**In Defence of Peace Speech**

**The disproportionate call for censure and censor of the Chief Justice’s suggestion for South Africa to foster peace in the Israeli-Palestinian conflict**

**Abstract**

This Article recounts how the Chief Justice of South Africa, Mogeong Mogeong’s balanced and personal statements about Israel, framed through the lens of his religious ideologies were disproportionately attacked and criticised. In June 2020, the Chief Justice participated in a webinar, hosted by the Jerusalem Post, focused on addressing racial prejudice, with the Chief Rabbi of South Africa, Dr Warren Goldstein that resulted in a formal complaint being lodged against him. The platform was intended to foster positivity, community building and allyship during South Africa’s Covid-19 lockdown.

Part 1 introduces a synopsis of the relevant conversation points in the webinar discussion that will be referenced in greater detail throughout the Article.

Part 2 considers the allegations made against the Chief Justice by Africa 4 Palestine and the Chief Justice’s response thereto considering the role of Judges in South Africa and the ambit of the appropriateness of expressing religious and political views through applicable governing legal and organisational mechanisms.

Part 3 reveals the double-standards and rule of law implications of other Judges not being subjected to the same level or standard of critique as that imposed on the CJ, when engaged in matters concerning Israel/Palestine.

Part 4 concludes that the statements made by the Chief Justice about Israel did not breach the legal ambit of his freedom or constitutional duty. Based on the specific facts and the socio-political climate, the statements merely reflected a view unpopular with the majority – a view that did not expressly criticise and call for the boycott, divestment or sanction of Israel but rather called for an objective and robust reconsideration of policy application and standards, in accordance with the demands of a robust constitutional democracy.

**Part 1: Introduction**

On 23 June 2020, the Chief Rabbi of South Africa, Dr Warren Goldstein (**Goldstein**), invited the Chief Justice of South Africa, Mogoeng Mogoeng (**CJ**) to feature alongside him in conversation with the Jerusalem Post. The webinar[[1]](#footnote-1) titled “*Two Chiefs, One Mission: Confronting apartheid of the heart*” was to address current affairs through opinion-based and faith-led discussions framed in optimism and unity. The Chief Rabbi emphasised the trite teachings and laws that promote the dignity and equality of each and every human being at the heart of Judaism. Being a nation that has suffered persecution, discrimination, and abuse throughout the ages, it is the Jewish mandate to treat each person with love and compassion and oppose any racist agenda.

The talk was scheduled following the killing of George Floyd[[2]](#footnote-2), with the intention to reflect on the South African experience and consider practical tools to foster respect and dignity for all, as so entrenched in the Jewish mandate. The Chief Rabbi aimed to confront the global ill of racism through the South African context of apartheid, reinforcing and aligning the South African Jewish community to collectively “*work to build a society in which we dismantle the apartheid of the heart*.”[[3]](#footnote-3)

The CJ accepted the invitation and the conversation began focusing on the rise of racial tensions across the globe. Both Chiefs shared views on how South Africa can inspire other nations and countries to forgive, bridge and move forward from a tainted past. It was agreed that the Judeo-Christian foundations of “loving our fellows” as created in “the image of G-d” can critically help to mould social attitudes and experiences.

The conversation was hosted by Jerusalem Post Editor-in-Chief Yaakov Katz (**Katz)**. In the 40th minute Katz asked the CJ’s opinion on the tense diplomatic relations between Israel and South Africa and whether the CJ is of the view that such relations should be improved. (**First Question**) The CJ responded with the caveat that he is unequivocally aware that the policy direction taken by the South African government is absolutely binding on him and that anything said should not be misconstrued. He reiterated that each and every citizen of democratic South Africa has the freedom to disagree with policies and to even to suggest that change is unnecessary. The CJ continued to quote psalms that obligate him, as a devout Christian[[4]](#footnote-4), to “*pray for the peace of Jerusalem*” and love Israel and that as a practising Christian he believed that those who curse Israel would themselves be cursed. Aligning with the motivation of the webinar’s theme of peace and reconciliation, the CJ said that “*we are denying ourselves a wonderful opportunity of being game-changers in the Israeli-Palestinian situation*.”

The CJ highlighted that South Africa is uniquely positioned to understand reconciliation through Nelson Mandela’s legacy and to mediate peace, by virtue of our own experience through-out the world, being able to bury, but not forget, the bitterness of the past and actively work for a fairer future.[[5]](#footnote-5) He called for a principled stance to foreign policy and for us to design a mutually beneficial future, forgiving the history that has bound us together.

The CJ alluded to the South African government failing to apply a coherent foreign policy framework as it has not and does not apply similar criticisms or impassioned divestment campaigns against other colonialist nations that have, in the past, and continue, in the present through neo-colonial ventures, to take South Africa’s land and mineral-wealth and cause suffering to local communities as it applies to Israel. In fact, South Africa considers such diplomatic ties an “honour”. Unbiased considerations are critical in achieving coherent and principled policies.[[6]](#footnote-6)

Katz asked the CJ directly whether he believes the call to boycott, divest and sanction Israel, advocated for by BDS South Africa,[[7]](#footnote-7) could, in his opinion, facilitate peace. (**Second Question**) The CJ responded by reiterating his obligations as a member of the Judiciary and his feeling that such a question is too sensitive to answer in the particular. He refocused the conversation by speaking about achieving justice in broad, principled terms. The CJ noted that while there will always be opposing viewpoints, there is a need for us all to objectively reflect on injustices perpetrated and the opportunity for South Africa to foster meaningful and practical justice, not “one-sided justice,” all over the world.

The Chief Justice and Chief Rabbi spoke about the power of words both in a religious context as well as practically, in every-day settings to overcome division and foster peaceful relationships. Unbeknown at the time, it would be the words of peace and love that the CJ spoke towards Israel that would result in a “war-on-words” media frenzy, public outcry, and formal complaint.

