separation of powers, the principle of deference and legal certainty. Third, when the executive decision at stake had to be taken in light of conflicting evidence (such as in the *Fair Trade Independent Tobacco* case), it is the *process* of evaluating the evidence that needs to be analysed, not the merits of the decision – this is referred to as "procedural rationality". Lastly, the decision must promote the purpose for which it was taken. A decision that cannot promote the purpose, or that only promotes the purpose to a negligible extent, cannot be rational. These guidelines may lead to increased predictability and certainty in the application of the rationality test and ultimately promote the rule of law. One can only hope that these trends and inconsistencies in the application of the rationality test will not be replicated in future judgments.

R LAUBSCHER
University of Johannesburg

PROPER PROSECUTION AND CONVICTION OR BLUNDER?

S v Catzavelos
(Randburg Magistrate's Court, convicted 5 December 2019, sentenced 28 February 2020)

OPSOMMING

Behoorlike vervolging en skuldigbevinding of flater?

Catzavelos, 'n Suid-Afrikaanse burger, het gedurende 2018 in Griekeland 'n video van homself gemaak waarin hy die k-woord gebruik het terwyl hy juig oor die afwesigheid van swart mense op die strand. Hy het terwyl hy in Griekeland was die video na 'n WhatsApp groep in Suid-Afrika gestuur waarvandaan dit na sosiale media gelek het. Die video is in Suid-Afrika deur die klaer gesien en 'n strafregtelike klag is gelê. Catzavelos is in 2019 in Suid-Afrika vir *crimen injuria* aangekla en skuldig bevind. Hy is ook in die Gelykheidshof vir haatspraak aangekla en 'n boete opgelê, en hy is in Griekeland strafregtelik vervolg. Hierdie nota bevraagteken die besluit van die Suid-Afrikaanse owerhede om strafregtelik jurisdiksie in die aangeleentheid uit te oefen, en die aanname dat die optrede van Catzavelos aan die vereiste elemente van *crimen injuria* voldoen het. Daar word ook aangevoer dat die kriminalisering van dié tipe uitlatings van Catzavelos nie in ooreenstemming is met internasionale reg, so-ook nie met die grondwetlike en statutêre benadering tot die voorkoming en verbod op haatspraak nie.

1 Background and introduction

While on holiday in Greece in August 2018, Catzavelos, a South African citizen, recorded a video of himself in which he uttered the k-word in rejoicing the absence of black people on a beach. While still in Greece, the video was sent to a WhatsApp group from where it was leaked to social media in June 2019. The video was seen by the complainant in South Africa during August 2019 and a political party, the Economic Freedom Fighters, laid a charge with the South African Police.

As a result, the National Prosecuting Authority (NPA) charged Catzavelos with *crimen injuria* on the basis that he injured the complainant's dignity by the use of racially-offensive language. Catzavelos applied to the NPA to drop the

charge since the incident happened outside the jurisdiction of the South African courts and because the State could not prove that Catzavelos intended to impair anyone's dignity. The submissions were dismissed and the accused decided to enter into a plea agreement. Catzavelos was convicted at the end of 2019 and sentenced in early 2020.

During this time, Catzavelos was also criminally charged by the Greek authorities for having via the internet incited, provoked, excited or encouraged acts or actions which may cause discrimination, hatred or violence against a person or group of persons identified by race, colour, religion, genealogy, national or ethnic origin, sexual orientation, gender identity or disability in a manner which endangers public order or threatens the lives, freedom or physical integrity of such persons. To secure his attendance at court, he was issued with a summons.

