomenon which does not in itself amount to a violation...
of human rights, but which provides a fertile context in which such violations may occur.  
It is therefore important to investigate the scope and permissible restrictions on the right to freedom of expression in international law to enable a determination to be made as to whether defamation of religion can be a justifiable ground to limit this right.

(a) Defamation of religion and articles 19 and 20 of the ICCPR

Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) provides for certain restrictions to the right to freedom of expression. They include restrictions necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (l'ordre public), or of public health or morals. Article 20 prohibits ‘hate speech’ by stating:

1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 19 of the Universal Declaration of Human Rights in turn states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The right to freedom of expression is also guaranteed in the European Convention on Human Rights (ECHR) (art 10); the American Convention on Human Rights (ACHR) (art 9); and the African Charter on Human and Peoples’ Rights (ACHPR) (art 13). These are largely similar to those in the ICCPR.

The question remains whether defamation of religion can be justified as a restriction falling within the scope of the sections that provide for freedom of expression and opinion in international law. Does defamation of religion amount to the disrespect of the rights and reputations of others, a threat to the protection of national security, public order, public health or morals under art 19(3)? Is defamation of religion propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence? Can defamation of religion be classified as ‘hate speech’?

35 ICCPR art 20.
36 Adopted by the GA on 10 December 1948.
37 Adopted 4 November 1950, entered into force 3 September 1953.
Assessing the permissible restrictions on freedom of expression is an extremely complex matter because freedom of expression is multifaceted and it protects numerous interests which can occur in contexts which are limitless. The restrictions on art 19 of the ICCPR apply to information and ideas of any kind. As stated by the UN Human Rights Committee, this includes any information or ideas which may be communicated. Protected expression includes factually incorrect statements, opinions without merit, and even offensive statements. The fact that the concept ‘Islamist militants’ was incorrect or even offensive alone, cannot provide a reason to restrict such speech under art 19. Context has also been determined to be very important. Several factors such as the manner of dissemination, as well as the form of the expression, have often been taken into account by international courts when assessing the context in which the legitimacy of a restriction is assessed. Screaming a statement to an angry crowd, for instance, is not the same as reciting it in a poem.

International law provides a general three-part test in order to determine if a restriction on freedom of expression is permissible.

(i) Part one of the three-part test
The first part of the test states that the restriction must be provided for by law that is accessible. This law cannot be undefined and totally discretionary. It must be ascertainable and understandable. Restrictions on the right to freedom of expression must be articulated with sufficient precision and also be accessible to the public.

What is reasonably foreseeable is determined by the context of the case. Principle 1.1 of the Johannesburg Principles on National Security, Freedom

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41 Ibid.
42 Ballantyne and Davidson v Canada communication no 359/1989; and McIntyre v Canada communication no 385/1989 (31 March 1993) para 11.3.
43 Mendel (note 40 above).
44 Ibid.
45 Article 19 of the Camden Principles on Freedom of Expression and Equality (Camden Principles) confirms this test by providing for several grounds upon which expression can be limited. Principle 11 states that restrictions should be provided by law, protect the rights or reputations of others, national security or public order, or public health or morals, and be necessary in a democratic society to protect these interests. Principle 11 further states that such restrictions must (i) be clearly and narrowly defined; (ii) respond to a pressing social need; (iii) be the least intrusive measure available; and (iv) should not be over-broad and disproportionate. Camden Principles on Freedom of Expression and Equality, art 19: Global campaign for free expression (2009) <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>. This test is also confirmed in General Comment 34, art 19: freedoms of opinion and expression, UN Human Rights Committee, UN doc CCPR/C/GC/34 (2011) para 22.
47 General Comment 34 (note 45 above) para 25.
48 Mendel (note 40 above).
of Expression and Access to Information also states that any restriction on the right to freedom of expression must be prescribed by law that is accessible, unambiguous and drawn narrowly and with precision. The individual should be able to foresee whether a particular action is unlawful.

If we turn to the context of this note, one of the main concerns of the resolutions concerning defamation of religion is the fact that the concept is undefined – and hence difficult to ascertain and not accessible. The resolutions concerning defamation of religion and res 16/18 are so broad and open to subjective interpretation that they do not make it clear to the individual as to when his/her expression will be contrary to the resolutions – it is not ‘drawn narrowly and with precision’. Also, and as described by the author in another article, the threshold of the limitations to freedom of expression, as mentioned above, is very high, supporting the notion that these limitations should be narrowly and clearly defined for them to be the ‘least intrusive means’ of limiting expression.