**Part 2 – AFP’s Complaint and the CJ’s Response**

In the days and weeks that followed, the CJ became embroiled in a local and international media storm. The majority of articles, opinion pieces and public statements, including by the ruling party – the ANC- denounced the “*sentiments attributed to Chief Justice Mogoeng Mogoeng expressing his apparent support for Apartheid Israel*.”[[8]](#footnote-8)

Retired Constitutional Court Justice Zak Yacoob[[9]](#footnote-9) called for a Judicial Services Commission (**JSC**) investigation stating, “*we call on the JSC to investigate the statements with the possibility of censuring him for breaching the official Code of Conduct by appearing in public in his capacity as Chief Justice and making comments that are in contradiction with South African foreign policy*.”[[10]](#footnote-10)

Many public organisations did not shy away from criticisms. The National Association of Democratic Lawyers called on the CJ to “*withdraw his inflammatory, offensive and divisive statements, which are inconsistent with South African foreign policy, human rights and international law*.”[[11]](#footnote-11)

Africa4Palestine, formally known as BDS South Africa (**A4P**), a self-professed human rights organisation “*advancing, in South Africa, the international BDS campaign against Israel*,”[[12]](#footnote-12) stated that “*it is regrettable that the CJ has publicly entered the Israeli-Palestinian issue on the side of the oppressors – the Israeli regime*,"[[13]](#footnote-13) and laid a complaint with the JSC against the Chief Justice.

The JSC, established in terms of the South African Constitution, Act 108 of 1996 (**Constitution**),[[14]](#footnote-14) is tasked with advising the national government on any matters relating to the Judiciary or administration of justice. Additionally, it interviews candidates for judicial posts and makes recommendations for appointment to the bench as well as and deals with complaints brought against Judges. As per section 165 of the Constitution, “*the Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.*”[[15]](#footnote-15) In accordance with this duty and section 12 of the Judicial Service Commission Act, No. 9 of 1994 (**JSC Act**)[[16]](#footnote-16), the CJ, acting in consultation with the Minister, must compile and maintain a Code of Judicial Conduct (**Code**) that shall serve as the prevailing standard judicial conduct and that any wilful or grossly negligent breach of the Code may amount to misconduct which will lead to disciplinary action. The CJ is indeed the publisher and custodian of the current, 2012, Code.

The A4P Complaint dated, 4 July 2020[[17]](#footnote-17) (**A4P Complaint**), alleges that the CJ had wilfully or through gross negligence breached the Code, the on the grounds of articles 12(1)(b), 13(b) and 14(2)(a)[[18]](#footnote-18) and alternatively, that the CJ’s conduct is incompatible with or unbecoming of the holding of judicial office, including conduct that is prejudicial to the impartiality of the courts, in terms of section 14(4)(e) of the JSC Act.

Complaint 1: The CJ became involved in political controversy or activity

Article 12(1)(b) of the Code: Association

*“A judge must not unless it is necessary or the discharge of judicial office, become involved in political controversy or activity”*

The A4P Complaint arrives at the conclusion that the CJ became involved in political controversy or activity through manipulating and omitting the content and context of the webinar conversation. A4P’s allegations fall short on the following arguments:

1. The CJ specifically avoided political controversary or activity
2. The CJ spoke in his personal capacity and on his personal views
3. The CJ’s words did not constitute political controversy or activity
4. The CJ specifically avoided political controversary or activity

The CJ was clearly alive to the sensitivity of the conversation about Israel. Before engaging with the First Question, he caveated his response by acknowledging: “*without any equivocation, that the policy direction taken by my country, South Africa is binding on me. It is as binding on me as any other law would bind on me. So, whatever I have to say should not be misunderstood as an attempt to say the policy direction taken by my country in terms of their constitutional responsibilities is not binding on me. But just as a citizen, any citizen is entitled to criticise even the Constitution of South Africa, is entitled to criticize the laws and the policies of South Africa, or even suggest that change is unnecessary, and that’s where I come from.”* The CJ plainly sets out a balanced consideration - citizens can, on the one hand, criticize laws and policies and on the other, suggest change is unnecessary.

This position was subsequently re-affirmed in the CJ’s affidavit in response to the A4P Complaint, dated 27 July 2020,[[19]](#footnote-19) (**CJ Response**): “*I regard that policy as binding on me because our government determined it in terms of its constitutional authority. And as a citizen and even as a judge I am entitled to criticise the constitution, the laws and even policies of my country* *although they are binding on me. This notwithstanding how popularised a particular narrative or understanding of them might be*.”

Katz, himself acknowledged the sensitivity of the CJ being a member of the judiciary when asking the Second Question: whether the CJ believes the call to boycott, divest and sanction Israel can achieve peace. The CJ responded that he thought it rather too sensitive for him, as CJ, to address and that he is more comfortable dealing with a broader principle. He called for all nationalities, religions, ethnic groups and indeed all South Africans to take a deep breath and reconsider how we, as South Africans, Africans and the community of the world are addressing injustice to ensure real justice. The CJ stated that in cases of perceived injustice, people will choose a side. He however, avoided taking a stance himself refocusing the conversation on general principles and speaking in overarching and global and peaceful terms.

All these statements reflect the CJ’s awareness, to actively avoid engaging in political rhetoric, controversy, or activity. He sought to clarify that he considers himself bound by South Africa’s policy directives and stated that his words should not be misrepresented. The CJ’s responses were appropriate, balanced and measured.

1. The CJ spoke in his personal capacity and on his personal opinions

The A4P Complaint weakly asserts that, in relation to the First Question, the CJ “*unambiguously implied, that the political posture adopted by the Government of South Africa in relation to the State of Israel is not right* *and can only attract unprecedented curses upon our nation*”.