The South African Human Rights Commission (SAHRC) also investigated the matter and a complaint was submitted to the Equality Court. The SAHRC asked the court to declare Catzavelos's utterance hate speech. Catzavelos reached a settlement with the SAHRC in terms of which he paid a substantial fine for using a racial slur (Crime Legal South Africa "Legal experts weigh in on chance of Adam Catzavelos being successfully prosecuted" 24 May 2019 https://www.2oceansvibe.com/2019/05/24legal-experts-weigh-in-on-chances-of-adam-catzavelos-being-succesfully-prosecuted/ (accessed 02-07-2020); Eyewitness News "NDPP set to make decision whether to drop Adam Catzavelos case" 28 May 2019 https://ewn.co.za/Topic/Adam-catzavelos (accessed 02-02-2020); IOL "Adam Catzavelos case tests jurisdiction of courts over cybercrimes committed abroad" 29 May 2019 https://www.iol.co.za/the-star/news/adam-catzavelos-case-tests-jurisdiction-of-courts-over-cybercrimes-committed-abroad-24334924 (accessed 03-05-2020); IOL "Letter: Who has jurisdiction in Adam Catzavelous case?" 3 June 2019 https://www.iol.co.za/dailynews/opinion/letter-who-has-jurisdiction-in adam catzavelos-case-24838513 (accessed 03-05-2020); Times Live "These are the charges Adam Catzavelos faces in Greece" 10 July 2019 timeslive.co.za/news/south-africa/2019-07-10-these-are-the-charges-adam-catzavelous-faces-in-greece/# (accessed 03-05-2020); Times Live "He must stop wasting time: EFF on Catzavelous bid to sink criminal case" 2 October 2019 https://www.timeslive.co.za/news/south-africa/2019-10-02-he-must-stop-waisting-time-eff-on-catzavelos-bid-to-sink-criminal-case/ (accessed 03-05-2020); Citizen "Batohi dismisses bid by racist Adam Catzavelos to avoid criminal prosecution" 12 November 2019 https://citizen.co.za/news/sout-africa/courts/2203409/batohi-dismisses-bid-by-racist-adam-catzavelos-to-avoid-criminal-prosecution/ (accessed 03-05-2020); News24 "Catzavelos pleads guilty to crimen injuria for k-word slur video" 5 December 2019 https://www.news24.com/news24/southafrica/news/just-in-catzavelos-pleads-guilty-to-crimen-injuria-for-k-word-slur-video-20191205 (accessed 03-05-2020); Sowetan Live "Adam Catzavelos pleads guilty to *crimen injuria* charge for racial slur" 5 December 2019 https://www.sowetanlive.co.za/news/south-africa/2019-12-05-adam-catzavelos-pleads-guilty-to-crimen-injuria-charge-for-racial-slur/ (accessed 03-05-2020).

This note challenges the decision by the South African authorities to exercise jurisdiction in the matter and the assumption that the conduct of Catzavelos complied with the definitional elements of *crimen injuria*. It also argues that constitutional and statutory approaches to the prevention and prohibition of hate

speech were not followed in this matter. Yet, the note should not be read as condoning the conduct of the accused in any way. The significance of this topic for South Africans is furthermore clear. Given the sensitivity of the issue, and the nature of communication in a modern world, an understanding of the legal basis for such adjudication is important. The note briefly discusses the relevant general principles of jurisdiction and the position under South African law. It also briefly discusses the definitional elements of *crimen injuria* and constitutional and statutory approaches to the prevention and prohibition of hate speech. It deliberates whether Catzavelos was properly prosecuted and convicted based on the issues outlined above.

2 General principles of jurisdiction

Jurisdiction can be said to be the legal capacity of a court to give a valid judgment. This in the first place depends on whether the offence was committed within the court's area of jurisdiction (Kruger *Hiemstra's Criminal procedure* (2020) 16-1; and Du Toit *Commentary on the Criminal Procedure Act* (loose-leaf updated to 31 January 2020) 16-1).

In South Africa, and most countries influenced by English common law, the principal of territoriality generally is applied. The principle is based on mutual respect for the sovereign equality of states and goes hand in hand with the principle of non-intervention in the affairs and exclusive domain of other states. In these countries there is a presumption against the extra-territorial operation of criminal law and the South African courts have generally declined to exercise jurisdiction over offences committed in other countries (*Macleod v Attorney-General of NSW* (1891) AC 455; *R v Holm, R v Pienaar* 1948 1 SA 925 (A); United Nations *Manual on the prevention and control of computer-related crime: International review of criminal policy no's 43 and 44* "International Cooperation" 43 *Int'l Rev Crim Pol'y* 38 (1994) [249]; Jessberger and Powell "Prosecuting Pinochets in South Africa – Implementing the Rome Statute of the International Criminal Court" 2001 *S Afr J Crim Just* 344 351; *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) [38]; *S v Okah* 2018 1 SACR 492 (CC); and Du Toit *supra* 16-3).