(ii) Part two of the three-part test

The second part of the test for restrictions on freedom of expression is that restrictions must protect a legitimate and overriding interest. In determining legitimate aim, both the purpose and the effect of the expression should be taken into account. For a restriction to be upheld, such restriction must be to achieve an aim that is listed in art 19(3). The restriction must also be exclusively, not just tangentially, directed towards the legitimate aim. Justification of the restriction also requires more than the general goal of protection from harm. The purpose must be specific, pressing and substantial.

50 For example, res 62/154 mentions its concern with the ‘intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities’ without qualifying or identifying this ‘campaign’ as causing insult to Islam. GA res 62/154, UN doc A/RES/62/154 (2008).
54 See for example, The Sunday Times v United Kingdom (26 April 1979) application no 6538/74 (European Court of Human Rights).
55 Mendel (note 40 above).
In the case of *Mohammedi*, the purpose of the expression was not exclusively directed towards disrespect of the reputation of others as indicated in art 19(3) (this is also discussed in more detail below). The effect of the expression was likely to be minimal in that no violence or danger occurred. The general concept of defamation of religion, as described in the resolutions, also refers to a general and broadly-framed goal of protection from harm which can, but need not necessarily, include the restrictions in art 19(3). The broadly-framed principles included in defamation of religion resolutions will be dependent upon the subjective determination of the interpreter as there is no specific purpose identified other than the general prohibition from harm.

(iii) Part three of the three-part test

The restrictions on freedom of expression must be ‘necessary’ to protect the interest identified under the second part of the test.\(^\text{56}\) A high standard has to be overcome to legitimise the restriction. International courts often assess whether or not there is a pressing or ‘substantial need’ for the restriction.\(^\text{57}\) According to David Bilchitz, the proportionality enquiry in the end seeks to evaluate the benefits of the infringing measure against the harms caused by the violation of the fundamental right.\(^\text{58}\)

In the case of defamation of religion, I argue that there is no pressing or substantial need to introduce the notion of defamation of religion to limit freedom of expression. This is because of the fact that narrowly-defined instances of hate speech (in art 20 discussed below) based on religion are already provided for as well as areas of restriction under art 19(3).

The measures to protect the right must be rationally connected to the objective of protecting the interest, ‘in the sense that they are carefully designed so as to be the least intrusive measures which would effectively protect it’.\(^\text{59}\) This is important in order to minimise the chilling effect on freedom of expression.\(^\text{60}\) The sole purpose of the restriction has to be in order to protect individuals holding specific beliefs or opinions, rather than to

\(^{56}\) *Handyside v United Kingdom*, application no 5493/72, paras 48–50; *Sunday Times* (note 54 above) 62.

\(^{57}\) *Sunday Times* (ibid) 62.

\(^{58}\) For an in-depth discussion of the proportionality test, see D Bilchitz ‘Necessity and Proportionality: Towards a Balanced Approach?’ in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) chapter 3. According to Bilchitz, the first part of the proportionality test involves considering the purpose of the measure is used to limit the right. Second, the measure limiting the right must be rationally connected to the purpose – it must be suitable. The method used must limit the right as little as possible and the limiting measure must be proportional to the violation caused. This is also called the ‘necessity’ part. Ibid.

\(^{59}\) Mendel (note 40 above).

\(^{60}\) General Comment 34 (note 45 above) para 47 states that ‘[d]efamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression’.
protect belief systems from criticism – such as is required by defamation of religion. Because defamation of religion is so broadly described, it will result in intrusive and substantial limitations on the freedom of expression while there are less intrusive and narrowly-defined hate speech provisions already available in art 20 of the ICCPR. General Comment 34 clearly states that restrictions must not be over-broad.

Restrictions must meet a proportionality test, where the benefit in terms of protecting the interest must not be disproportionate to the harm caused to freedom of expression. Otherwise, the restriction cannot be justified as being in the overall public interest. A blanket ban on specific words could, in my view, cause more harm than any benefit since this will amount to censorship and the ban of such expressions in instances where religion should be criticised – for example, in cases of women’s rights violations. In fact, freedom of expression implies the right to scrutinise and criticise belief systems, even in a harsh and unreasonable manner.