A4P alleges that the issue of whether it is right for the State of Israel to be subject to diplomatic, economic, and cultural boycott, divestment, and sanctions (Second Question) is “*unquestionably a political controversy”* and that the CJ *“was clearly involving himself in a political controversary, and potentially even political activity*.”

Regarding the First Question, Katz enquired whether, in light of the diplomatic relations between Israel and South Africa going up and down over the years, “*is that something that should be improved in [the CJ’s] opinion?*” This question clearly asks for the CJ’s opinion as to whether South Africa’s diplomatic relations should be improved.

The CJ in no way stated that he believed the government of South Africa, to be attracting curses upon our nation through their policy position. The allegation to the contrary grossly distorts the CJ’s statements. The CJ contextualised his individual, personal and religious convictions by clearly stating “***I am under an obligation as a Christian*** *to love Israel, to pray for the peace of Jerusalem, which actually means the peace of Israel. And* ***I cannot, as a Christian****, do anything other than love and pray for Israel, because* ***I know*** *hatred for Israel* ***by me and for my nation*** *can only attract unprecedented curses upon our nation*.”

A4P alleges that the CJ’s statements were “*without doubt, expressions of support and solidarity with Zionism and Zionists*” and that “*in light of the strong views Mogoeng CJ expressed during the webinar in support of Zionism and in opposition to the boycott, divestment and sanctions campaign, Mogoeng CJ should have recused himself from the Masuku Case…*”.

The CJ did not in fact clearly object to the boycott, divestment, and sanctions campaign nor in any way allude to choosing Zionism and Israel over the Palestinian cause. The CJ unequivocally stated “*I love Jews, I love Israel, I love Palestine. I love the Palestinians. I love everybody. One, because it is a commandment from the God in whom I believe, but also when you love, when you pursue peace with all human beings, you allow yourself the opportunity to be a critical role player whenever there is a dispute*.”

Indeed, the CJ, in his Response[[20]](#footnote-20) to the A4P Complaint laments that “*bible-based prayers for the peace of Jerusalem and the refusal to hate or curse are now being made out to look like a preference of Israel over Palestine, as support for everything that the Israeli government has done, is doing or is yet to do, and the rejection of, if not hatred for Palestine*.”

A4P justify their classification of the CJ’s remarks as political controversy or activity with reference and comparison to the CJ’s 2016 statement in a JSC interview with Advocate Michael Donen (Donen). The CJ intervened when Donen was asked his views on “*the demand for the existence of an independent state of Palestine*” stating that this was a highly sensitive political question and contending, in the CJ’s Response, that the enquiry was irrelevant for the purposes of appointing a candidate as a Judge.

This comparison with the JSC interview is inauthentic and self-defeating to A4P’s position. Donen was asked for a clear position as to whether he believes that an independent state of Palestine should exist during a formal JSC interview. On the other hand, as stated above, the CJ was asked about whether he thinks diplomatic relations should be improved (First Question) and whether he believes boycotts and sanctions against Israel could result in peaceful resolution (Second Question) during an informal community webinar. To suggest conflation that the First and/or Second Question can be conflated with taking a position on an independent Palestinian State creates fictious content and context and incorrectly supposes that the CJ has taken a stand on the matter.

Interestingly, the question asked to Adv. Donen, was immediately preceded by the statement “*Now, I also note that you are a member of the Jewish Board*.” This context alludes to the complicated dynamism of views, identities, and understandings both intra and inter the South African Jewish community regarding Israel, Zionism and Judaism in the South African political and social frameworks. As noted in the A4P Complaint, the mater of the South African Human Rights Commission on behalf of the *South African Human Rights Commission on behalf of the Jewish Board of Deputies v Bongani Masuku and the Congress of South African Trade Unions* (Case No CCT 14/2019) (**Masuku Case**)[[21]](#footnote-21) “*turns on whether calling for such action against Zionists constituted advocating harm against people of Jewish religion/or ethnicity*”.

1. The CJ’s words did not constitute political controversy or activity

Regarding content, it is untenable to reconcile the CJ’s words that “*we must use [forgiveness and understanding] around the world to bring peace where there is no peace, to mediate effectively based on our rich experience*” as political controversy or activity. Policy, even when it touches on the political, must not be conflated. In the webinar, the CJ stated “*we’ve got to move from a position of principle here, we’ve got to have the broader perspective and say: we* *know what it means to suffer and to be made to suffer, but we’ve always had this spirit of generosity, this spirit of forgiveness, this spirit of building bridges and together with those that did us harm, coming together and saying well, we cannot forget what happened, but we are stuck together. Our history forces us to come together and look to how best to coexist in a mutually beneficial way*.”

The CJ’s Response emphasises the above approach framed in the biblical commandment to pray for the peace of Jerusalem, to embrace love for all rather than hatred, peace rather than war and the possibility for mediation rather than self-exclusion. This principled stance falls short of a political posture.[[22]](#footnote-22)

For the CJ to suggest an approach other than one of “mutually beneficial” relation-building, cohesion and peace would be contrary to the values espoused in the Constitution and his political and legal mandate. In accordance with the CJ’s judicial oath, enshrined in the Constitution, he must affirm to “*uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law*."[[23]](#footnote-23) Central to the affirmation or oath of office is the obligation to uphold the foundational values of our constitutional democracy, which include the rule of law, human dignity, equality, freedom, transparency and accountability.[[24]](#footnote-24) Speaking on a webinar aimed at confronting racism and fostering positive relationships between all South Africans, statements of “*love, forgiveness and peace speech*”[[25]](#footnote-25) should have been welcomed. It is unimaginable and alarming that a democratic, open, and free South Africa should entertain calls for disciplinary measures and punishment for such views.

