24 December 2020

Dear Russel and Yifa

**LNI Academic Article Project Summaries**

The second project that we undertook was the drafting of academic articles regarding the deeply contested issue of hate speech and freedom of expression in South Africa. Recently there have been two important cases heard before the highest court in the country, the Constitutional Court, regarding the limitations of freedom of expression which will have a major impact on the Jewish community in South Africa and with regards to anti-Israel rhetoric. The first is the case *South African Human Rights Commission v Bongani Masuku & Others* which concerns hateful statements directed towards what Masuku termed “Zionists” and whether his speech amounted to antisemitism and hate speech, and thus should be penalised in terms of South African law. The second case *Jonathan Dubula Qwelane v South African Human Rights Commission and Another* concerned offensive and hurtful comments about homosexuals and whether such words also fall into the legal category of hate speech in terms of South African legislation. In this case, the legislation regarding hate speech was challenged as not being consistent with the South African Constitution and thus the legislative provisions have been put in question. Both cases are still awaiting judgment.

In light of these developments, a colleague of mine (who is in fact not Jewish) and I, wrote an article examining how the legislature should define what should be deemed inadmissible speech and set out how it should protect vulnerable minority groups from hate speech. We argue that the right to dignity and equality should be weighed carefully against the right to freedom of expression in determining what should be classified as hate speech in our South African constitutional dispensation and that particular weight should be placed on whether the target of the hate speech is a vulnerable minority that has experienced a history of prior persecution, such as a member of the LGBTI community or a member of a religious minority such as the Jewish community. To this end, we examine international human rights law treaties, as well as the jurisprudence of the European Court of Human Rights. We examine international and European case law that concerns Holocaust denial and highlight how antisemitic comments have been banned by these courts even where this is no direct incitement to violence.

We also examine Canadian and Israeli law as to their approaches to freedom of expression. Analysing Israeli law in an academic journal shows that Israel has a fully functioning legal system and independent judiciary in a democratic state with separation of powers. This rebuts claims by BDS and other anti-Zionists that Israel is an illegitimate autocracy. It is very unusual for any South African law journal or academic to consider Israeli law and thus will prove a refreshing contribution to the debate. Together with this, we set out a proposed new legislative provision that would protect minorities such as the Jewish community from hate speech.

We were fortunate to be selected to be published in the very prestigious *Constitutional Court Review*, which is published only once a year examining the jurisprudence of the Constitutional Court. Its editors are internationally renowned leaders and activists in the constitutional and human rights law world, including professors and academics from the University of the Witwatersrand; the South African Institute for Advanced Constitutional, Public, Human Rights and International Law; the University of Cape Town; Oxford University and leading advocates. We were privileged to have been invited to the conference for the authors held on 3 and 4 December where we were able to present our draft article in front of a large audience consisting of all the editors and other writers via Zoom. We were able to interact with this audience which represented the highest level of academic legal thought in the country in this area of law and we received positive feedback on our draft paper. They were particularly appreciative of the fact that Israeli law had been referred to, as it is generally overlooked in South Africa. We will be supervised by Prof. David Bilchitz and Advocate Salim Nakjavani in the peer-review process.

This highly prestigious publication with its strict double-blind, peer-reviewed editorial process, together with the fact that it is being co-written with a non-Jewish author will add objective and authoritative weight to the arguments that we are proposing in our paper. It will give a new voice to the Jewish community and Israeli law which is often silenced or represented in a derogatory light in the academic world.

**Preventing Attacks on Judicial Officers over Israel**

This article focuses on the issue of free speech and the Chief Justice of South Africa and attacks against him for his support for Israel. Therefore it has become important to develop a defense of his freedom of speech at an academic level to prevent attacks on judicial officers at later dates.

The 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.

The paper introduces a synopsis of the relevant conversation points in the webinar discussion. It then 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. It also 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 and BDS in particular. The article concludes that the statements made by the Chief Justice about Israel did not breach the legal ambit of his freedom or constitutional duty.

Kind regards

Romy Wulfsohn