The UN Human Rights Committee indicated in General Comment 34 that blasphemy laws should not be used to prevent or punish commentary on religious doctrine and tenets of faith, or even religious leaders. Only when instances of expression against religion amount to restrictions under art 20, can freedom of expression be restricted. The prohibition of speech that defames religions could also potentially limit discussion of religious practices within religions that sanction the violation of other human rights.

General Comment 34 specifically states that the ICCPR does not permit general prohibitions on expression of historical views, nor does it prohibit a person’s entitlement to express an erroneous opinion or an incorrect interpretation of past events. Therefore, a blanket prohibition of defamation of religion or a phrase such as ‘Islamist militants’ has the potential to limit discussion or the publication of instances where criticism of militant actions by followers of Islam (or any other belief or religion) or other human rights violations in accordance with religious tenets are necessary and important.

Article 20 of the ICCPR concerns restrictions that amount to ‘hate speech’ on the listed grounds of nationality, race and religion. Article 20(2) states

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62 General Comment 34 (note 45 above) para 34.
63 Mendel (note 40 above).
64 Marais (note 61 above) 77.
65 General Comment 34 (note 45 above) para 48.
66 Marais (note 61 above) 82.
67 General Comment 34 (note 45 above) para 49.
68 ‘Hate speech’ is prohibited for several reasons, including, to: (i) prevent disruption to public order and social peace originating from retaliation by victims; (ii) prevent psychological harm to targeted groups that would impair their ability to positively participate in the community and contribute to society; (iii) prevent both visible exclusion of minority groups and exclude their acceptance as equals; and (iv) prevent social conflagration and political disintegration. It is also a direct invasion of dignity and an infringement on the rights of association of an individual. See, for instance, Afri-Forum v Malema 2011 (6) SA 240 (EqC) 29–30.
that: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Only forms of defamation of religion that meet the requirements of art 20, can amount to hate speech and restrict the freedom of expression. However, the restrictions in art 20 will not encompass the overly-broad statements and descriptions of the resolutions on defamation of religion because ‘hate speech’ restrictions should be seen in light of the fact that they are usually responsive to racial-hatred campaigns and they are aimed rather at combating the horrors of fascism, racism, and exclusion of minorities at their origin.\(^6^9\) The concept ‘hate speech’ should not be arbitrarily used unless it has been proven that the expression was used with the intention of inciting discrimination, hostility or violence.\(^7^0\)

The Camden Principles provides for further characteristics of ‘hate speech’. Principle 12(1) states that all states should adopt legislation that prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. ‘Hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group. ‘Advocacy’ requires an intention to promote hatred publicly towards the target group. ‘Incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against a person belonging to that group. Principle 12(3) clearly states that states should not prohibit criticism directed at beliefs, ideologies, religions or religious institutions, unless such expression constitutes hate speech. Therefore, defamation of religion as identified in the resolutions will be too broad to fall within the scope of art 20. The terms used to describe defamation of religion are open to subjective interpretation and will not necessarily objectively amount to hatred, hostility, advocacy or incitement. In accordance with this view, in its recommendation on blasphemy, religious insults and ‘hate speech’ against persons on grounds of their religion,\(^7^1\) the Parliamentary Assembly of the Council of Europe reaffirmed that ‘hate speech’ against persons, whether on religious grounds or otherwise, should be penalised by law. It was, however, recommended that blasphemy, as an insult to a religion, should not be deemed a criminal offence.

It is therefore clear that expressions will only be restricted under arts 19 and 20 if it passes the three-part test or adheres to the strictly-defined scope of the restrictions in art 20. I have argued throughout that defamation of religion, as such, will not pass these tests and, consequently, that a blanket ban on phrases such as ‘Islamist militants’ (argued to be a form of ‘defamation of religion’ by the complainant in \textit{Mohammedi}) cannot succeed in international law. However, we need to scrutinise the concept of defamation of religion and

\(^{69}\) Marais (note 61 above) 79.

\(^{70}\) Ibid 72–3.

\(^{71}\) Recommendation 1805, on blasphemy, religious insults and ‘hate speech’ against persons on grounds of their religion, Council of Europe (2007).
how it would be considered within South African jurisprudence concerning freedom of expression and it is to this matter that I now turn.