The CJ spoke to a general reconsideration of political postures, touching on poverty, land and colonialism. He in no way displayed favouritism toward Israel or a bias against Palestine. In his response, he reflected “*I cited key human rights-related challenges that affect South Africa and Africa that were in my opinion given rise to by former colonial powers. I did so, not as political commentary, but a human- rights, justice, and peace-driven reflection. For to me, landlessness, homelessness, poverty in the ocean of wealth in our nation and continent, and multitudes that die at a younger age, are more of human rights issues than they are political…If I understand the position of Africa 4 Palestine correctly, these are not human rights issues but self-evident political controversies — a forbidden territory for judges if they still hope to enjoy public confidence. I disagree.*”

The CJ asserts that article 12(1)(a) of the Code is intended to ensure neutrality on justiciable issues and applies to political controversies, on home ground, so as to protect the professional duties of Judges from outside influence. To propose that any commentary on international political controversies should bring about allegations of lack of independence and call for censure are not only are a misinterpretation of the Code but are counter-productive to advancing our local[[26]](#footnote-26) and international law[[27]](#footnote-27) duties in promoting and peace and upholding human rights across the African continent[[28]](#footnote-28) and the world. Indeed, South African Judges have indeed played important international peace-building roles. Notably, as cited the CJ’s Response, Deputy Chief Justice Moseneke “lead a team who would act as mediators between key role players in Lesotho to assist in their search for a lasting and sustainable solution to their political and security challenges” and former Chief Justice Pius Langa was involvemed in the resolution of the Fiji Islands’ political controversies.

In a vibrant democracy such as South Africa, Judges, as noted by the CJ, “*ought to be free to continue to write articles or books, deliver public lectures, to participate in radio or television programmes to share reflections on human rights, constitutionalism, policies or any other subject of public interest.*” To suggest otherwise would divest Judges not only of their judicial impetus to uphold constitutional rights but also diminish their critical advocacy role in the public eye.

Complaint 2: The CJ failed to recuse himself from a pending case where there has arisen a reasonable suspicion of bias against one of the parties

Article 13(b) of the Code: Recusal

“*A judge must recuse him- or herself from a case if there is a reasonable suspicion of bias based upon objective facts and shall not recuse him- or herself on insubstantial grounds*.”

As discussed under Complaint 1 above, A4P argues that the CJ’s alleged expressions of support for and solidarity with Zionism and Zionists, results in a “*reasonable suspicion of bias*” against Mr Masuku and COSATU and accordingly, irreparably damaged the public’s confidence in the fairness of the Masuku Case hearing. The A4P Complaint relies on these ungrounded assumptions to allege that the CJ should have recused himself from the August 2019 Masuku Case.

The Masuku Case deals with the parameters of free speech and hate speech in relation to statements made by Bongani Masuku, as Head of International Relations for the Congress of South African Trade Unions (COSATU). During the 2009 Gaza War, with reference to Zionists, Masuku posted *“…We must … do all that is needed to subject them to perpetual suffering…*” At a gathering held at Wits University, he said *“. . . COSATU has got members here on this campus, we can make sure that for that side it will be hell . .* .”, *“. . . any South African family who sends its son or daughter to be part of the Israeli Defence Force must not blame us when something happens to them with immediate effect . .* .”, and *“. . . we will do everything to make sure that whether it is at Wits, whether it is at Orange Grove, anyone who does not support equality and dignity, who does not support the rights of other people must face the consequences even if we will do something that may necessarily be regarded as harm . . .*”

Judgment has been reserved while the Constitution Court, the highest court in South Africa, determines whether the comments amounted to hate speech directed at Jews, or whether they constitute constitutionally protected political speech.

The allegations made by A4P are problematic in that they assume that perceived personal support of an ideology, based on religious grounds, implies bias against other viewpoints. In the CJ’s Response to the A4P Complaint, he dismissed the allegation that he should have recused himself as a “red herring” and stated that he “*never expressed any view on Zionism*” in the webinar and that A4P deliberately and “*tactfully or strategically left out*” his declaration of love for Palestine and Palestinians. By declaring his Christian duty to love Israel the CJ did not, by implication denote an anti-Palestine disposition, in fact he clearly said “*I love everybody*. A4P is further misguided in understanding the Chief Justice’s assumed support of Zionism and Israel as political when all statements were clearly framed conceptually through a balanced and metered attitude.

The Code directs, in note 13(ii), that “*sensitivity, distaste for the litigation…are not grounds for recusal*.” On a strained interpretation, at most, the CJ’s stance, in view of the Masuku Case, could be perceived as being sensitive, which, according to the Code would not constitute a ground for recusal.

Incidentally, it would be difficult to reconcile the classification of Masuku’s statements that aggressively denote violence, destruction, and supremacy of ideology in a specific context against a specific group, as protected political speech, but the CJ’s statements, that connote love, reconciliation, forgiveness, generally, as impermissible, even in light of his role as head of the Judiciary.

Freedom of political expression is the ground relied upon by COSATU to justify Masuku’s statements. Freedom of religion, belief and opinion and freedom of expression are rights, protected by sections 15 and 16 of the Constitution[[29]](#footnote-29) respectively, and apply to all South Africans. The CJ is not excluded, by virtue of his public office, from expressing his constitutionally permissible religious ideologies in both personal and public capacities. In the CJ’s Response, he references the importance of these rights in light of South Africa’s apartheid history of oppression, designed to circumscribe freedoms extensively and severely, reminding us that “*Judges are citizens with fundamental rights and freedoms and should not be ‘needlessly censored, gagged or muzzled*.”

Complaint 3: The CJ involved himself in extrajudicial activities which are incompatible with the confidence in and the impartiality of judges

Article 14(2)(a) of the Code: Extra-judicial activities of judges on active service

“*A judge may be involved in extra-judicial activities, including those embodied in their rights as citizens, if such activities are not incompatible with the confidence in, or the impartiality or the independence of the judge*.”

14(4)(b) or (e) of the JSC Act: Lodging of complaints

14(4)(b) states that “*the grounds upon which any complaint against a judge may be lodged, are any one or more of the following: Any wilful or grossly negligent breach of the Code of Judicial Conduct…*.”