However, common law countries traditionally also use other doctrines or bases of jurisdiction proclaimed to be lawful under international criminal law, in addition to focusing on the physical act (under South African law s 3 of the Statute of Westminster 1931 expressly conferred extra-territorial jurisdiction upon the Union Government. This position was confirmed in subsequent South African Constitutions (Smyth and Omar *LAWSA Criminal procedure vol 12* (2020) [26] General principles relating to extra-territorial jurisdiction; and Kruger *supra* 16-8).

The first of these doctrines is the effects doctrine. This doctrine locates crimes in the territory in which the crime is intended to produce, or does produce, its effects. (United Nations *Manual supra* [251]; Strydom *International law* (2016) 249; *The King v George Coombes* Case CLXXXIII 1 Leach 388 under English law).

The active nationality principle is also a ground of jurisdiction. This principle is based on the nationality of the accused and is generally confined to serious crimes (United Nations *Manual supra* [255(a)]; Strydom *supra* 246).

Another ground of jurisdiction is passive personality. This principle is based on the nationality of the victim. It has been highly criticised because it could subject a national of state A, although acting lawfully in state A, to punishment in state B for acts done in state A to a national of state B where the acts were unlawful. In practice this principle is seldom used (United Nations *Manual supra* [255(b)]; Strydom *supra* 247).

Universal jurisdiction may be conferred based on the protection of universal values. It is usually affected by treaty provisions. No legitimising link is in principle required for the establishment of jurisdiction as the states have an interest therein that these international norms are not violated. However, nothing precludes a state from for example requiring the presence of the perpetrator as a requisite for adjudicative jurisdiction.

It is furthermore generally held that this principle only applies where the crime is serious and where the state that would have jurisdiction over the offence based on the normal principles is unable or unwilling to prosecute (United Nations *Manual supra* [256(d)], [257]; Vajda "The 2009 AIDP's resolution on universal jurisdiction – An epitaph or a revival call" 2010 *Int'l Crim L Rev* 325 [3.1], [3.2]; Abraham "Universal jurisdiction and the African Union (AU) – '… the wrong side of history'?" 2011 *AYIHL* 129; and *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre (Dugard as amici curiae)* 2014 12 BCLR 1428 (CC)).

All these doctrines raise the potential of jurisdictional conflict. Yet, the most fundamental problem with these doctrines is the *non bis in idem* or double jeopardy rule in terms of which someone cannot be tried twice for the same offence (see also United Nations *Manual supra* [247]).

However, these doctrines do not alter the primacy of the territoriality principle and it is generally accepted that in the event of jurisdictional conflicts claims of extra-territorial jurisdiction are subsidiary to primary territorial claims (United Nations *Manual supra* [284]).

3 Territorial and extended area of jurisdiction of the South African criminal courts

In terms of section 169(1)(b) of the South African Constitution, 1996, read with section 21 of the Superior Courts Act 10 of 2013, jurisdiction is conferred upon the High Court with regard to all offences triable within its area of jurisdiction that have not been assigned to another court by an Act of Parliament (see also Kruger *supra* 16-10; Du Toit *supra* 16 1-5; and *S v Mamase* 2010 1 SACR 121 (SCA) [10]). It is generally accepted that the wording of these sections does not exclude the common law principles. Accordingly, the common law and legislation determine which offences are triable in South Africa's High Court.

With regard to common law principles of extraordinary jurisdiction, two earlier cases held that if any of the elements or acts necessary to complete the crime took place in the Republic, the courts of the Republic had jurisdiction over the whole crime (*R v Holm, R v Pienaar* 1948 1 SA 925 (A); *R v Neumann* 1949 3 SA 1238 (Special Criminal Court); see also Voet 5.1.67; and Kruger *supra* 16-10). In the Constitutional era the courts have required that at least a material element of, or a significant portion of the activities constituting the offence, took place within the country's borders (*S v Dersley* 1997 2 SACR 253 (Ck); and *S v Basson* 2007 3 SA 582 (CC) [226] respectively).

The territorial jurisdiction of magistrates' courts is determined by section 90 of the Magistrates' Courts Act 32 of 1944 (MCA). Section 90(1) provides that "… any person charged with any offence committed within any district or regional division may be tried by the court of that district or of that regional division, as the case may be". Section 90(4) provides that a person charged with an offence may be tried by the court of any district or regional division, as the case may be, wherein any act or omission or event which is an element of the offence took place. Section 90(2) furthermore provides for extra-territorial jurisdiction under certain circumstances. The extended jurisdiction provided by section 90(2) does not apply where the offence was committed in another country (*Maseki* 1981 4 SA 374 (T)).