IV THE SOUTH AFRICAN POSITION

In this section, the scope of freedom of expression and its restrictions within South Africa are examined as well as the locus of defamation of religion within (or outside of) this scope. At first, s 16 of the Constitution of the Republic of South Africa, 1996 and s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) are examined. These sections are most important in establishing the scope of the right to freedom of expression within South Africa as well as the permissible exclusions (s 16(2)) and limitations (s 36(1)) of the Constitution to this right. Thereafter, the elements of these exclusions and limitations are discussed in order to show that defamation of religion cannot fall within the ambit of these. The exclusions are discussed as (i) incitement of imminent violence; (ii) ‘advocacy of hatred’ constituting ‘incitement to cause harm’ / hate speech; and (iii) the meaning of ‘harm’. Finally, the case of Mohammedi is compared to the cases of Van der Merwe and Jamiat-Ul-Ulama of Transvaal Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd. These cases provide for instances where harmful speech concerning religion does amount to hate speech. Here, the differences between legitimate hate speech and the use of the broadly-defined defamation of religion are discussed. These cases also provide an understanding of the broader constitutional values within which the right to freedom of expression has to be interpreted within South Africa.

(a) Section 16 of the Constitution and section 10 of PEPUDA

Section 16 of the Constitution provides for freedom of expression. Such freedom includes the freedom of press and media and imparting of information, but excludes propaganda for war, incitement of imminent violence and advocacy of hatred based on religion and which constitutes incitement to cause harm. Section 16(2)(c) was inspired by, and closely resembles, art 20(2) of the ICCPR and excludes ‘hate speech’ from the ambit of protected free expression. PEPUDA prohibits hate speech in s 10, stating that publication or expression of speech that is hurtful, harmful, incites harm or promotes or propagates hatred will be unlawful. In the case of Print Media it was stated that whatever expression does not fall under s 16(2), must do so under s 16(1)

72 Van der Merwe (note 3 above).
73 Jamiat-Ul-Ulama (note 4 above).
74 ‘(1) Everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (f) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.’
75 Print Media (note 17 above).
and is therefore lawful and constitutional.\textsuperscript{76} If defamation of religion cannot fall within the ambit of the restrictions in s 16(2) of the Constitution or s 10 of PEPUDA, such expression will be allowed in accordance with s 16(1) unless subject to limitation in terms of s 36(1).\textsuperscript{77}

I contend that defamation of religion cannot fall within the exclusions of s 16(2) for several reasons. This is also supported by international legal provisions discussed above. Each restriction will be examined separately and reasons given as to why such a restriction will not be legitimate in cases of defamation of religion.\textsuperscript{78}

\textbf{(i) Incitement of imminent violence}

The restrictions on freedom of expression must be ‘necessary’ to protect the interest identified under the second part of the test.\textsuperscript{79} A high standard has to be overcome to legitimise the restriction. International courts often assess whether or not there is a pressing or ‘substantial need’ for the restriction.\textsuperscript{80}

For purposes of s 16(2)(b), ‘incitement’ involves actively encouraging, calling for or pressurising others to engage in acts of violence where the threat of the violence occurring is imminent. The speaker should subjectively intend to incite imminent violence, and it should be objectively likely that such violence will result from the expression.\textsuperscript{81} The absence of a clear definition of the elements of defamation of religion renders it almost impossible to determine whether the requirements for ‘incitement for imminent violence’ can be fulfilled by the concept ‘defamation of religion’ – either under s 16(2) of the Constitution or s 10 of PEPUDA. There is room within s 16 of the Constitution and s 10 of PEPUDA for restricting speech that results in incitement of imminent violence against a religion. It renders redundant the need for an additional concept of defamation of religion. In the case of \textit{Mohammedi}, the mistake made by the SABC did not involve active encouragement for others to engage in imminent violence. If the demands of the complainant were to have been agreed to, the use of terminology would be banned before even being tested within its context.

In other words, context is also of paramount importance when determining whether there was ‘incitement of imminent violence’. As stated in \textit{Mohammedi} and international law, whether there is incitement of imminent violence against a religion has to be determined within the context in which the words are used.

\textsuperscript{76} Ibid para 48.
\textsuperscript{77} The possibility exists that there can be speech that is not ‘hate speech’, but which may permissibly be restricted in terms of s 36(1).
\textsuperscript{78} The restriction in s 16(2)(a) – ‘propaganda for war’ will not be discussed in this article and is not relevant here.
\textsuperscript{79} \textit{Handyside} (note 56 above) paras 48–50; \textit{Sunday Times} (note 54 above) 62.
\textsuperscript{80} \textit{Sunday Times} (ibid) 62.
\textsuperscript{81} Marais (note 61 above) 251.
Context and the meaning of the words for the relevant audience are also of importance. In Malema, the first issue in determining whether expression constitutes ‘hate speech’ was the meaning of the words for the relevant audience in the relevant context. The context, circumstances and the way in which the words were uttered as well as the gestures which accompanied the words and what they imply should be considered.