Section 14(4)(e) is the generic “catch all” provision listing grounds upon which any complaint against a judge may be lodged. The provision states “*any other wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) to (d), that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts*.”

The A4P Complaint baldly alleges that the CJ knew, or should have reasonably known that if his views on Zionism were to become known it would cause the public to lose confidence in his impartiality in the Masuku Case and should accordingly be subject to a complaint in terms of section 14 of the JSC Act, on the grounds of 14(4)(b) and 14(4)(e), in the alternative. This suggestion, that the comments made by the CJ during the webinar could cause the public to “*lose confidence in his impartiality*” and thereby in the confidence of the judiciary as a whole, is disproportionate and alarmist.

The following analysis reveals that the CJ was not, in fact, in breach of the Code:

1. The content and context of the webinar were neither *“incompatible with* *the confidence in, or the impartiality or the independence of the judge”* nor *“incompatible with or unbecoming the holding of judicial office.”*
2. The CJ’s statements are within the ambit of his constitutionally protected personal rights and freedoms as well as his public-judicial role.
3. The dictates of openness and transparency serve to promote “*independence of the judge”* and *“independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts”.*
4. The content and context of the webinar were neither *“incompatible with* *the confidence in, or the impartiality or the independence of the judge”* nor *“incompatible with or unbecoming the holding of judicial office.”*

Regarding the content and context of the webinar, in the first instance, as elaborated on above, it is rejected that the CJ disclosed his views about Zionism given the general, global content of his address. Even if it is contended that the CJ’s views were made known, it is anomalous to contend that an impartial message of love and peace is “unbecoming” and would cause public confidence to be questioned or lost. Surely an attempt to promote peace and call for South Africa to facilitate peace should constitute a judicially-appropriate view?

In any event, the argument that the webinar constituted engaging in a political controversy and/or that the CJ’s extra judicial conduct was incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts, is far-fetched. [Judges Matter,](https://www.judgesmatter.co.za/)[[30]](#footnote-30)a campaign that monitors the judiciary and does research into judicial governance processes, postures that it is “*not to say that judges should not hold personal views, or that they can never speak on topical issues*” but warns that Judges should be “*extremely careful*” when they do so as not to attract criticisms of judicial overreach. Of course, it is the Executive, not the Judiciary, that is vested with the power to make foreign policy and Judges should not overreach their mandate by trying to influence the politics of the day[[31]](#footnote-31). The CJ was invited to speak about the “*apartheid of the heart*” in a webinar aimed at fighting against local and global racism. The public discussion therefore was not one intended or centred around the Israel/Palestine conflict nor on specific South African politics or policy. Throughout the webinar, the CJ remained cautious to speak in personal, language on general terms about human rights issues and the Israel-Palestine conflict, framed through his conceptual religious beliefs, maintaining balanced and peaceful views.

1. The CJ’s statements are within the ambit of his constitutionally protected personal rights and freedoms as well as his public-judicial role.

In his personal capacity, the CJ, just like every other person in South Africa has protected constitutional rights to freedom of religion, belief, opinion (section 15) and expression (section 16). A call to limit such rights based on the internal limitation qualifier of section 16, to protect against harm to others[[32]](#footnote-32)or reasonable limitation in the public interest, [[33]](#footnote-33) under section 36, cannot possibly hold any merit especially in light of the content of the CJ’s words that promoted peace and love. Throughout the webinar, the CJ spoke in the first-person, using only subjective language, and in no way alluded to representing any other person or binding any institution.

However, should it be asserted that the CJ spoke in his public capacity, as may be inferred from the title of the webinar that speaks to his position as Chief Justice, then the question that follows is whether Judges should in fact make such statements and where to draw the line between personal and public capacities, if at all?

Provided a Judge acts in accordance with the mandate for which they were appointed, the distinction between a Judge speaking on a public platform and applying the law in a court may be superficial. It would be unfounded to argue that Judges’ public expression of views would allow critics of the Judiciary to revisit previous judgments and illustrate that judges are “political animals” hiding behind judicial robes. It should be the law, the Constitution and the facts that should determine the outcome of every case. It would be nonsensical to accept that Judges can consistently express strong views on certain issues in judgments and then call for recusal when Judges, who are known to be passionate about these issues or express strong views on them, extra-judicially.

Judges are, of course, individuals, appointed for their unique qualities and attributes. The role of the Chief Justice values candidates being independently-minded, thick-skinned, and diplomatic.[[34]](#footnote-34) Judges will have to remain sensitive to what their oath of office demands and decide according to their understanding of the law. As conclusively stated by the CJ “*as usual only the constitution, the law and the facts will inform my decision in Masuku*.”

1. The dictates of openness and transparency serve to promote “*independence of the judge”* and *“independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts”.*

The rule of law is an evasive term encompassing procedures, rules, policies, ideologies, norms and standards that adhere to, *inter alia*, the principles of legal certainty, avoidance of arbitrariness and procedural and legal transparency.[[35]](#footnote-35) The rule of law goes further than “the law” which, as South African history attests, can serve to degrade, discriminate, and divide, all protected under the ambit of legal legitimacy.

Contrary to A4P’s contentions as to the appropriateness of the CJ’s declarations, transparency and openness are trite democratic and rule of law principles that apply, not only to Judges but to judgments and serve as critical pillars for public confidence in Judges and indeed the Judiciary. It is openness and transparency that are critical foundational principles of good governance peppered throughout our Constitution, case precedents and entrenched in our democratic values that can prove robust tools in combatting corruption and exposing poor governance.

In line with this approach, the CJ’s Response notes that “*mature democracies do not penalise Judges or disqualify candidates from appointability, for holding strong views on Christianity or any religion. They insist on transparency. That should and does apply to South Africa as well.*”[[36]](#footnote-36)

Transparency, accountability, and openness would dictate that Judges should make their strong viewpoints on matters known but always adjudicate as independent, oath-abiding, and thoughtful decision-makers. As confirmed by the CJ, the “*integrity and the force of my oath of office always dictate that I do not contort the law or facts in order to enforce my beliefs, however deeply held*.”