If the words ‘Islamist militants’ are used out of context without any proof that the militant group is Islamic, or that the fact that they are Islamic is relevant to the group being militant, freedom of expression can, but will not necessarily, be limited by the provisions already in place within South African law. However, it is still not likely to constitute ‘incitement to imminent violence’ and a limitation is only possible if all the other requirements are met. Therefore, if defamation of religion becomes a recognised restriction to freedom of expression, the procedure of testing expression for ‘incitement’, ‘advocacy’ and elements of hate speech, will be completely undermined and the context within which the phrase is used disregarded.

(ii) ‘Advocacy of hatred’ constituting ‘incitement to cause harm’ / hate speech

With regard to advocacy, the speaker must promote hatred or attempt to instil hatred in others. Intention to advocate hatred and harm is not necessary. There are scenarios where a person advocating hatred may misjudge the disposition of the audience or may not realise that the audience is incited and harm a target group. ‘[C]ontempt for a certain group as part of a political campaign or cultural celebration, may serve as examples.’

However, ‘advocacy of hatred’ is not a sufficient restriction. The ‘advocacy of hatred’ must constitute a second element – ‘incitement to cause harm’. In the case of Freedom Front v South African Human Rights Commission, it was stated that the closer the causal link between the advocacy of hatred and the harm, the more likely it is that the expression will be deemed to be ‘hate speech’ and restricted. This likelihood will be greater the more vulnerable the target group, and the more sensitive the issue. In line with this, principle 12 of the Camden Principles discussed above states that ‘advocacy’ requires the promotion of hatred publicly towards the target group and ‘incitement’ should pose an imminent risk of discrimination, hostility or violence against a person belonging to that group. Principle 12(3) clearly states that mere criticism cannot qualify as a restriction, unless it amounts to hate speech.

By placing a blanket ban on phrases within the context of the broadly defined notion of defamation of religion, no opportunity is granted to determine

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82 Malema (note 68 above) 55.
83 Marais (note 61 above) 252.
84 Ibid 253.
85 Ibid 254.
86 2003 (11) BCLR 1283 (SAHRC) (Freedom Front).
87 Ibid 1296.
whether there was ‘advocacy of hatred’ that incites harm. In Mohammedi, no advocacy of hatred was intended. However, intent is not required. Can it then not be said that there was advocacy and hate speech by the SABC in Mohammedi? It cannot be concluded that actual hatred was promoted and that it incited any harm, whether or not Islam is a vulnerable group. A causal link between advocacy and the actual harm cannot be established. In this context, the concept of harm needs further deliberation.

(iii) Harm

(aa) Is the causing of ‘prejudicial relations’ in society sufficient for ‘harm’?
In the case of Islamic Unity Convention v The Independent Broadcasting Authority, the Constitutional Court stated that it acknowledges that certain expression does not deserve constitutional protection because it has the potential to impinge adversely on the dignity of others and cause harm. Yet, the court argued that although speech can cause prejudicial relations in society, it does not necessarily fall within the limitations of s 16(2):

Expression that makes propaganda for war may, depending on the circumstances, threaten relations between sections of the population … The converse is however not true. Not every expression or speech that is likely to prejudice relations between sections of the population would be ‘propaganda for war’, or ‘incitement of imminent violence’ or ‘advocacy of hatred’ that is not only based on race, ethnicity, gender or religion, but that also ‘constitutes incitement to cause harm’. (emphasis added)

Consequentially, even if a comment such as ‘Islamist militants’ or any other form of ‘negative stereotype’ (as indicated in res 16/18) threaten relations between different sections of the population, it does not necessarily mean that such a phrase will be hate speech as there are several other elements that need to be met as well. This view is supported by international law. The second requirement of the three-part test discussed above states that a restriction to the right to freedom of expression must be exclusively, not just tangentially, directed towards the legitimate aim. Justification of the restriction also requires more than the general goal of protection from harm. The purpose must be specific, pressing and substantial. However, it is argued below that, if the prejudicial relations affect the human dignity of a person negatively and the other requirements of s 16(2) are met, freedom of expression may be permissibly restricted.

(bb) Is human dignity, offence and hurtful speech in section 10 of PEPUDA included in ‘harm’?

Section 16(2)(c) also mentions that the advocacy of hatred must incite harm. However, the scope of the concept ‘harm’ is not easily determined. In the case

88 2002 (4) SA 294 (Islamic Unity Convention).
89 Ibid para 30.
90 Ibid para 34.
of Jamiat-Ul-Ulama, the High Court held that certain Danish cartoons were contrary to the human dignity of Muslims and therefore restricted freedom of expression and amounted to hate speech. However, it should be asked whether offence as in the Mohammedi case can be equated to an infringement of the human dignity of a person and therefore amount to hate speech? Even more complex is the fact that s 10 of PEPUDA prohibits ‘hurtful speech’. Is offence, as in the case of Mohammedi, a type of ‘hurtful speech’?

Hate speech and speech that causes harm must be distinguished from speech that causes offence. Constitutional Court jurisprudence indicates that freedom of expression includes the right to cause offence. An offence of blasphemy does not exist in South African law. In principle, religious insult is treated on the very same basis as insult on the other enumerated grounds. The mere fact that the phrase ‘Islamist militant’ causes offence cannot, on its own, justify the restriction of the right to freedom of religion. The mere causing of offence will also not be sufficient to justify the limitation of the right to freedom of expression. In the case of Mohammedi, the claimant was clearly offended but can it be said to have assaulted his dignity or have amounted to ‘hurtful speech’?

In religiously plural societies, persons are bound to be offended and members of religious groups will do or say things that are bound to offend persons of other religious groups or no religion at all. In the case of Jamiat-Ul-Ulama (as discussed below), human dignity is defined as the value or self-worth of a person and the public’s estimation of that value. A distinction should be made between impugning upon religious beliefs and actually attacking the religious believer or the person of the complainant. When religious views are criticised, the believer of those views might feel distressed and offended. This does not amount to hate speech or harm. However, if the expression infringes upon the dignity of the person (not merely offends his religion), such as claiming that the person is ‘evil’ (as was done in the Van der Merwe case, discussed below), and adheres to the other requirements of harmful speech, then hate speech may ensue.

With regard to the additional restriction added by s 10 of PEPUDA, in other words ‘hurtful speech’, more questions are raised than there are answers. Section 10 of PEPUDA includes the prohibition of ‘hurtful’ speech as opposed to the ‘harmful’ speech of s 16. It is not clear what is intended with the concept ‘hurtful’, but it is clear that it cannot exceed the scope of ‘harm’ as mentioned in s 16 of the Constitution. It is therefore argued that s 10 and the concept

Note 4 above.

When the abovementioned resolutions are scrutinised, it becomes clear that defamation of religion contains such broad statements that mere offence can easily be included as part of defamation of religion. For example, the phrase ‘negative stereotyping’ as used in the HRC res 7/19 can be interpreted to include offence.

De Reuck v Director of Public Prosecutions, WLD 2004 (1) SA 406 (CC).

Marais (note 61 above) 269.

S v Tanteli 1975(2) SA 772(T).

Jamiat-Ul-Ulama (note 4 above) 7.

Van der Merwe (note 3 above) 2.
‘hurtful’ could be said to widen the restrictions to freedom of expression in an unconstitutional manner. Therefore, the concept ‘hurtful’ will not pass constitutional muster.98

(b) Cases that did amount to hate speech

(i) Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd

The background to this case involves the publishing of cartoons in a Danish newspaper in 2005. These cartoons made fun of Prophet Muhammad and were very offensive. The cartoons were also reprinted in other newspapers, including the Mail & Guardian within South Africa.99 The Muslim association, Jamiat-ul Ulama of Transvaal, brought an application to the Johannesburg High Court for an interdict against Johncom Media Investments Ltd to prevent the Sunday Times from publishing the cartoons.100 The judge in this case viewed the right to freedom of expression within the context of human dignity and the spirit of the Constitution in general. Judge Jajhbay mentioned the importance of the media in the South African democracy but that they had to act with ‘vigour, courage, integrity and responsibility’.101 It was also stated that the right to freedom of expression, although very important to our democracy, is not of paramount value.102 Therefore, freedom of expression must be interpreted within the context of the other constitutional values and particular the values of human dignity, freedom and equality.103 The judge described human dignity as:

The value of human dignity in our Constitution is not only concerned with the sense of self-worth of an individual or a group of people but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her or their own individual achievements. The value of human dignity in our Constitution therefore values both the person sense of self-worth as well as the public’s estimation of the worth of value of such an individual or group of persons. Our Constitution seeks to promote and to protect the legitimate interests of individuals and groups to have their reputation intact.104