The recent case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*[[37]](#footnote-37) illustrates how the CJ acted contrary to his publicised, deeply held Christian beliefs by ruling against the parental authority and entitlement to administer moderate and reasonable chastisement to children, because he believed that he was constitutionally and legally so enjoined.

Public knowledge of a Judge’s strong views on a particular matter and considering judgments in light of these views could add another layer of textured understanding to jurisprudence both for the benefit of the public and for the Judge. The public would be able to assess the judgments with reference to known dispositions and could “check” to ensure that matters are properly considered and proportionately adjudicated as opposed to risking undisclosed agendas suspiciously being applied under the guise of impartiality. For Judges, their critical analysis of personal views in the public realm, and wrestling with and drafting persuasive legally, factually, and constitutionally sound arguments, could benefit in expanding knowledge and evolution of understanding.

A4P’s contention that public confidence would be lost should a Judge express strong views on issues, whether it be LGBTQI+, WomeXn or indeed religion are unfounded and if taken to the extreme, could lead to Judges being reduced to sterile arbiters’ and the Judiciary an out-of-touch adjudicator.

**Part 3 – Comparable Cases and Double Standards**

The “double-standards” highlighted in the A4P Complaint apply both in the context of no such similar criticisms or complaints being levelled against other members of the judiciary who were actively involved in international peace-keeping roles[[38]](#footnote-38) as well as in the content of Israel/Palestine relations. This, Part 3 focuses on the content of Israel discussions.

The CJ rhetorically reminded us that “*this is a free country – not a sophisticated dictatorship*.” This concept begs analysis on the facts.A dictatorship promotes censorship of opposing views and cancel culture. In a vibrant free democracy, promised by the Constitution, free speech, thought and expression are to be protected and promoted.

As discussed in Part 2 above, freedom, openness and transparency are cornerstones of our democracy. Openness, should not be confined to disclosure of views but should also encompass openness to considering alternative views, engaging and debating freely, without fear or prejudice. It is indeed open-mindedness and meaningful engagement that provide useful challenge-solving mechanisms. The silencing and oppression of views that go against popular opinion is not only democratically unsound but deprives a society of the richness that comes from challenging mindsets to achieve growth and better understanding others in the pursuit of nurturing respectful relationships. The CJ’s views must be open to question, disagreement, and challenge but his right to hold such views and freedom to publicly express them in both a private and public capacity, must be defended.

Interestingly, other political figures including Judges have been free to speak their views about Israel/Palestine. It is the deeply revered retired Constitutional Court Justice and human rights activist, Edwin Cameron (**Cameron**), who, in 2015 said that “*just resolution in Israel/Palestine is one of the pre-eminent moral challenges, not just for those who support Israel, but for the world at large. We must live together in this world with all of its caprice and hatred and cruel unpredictability. And our claims of it for ourselves must not contribute to its caprice and hatred and unpredictability*”.[[39]](#footnote-39)

This seems comparable content to the words of the CJ - calling for love and peace and opposing hate. Both Justices made their remarks in a public address, with the predominant audiences being the South African Jewish community, in Cameron’s case, at the Great Park Synagogue and published online and in the CJ’s case, on a webinar facilitated by the Office of the Chief Rabbi of South Africa. Both events were community events, not political ones. Both espoused balanced approaches. Only the CJ’s statement resulted in a formal Complaint. Why? Because the CJ was perceived to be “pro-Israel” while Cameron is known to be openly critical of Israel.

To distinguish the remarks on the basis that the CJ’s view countered government policy, would have very troublesome implications in our constitutional democracy. The ANC’s statements that “*disagreement with the policy of the government is of grave concern where the main argument of the policy on Palestine is premised on human rights*” and that “*the chief justice is entitled to his personal views however when echoed out in the public such views should never be at the centre of societal polarisatio*n”[[40]](#footnote-40) seem to imply that Judges can hold public views, make political statements, however, such statements and views should toe the party line and avoid polarisation. These statements suggest suppression of dialogue, openness and transparency.

Far beyond metered or peaceful approaches, Judges have been permitted to express open and outright criticisms of Israel. While it is beyond the ambit of this Article to consider the merits of the Israel/ Palestine conflict, the contrast as to what is deemed acceptable for Judges to canvas on this topic is stark.

Cameron has publicly stated, “*by flagrantly and persistently violating international law‚ Israel forfeits much of its claim to moral standing*” and that “*Israeli oppression on the West Bank and in Gaza has become only more acute and more ruthless. One is driven to conclude that Israel‚ through its own policies of unlawful annexation‚ has‚ perhaps deliberately‚ made the two-state solution unattainable*.”[[41]](#footnote-41) When an audience member responded he was disappointed that Cameron had criticised Israel, Cameron replied: “*I cannot conscientiously address a Jewish audience without speaking about Israel’s degradations against international law*.” Cameron clearly makes his partial view public, as Judges should be able to, detailed in Part 2 above.

In 2010, Judge Siraj Desai (**Desai**) led the South African delegation of 15, activists, trade unionists and journalists on the planned Gaza Freedom March organised by the Palestine Solidarity Alliance (PSA), in Cairo. The action was timed to mark one year since Israel’s siege on Gaza. Desai has said that the Israeli occupation of Palestine is "*one of the longest continuing breaches of human rights in the world*".[[42]](#footnote-42)

The potential for “societal polarisation” of the CJ’s suggestion that South Africa could contribute towards the attainment of peace in the Israel/Palestine conflict seems dwarfed in light of Cameron’s and Desai’s statements.