Because dignity is a paramount right, the judge found the cartoons to be contrary to the value of human dignity.105 It is my opinion that this judgment is contrary to previous jurisprudence on freedom of expression and the interpretation of the limitation of freedom of expression by human dignity incorrectly interpreted in this case. The cartoons were not directed at the human dignity of a person, but rather a religion. Furthermore, the definition of human dignity is a concept that is difficult to define and also very broad. If

98 This is not the only part of s 10 that might not pass constitutional muster. However, a discussion of these sections is not within the ambit of this article.
99 Mail & Guardian (3 February to 9 February 2006).
100 Case no 1127/06.
101 Jamiat-Ul-Ulama (note 4 above) 5.
102 Ibid 6.
103 Ibid 7.
104 Ibid 7.
105 Ibid 9.
the cartoons merely caused offence, it cannot be claimed that human dignity was affected. Although human dignity is paramount to the South African Constitution, courts should be careful not to include mere offence within the ambit of human dignity.

The value of human dignity also does not indiscriminately justify a blanket ban on words. Such a blanket ban will undermine the process (and deny the opportunity) to determine whether speech does indeed infringe upon the value of human dignity or not. It will prevent a context-sensitive approach from being adopted and also decide each case on its own merits and circumstances. Therefore, although freedom of expression should not be interpreted legalistically, and the values of the Constitution play a fundamental role in its interpretation, these values cannot be used as justification for the blanket ban on certain words for the reasons described above.

(ii)  Van der Merwe v Radio Rosestad

Of importance here is another case from the BCCSA – Van der Merwe v Radio Rosestad.\(^{106}\) This case is important as it also shows arguments for the restriction of freedom of expression, but the claims being made are not based on defamation of religion, but rather the well-defined principles of ‘hate speech’. In this case, the complaint concerned a discussion programme where questions relating to religion were answered by a panel.\(^{107}\) The complainant indicated that on the specific Christian show, there was a discussion on Islam. The speakers mocked the way in which the Islamic people recite their holy book and that such recital is nothing but a ‘mantra’ and that the Islamic people are nothing but Satanists. The complainant further stated that Satanism is the first enemy of the Christian churches and places the Christian church against Islam.\(^{108}\) The BCCSA Free-to-air Code of Conduct for Broadcasting Service Licensees of 2009 (the Code) also prohibit hate speech in clause 4(2) stating that:

> Broadcasting service licensees must not broadcast material which, judged within context, amounts to (a) propaganda for war; (b) incitement of imminent violence or (c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.

This clause reiterates art 20 of the ICCPR and s 16(2) of the Constitution. However, clause 5 indicates several exclusions. These include: (i) a broadcast which, judged within context amounts to a bona fide religious broadcast; (ii) a discussion, argument or opinion relating to religion; or (iii) a bona fide discussion, argument or opinion on a matter of public interest.

In the case of Van der Merwe, the BCCSA stated that the test of bona fides is an objective one which pertains to the nature of the programme and does not

\(^{106}\)  Van der Merwe (note 3 above).
\(^{107}\)  Ibid 1.
\(^{108}\)  Ibid 2.
depend on the subjective view of those taking part in the programme. The BCCSA further stated that the programme lacked objectivity, the arguments were extremely simplistic, the interpretations of Islam clearly incorrect and the conclusions drawn grossly distorted and even dangerous in the manner that they set up a clear opposition between Christianity and Islam (which was characterised as militant throughout the discussion). The entire programme was aimed at criticising and condemning Islam. A distinction was also made between expressing such views in a church and expressing such views in the public domain where there are ‘definite limits to what an individual may say’. The views expressed amounted to more than merely stating a view and escalated to a severe attack against the Muslim faith and the broadcast was propagating or advocating a view which is ‘outrageous and amounts to incitement to cause harm to Muslims, in person, in the sense that the opinion attacks the very foundation of their faith’. Therefore, hate speech was held to be present and a contravention of clause 4(2) of the Code.

In light of cases where expression against religion was restricted, how should defamation of religion be approached? The legal concepts as described in international law, South African law (s 16 of the Constitution and s 10 of PEPUDA), and the two mentioned cases are considered together in the next part in order to indicate whether the concept defamation of religion is a legitimate restriction to the right to freedom of expression.