Goldstein published an opinion article describing the double standards being applied to public figures engaging in discussions about Israel. In a following open letter in response to Justice Cameron’s reply to this opinion piece, Goldstein neatly summarises his concern, “*when Mogoeng calls for a more even-handed approach from the South African government to the Israeli-Palestinian conflict, he is roundly condemned. And yet, when you [Justice Cameron] (and other prominent Constitutional Court judges) voice your own strong objections to Israel’s actions, there is no condemnation, no public outcry about judges speaking out on fraught political issues. The point is not whether judges can be outspoken on political issues – clearly, you believe they can be since you yourself have been. The point is, if you are pro-Israel – or even not sufficiently censorious of Israel – you are condemned; if you are anti-Israel, you are lauded*.”[[43]](#footnote-43) These inconsistent, double-standards are worrisome for our democracy and should be brought to light and addressed before such an approach becomes regularised. As lamented by the CJ “*hypocrisy is a vice we dare not institutionalise or normalise, formally or informally, knowingly or unknowingly*.”

Goldstein called for a rededication to open dialogue, to the pursuit of peace and finding solutions. The *audi alteram partem* rule – granting a fair hearing and listening to all sides of an argument is a pivotal egalitarian and democratic construct,[[44]](#footnote-44) and a fundamental principle of our law enshrined under the bill of rights in the Constitution.[[45]](#footnote-45)

Cancel culture efforts, on the other hand, are an undemocratic suppression of dissent and open dialogue through the politics of vilification and intimidation. A4P known formerly as BDS, are accustomed to making an example of those who would ever dare to differ with them knowingly or unknowingly.[[46]](#footnote-46) The CJ is alive to these intimidation tactics as “*a desperation to enforce own or sectional agendas, by singling out a public figure to make an example of him or her, almost as if to say to all, ‘you better watch out’*.”

The rule of law demands consistency and certainty. Double standards fly in the face of rationality and fairness. Both procedural fairness and substantive fairness would require that like cases be treated alike and that objective measures to justify deviation be applied. Incidentally, it is consistency and certainty that the CJ was advocating for when he spoke about South Africa taking a “principled approach” to policy.

Israel/Palestine sentiments in the South African public sphere are highly contentious. While discordant viewpoints and robust debate are congruent with a constitutional democracy in which critical engagement and meaningful dialogue must always be promoted, there is an important need to harmonise standards and norms of deemed appropriate and acceptable views of Judges on the Israel/Palestine conflict. To neglect to do so could risk eroding robust expression and result in perceptions of unstable and unpredictable structures where certain unpopular views are regulated while others, that accord with popular views, are not.

**Part 4: Conclusion**

This Article concludes that the criticisms levelled against the CJ are more outrageous than they are accurate. An analysis of each ground on which the A4P Complaint relies has been shown to be misplaced and unsubstantiated. The controversy that emanated from the webinar reveals an alarming attempt to distort facts and inconsistently apply legal and normative standards with an intention to silence and censure a view seeming to be discordant with the official stance taken by the government and populist views of the South African people. The prevailing attitudes label Israel as “a violator of human rights” and “apartheid state.” A view other than one that calls for boycott, sanction, and protest, even one that promotes peace, seems subject to attack with the people who hold it subject to vilification.

# The late Chief Rabbi, Lord Jonathan Sacks wrote that “*freedom is won by making space for the people not like us.*[[47]](#footnote-47)” Religion and morality can be indispensable supports to political freedom and prosperity. Freedom relies not only on the certainty and consistency of legal and democratic structures but equally on the internalised morality of “we, the people.”

# If “we the people” of South Africa are to live up to our constitutional and democratic promises of being an open, free, and fair society - respect, tolerance, and consideration of all views, whether we agree with them or not, is paramount in both the official/public, and private/personal arenas. Only then can we truly be united in our diversity, heal the divisions of the past, and establish a society based on democratic values, social justice, and fundamental human rights,[[48]](#footnote-48) as we lift others, and they lift us.[[49]](#footnote-49)

1. https://www.jpost.com/diaspora/two-chiefs-one-mission-confronting-apartheid-of-the-heart-watch-632388 [↑](#footnote-ref-1)
2. https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [↑](#footnote-ref-2)
3. https://www.jpost.com/opinion/confronting-apartheid-of-the-heart-opinion-631997 [↑](#footnote-ref-3)
4. https://www.concourt.org.za/index.php/judges/current-judges/13-current-judges/71-justice-mogoeng-mogoeng [↑](#footnote-ref-4)
5. https://www.jpost.com/opinion/op-ed-contributors/mandela-and-israel-334174 [↑](#footnote-ref-5)
6. The CJ rhetorically asked whether South Africa had: “cut diplomatic ties with our previous colonisers? Have we embarked in a disinvestment campaign against those that are responsible for untold suffering in South Africa and the continent of Africa? Did Israel take away our land? … I believe that we would do well to reflect on these things as a nation and reflect on the objectivity involved in adopting a particular attitude towards a particular country that does not seem to have taken as much, and unjustly, from South Africa and Africa as other nations that we considered to be an honour having some diplomatic relations with.” [↑](#footnote-ref-6)
7. http://www.bdssouthafrica.com/about-bds/ [↑](#footnote-ref-7)
8. https://twitter.com/MYANC/status/1276239899553824768?ref\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1276239899553824768%7Ctwgr%5E%7Ctwcon%5Es1\_&ref\_url=https%3A%2F%2Fewn.co.za%2F2020%2F06%2F26%2Fanc-mogoeng-s-apparent-support-of-apartheid-israel-of-grave-concern [↑](#footnote-ref-8)
9. https://www.concourt.org.za/index.php/11-former-judges/67-justice-zak-yacoob [↑](#footnote-ref-9)
10. https://www.iol.co.za/news/politics/mogoeng-to-face-jsc-complaint-over-israel-comments-50021011 [↑](#footnote-ref-10)
11. https://www.iol.co.za/news/politics/mogoeng-to-face-jsc-complaint-over-israel-comments-50021011 [↑](#footnote-ref-11)
12. http://www.bdssouthafrica.com/about-bds/ [↑](#footnote-ref-12)
13. http://www.bdssouthafrica.com/post/africa4palestine-to-lay-a-complaint-with-judicial-service-commission-regarding-chief-justice-mogoeng/ [↑](#footnote-ref-13)
14. <https://www.justice.gov.za/legislation/constitution/SAConstitution-web-en> at section 178. [↑](#footnote-ref-14)
15. <https://www.justice.gov.za/legislation/constitution/SAConstitution-web-en> at section 165. [↑](#footnote-ref-15)
16. file:///C:/Users/Jade/Downloads/JSC%20Act%20(1).pdf [↑](#footnote-ref-16)
17. http://www.bdssouthafrica.com/post/africa4palestine-to-lay-a-complaint-with-judicial-service-commission-regarding-chief-justice-mogoeng/ [↑](#footnote-ref-17)
18. https://www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor865-judicial-conduct.pdf [↑](#footnote-ref-18)
19. https://www.dailymaverick.co.za/article/2020-07-29-judges-should-not-be-muzzled-chief-justice-responds-to-complaint-on-comments-about-israel/?utm\_campaign=snd-autopilot [↑](#footnote-ref-19)
20. https://www.dailymaverick.co.za/article/2020-07-29-judges-should-not-be-muzzled-chief-justice-responds-to-complaint-on-comments-about-israel/?utm\_campaign=snd-autopilot [↑](#footnote-ref-20)
21. https://ohrh.law.ox.ac.uk/blurred-lines-when-free-speech-becomes-hate-speech/ [↑](#footnote-ref-21)
22. Para 47 of the CJ’s Response [↑](#footnote-ref-22)
23. Section 174(8) of the Constitution [↑](#footnote-ref-23)
24. https://www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/250613Mogoeng.pdf [↑](#footnote-ref-24)
25. Para 31 of the CJ’s Response [↑](#footnote-ref-25)
26. Section 7(2) of the Constitution  [↑](#footnote-ref-26)
27. See the Universal Declaration of Human Rights (Adopted on 10 December in 1 948. The Universal Declaration was supplemented by the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly on 16 December 1966 and entered into force 23 March 1976, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was also adopted on 1 6 December 1 966 and entered into force on 3 January 1976. Together these instruments are referred to as the International Bill of Human Rights) and United Nations Charter (Signed on 26 June 1945 in San Francisco and came into force on 24 October 1945) [↑](#footnote-ref-27)
28. See the Constitutive Act of the African Union (adopted in 2000 at the Lomé Summit (Togo) and entered into force in 2001) and African Charter on Human and Peoples' Rights (Adopted in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 21) [↑](#footnote-ref-28)
29. <https://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng-02.pdf>, these rights may be limited, in accordance with section 36 of the Constitution. [↑](#footnote-ref-29)
30. https://www.judgesmatter.co.za/ [↑](#footnote-ref-30)
31. https://www.dailymaverick.co.za/article/2020-07-02-the-mogoeng-mogoeng-blowup-what-judges-say-does-matter/ [↑](#footnote-ref-31)
32. The Right to Freedom of Expression 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. [↑](#footnote-ref-32)
33. Section 36 of the Constitution states that 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. [↑](#footnote-ref-33)
34. https://www.judgesmatter.co.za/opinions/criteria-for-the-appointment-of-a-chief-justice/ [↑](#footnote-ref-34)
35. https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ [↑](#footnote-ref-35)
36. CJ’s Response at 30 [↑](#footnote-ref-36)
37. http://www.saflii.org/za/cases/ZACC/2019/34.html [↑](#footnote-ref-37)
38. See references to DCJ Moseneke and former CJ Langa in Part 2 above [↑](#footnote-ref-38)
39. https://www.dailymaverick.co.za/article/2015-11-24-groundup-the-rabbi-the-president-and-the-palestinians/ [↑](#footnote-ref-39)
40. https://www.iol.co.za/news/politics/chief-justice-mogoengs-love-for-apartheid-israel-upsets-anc-49960277 [↑](#footnote-ref-40)
41. https://www.timeslive.co.za/news/south-africa/2017-09-14-concourt-judge-edwin-cameron-says-israel-violates-international-law-daily/ [↑](#footnote-ref-41)
42. https://www.sowetanlive.co.za/news/2011-03-22-ex-minister-and-judge-support-boycott-of-israel/ [↑](#footnote-ref-42)
43. https://www.dailymaverick.co.za/article/2020-07-06-to-judge-edwin-cameron-let-us-talk-to-and-hear-one-another-on-the-israel-palestine-conflict/ [↑](#footnote-ref-43)
44. https://www.dailymaverick.co.za/article/2020-07-01-can-a-judge-not-ask-for-both-sides-to-be-heard/#gsc.tab=0 [↑](#footnote-ref-44)
45. [M](http://www.saflii.org/za/cases/ZAGPJHC/2018/44.html)*[dwaba v Nonxuba](http://www.saflii.org/za/cases/ZAGPJHC/2018/44.html)* [(A5051/2015) [2018] ZAGPJHC 44](http://www.saflii.org/za/cases/ZAGPJHC/2018/44.html) [↑](#footnote-ref-45)
46. https://citizen.co.za/news/south-africa/1959555/jewish-board-slams-bds-for-bullying-shashi-naidoo/ [↑](#footnote-ref-46)
47. https://rabbisacks.org/freedom-is-won-by-making-space-for-the-people-not-like-us-tftd/ [↑](#footnote-ref-47)
48. Preamble to the Constitution. [↑](#footnote-ref-48)
49. https://rabbisacks.org/wp-content/uploads/2020/08/The-Good-Society-Reeh-5780.pdf [↑](#footnote-ref-49)