V CONCLUSION

First, defamation of religion started by way of introduction to the United Nations. The resolutions that mention this concept construe it very broadly without any tangible and recognisable definition or set of elements that it contains. In all of these resolutions, except for the most recent one, defamation of religion is presented mainly for the protection of Islam, and therefore seems to overemphasise one religion over others.

Second, in Mohammedi, the recognition of an unidentified and undefined concept of defamation of religion is called for and recognition for it is sought. This concept is then utilised to justify the blanket ban of concepts such as ‘Islamist militants’. Such a blanket ban will undermine the opportunity to test each and every expression within its own context and against the elements of the law which determine when restrictions are permissible or not. In some instances, issues defined in terms of the concept defamation of religion will amount to one of the permissible restrictions and in some instances not. Defamation of religion is not needed since there are already adequate provisions provided for instances of permissible restrictions on expression. These specific restrictions with elements such as ‘advocacy’, ‘harm’ and ‘incitement’ have very specific meanings. In international law,
a high standard has to be overcome to legitimise the restriction in order to minimise the chilling effect on freedom of expression. In the case of *Van der Merwe*, the specific instance is dealt with in context and no call is made for a blanket ban of concepts and the promotion of a vague notion of defamation of religion. The case is judged within context and only the application of the elements of hate speech is called for.

Third, it is argued that cases of harm (not mere offence or hurtful speech) to the human dignity of a person, and not his religion, can amount to a permissible restriction on freedom of speech. *Mohammedi* amounts to the mere offence of Islamic adherents and as already stated, offence alone is not sufficient. However, in the case of *Van der Merwe*, there are more elements present than the offence of adherents of a religion. Within the context of *Van der Merwe*, the nature of the words used (hating concepts such as comparing recital of the Qur’an with Hitler), the way in which it was stated and the opposition created between two religious groups can result in the advocacy of hatred, even if done unintentionally. In the case of *Jamiat-Ul-Ulama*, human dignity was regarded as a sufficient justification to limit the freedom of expression. However, it is argued that human dignity cannot arbitrarily be used as a limitation to the right to religious freedom, especially where mere offence is present. In *Mohammedi*, although also unintentional, the context of the case and the nature of the words used do not provide a causal link between any harm caused (if harm is caused) and the expression. The comment was also raised against Islam as a religion and not any particular person adhering to the Islamic faith.

Finally, in the concurring judgment, Van der Westhuizen in *Print Media* states that the important right to freedom of expression lies at the heart of democracy. Yet, it is not an absolute right and can sometimes be used to cause harm and intimidate.

I therefore agree that in instances where the context indicates that the use of a phrase falls within one of the inherent limitations to the right to freedom of expression (as mentioned in s 16(2) of the Constitution and s 10 of PEPUDA, as well as arts 19(3) and 20 of three-part test of the ICCPR) or infringes upon the human dignity of a person, such phrase should not be allowed and the right to freedom of expression can be limited. Taking into account the context of South Africa, the spirit of the Constitution and the value of human dignity, the right to freedom of expression cannot be interpreted in a legalistic manner and on its own and needs to take into account the spirit of the Constitution in general. Instances exist today, and have in the past, of hate speech and expression being used to propagate genocide and other atrocities. To prevent such atrocities and also actions against human dignity resulting from, for

113 *Print Media* (note 17 above) 93. Also see S v Mamabolo (*et al.*, *Business Day* and the Freedom of Expression Institute Intervening) 2001 (3) SA 409(CC) para 37.

114 *Print Media* (note 17 above) 97.

example Islamophobia or phobia against any other religion in general, the necessary restrictions to freedom of expression exist both in South African and international law. Yet, allowing the overly-broad and undefined concept of defamation of religion to form a permissible limitation on the right to freedom of expression can also have the effect of limiting human dignity as it can prevent necessary criticism of religions and religious violations of human dignity. There will be instances that qualify as defamation of religion and also a permissible restriction on the right to freedom of expression, but the reverse is also true: there will be instances that qualify as defamation of religion, but do not constitute a justifiable limitation on the right to freedom of expression. It is clear that each case has to be evaluated on its own merits and in line with s 36\(^\text{116}\) of the Constitution and also other rights in the Bill of Rights, such as, the right to equality\(^\text{117}\) and the right to human dignity.\(^\text{118}\)

\[\text{116 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.}
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\[\text{117 Constitution s 9 states: ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’}
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\[\text{118 Constitution s 10 states: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’}
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