With regard to other legislation of general application section 110 of the Criminal Procedure Act 51 of 1977 (CPA), in terms of which the court will have the necessary territorial jurisdiction if the accused does not plead a lack of jurisdiction, does also not apply where the offence was committed in another country (*S v Ntwana* 1979 2 SA 1160 (Tk); and *S v Maseki* 1981 4 SA 374 (T)). Section 110A of the same Act does also not apply, as the section requires that the perpetrator must be immune from prosecution in the country where the offence was committed as the result of the operation of the certain conventions.

Section 111 of the CPA and section 22(3) of the National Prosecuting Authority Act 32 of 1998 (NPAA), in terms of which it can be directed that proceedings with regard to an offence take place in the jurisdiction of another Director of Public Prosecutions (DPP), do also not apply where the offence was committed, or partially committed in another country.

Extra-territorial jurisdiction also exists in terms of legislative provisions with regard to certain statutory offences. In each of these legislative provisions jurisdiction is expressly conferred on the grounds discussed in 2 above within the confines of international criminal law. The following are examples of this. Section 128(5)(c) of the Correctional Services Act 111 of 1998 regarding the unauthorised access to or modification of certain computer material – jurisdiction here is based on the nationality principle. Another example is section 90(b) of the Electronic Communications and Transactions Act 25 of 2002 with regard to certain offences relating to electronic communications and transactions, where jurisdiction is based on the effects principle. Section 4(3)(d) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 with regard to the crime of genocide, crimes against humanity and war crimes is a further example. Jurisdiction here is based on the passive personality principle.

4 *Crimen injuria*

Crimen injuria "consists in the unlawful, intentional and serious violation of the dignity or privacy of another" (Snyman *Criminal law* (2014) 461; see also Milton *South African criminal law and procedure* vol 11 (1996) 500; and Burchell *Principles of criminal law* (2016) 648). Milton and Burchell do not include the element of seriousness in their definitions. However, it is clear that they also take the view that the violation must be serious for a violation to occur). The elements of the crime are, accordingly, unlawfulness, intention, and the infringement of the dignity or privacy of another, which is serious. The onus is on the prosecution to prove all the elements of the offence (*S v A* 1971 2 SA 293 (T)).

The harm to dignity may involve the communication of the insult to the victim in public or privately (Burchell *supra* 648) and the person to whom the communication was made must be aware of the offending behaviour and feel degraded or humiliated by it (*S* 1964 3 SA 319 (T) 321B; *A* 1993 1 SACR 600 (A) 610e–f; Snyman *supra* 463; and Burchell *supra* 653).

The crime can be committed by addressing someone in language which humiliates or denigrates another person such as calling him or her the k-word (*M* 1979 2 SA 25 (A) [240]; *Steenberg* 1999 1 SACR 594 (N); *Pistorius* [2014] ZASCA 47; Snyman *supra* 464; and Burchell *supra* 649).

5 Constitutional and statutory approaches to the prevention and prohibition of hate speech

In terms of section 16 of the Constitution, 1996 everyone has the right to freedom of expression, which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research (s 16(1)(a)–(d)). This right does not extend to propaganda for war (s 16(2)(a)), incitement of imminent violence (s 16(2)(b), or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm (s 16(2)(c)).

Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) was enacted to give effect to section 16(2)(c) of the Constitution, 1996. In terms of section 10 no person may publish, propagate, advocate, or communicate words based on group characteristics including race and ethnicity against any person (generally referred to as hate speech) that could reasonable be construed to demonstrate the clear intention to be hurtful (s 10(1)(a)), be harmful or incite harm (s 10(1)(b)), or promote or propagate hatred. When proceedings are instituted in terms of the Act the Equality Court must hold an enquiry in the prescribed manner and may make an appropriate order, which is primarily aimed at transformation and not at punishment (ss 16 and 21). However, where appropriate, the court may refer any case dealing with hate speech to the relevant Director of Public Prosecutions for the possible institution of criminal proceedings (s 21(2)(n)).

6 Discussion

Given the sensitivity surrounding the use of the k-word, the desire to prosecute Catzavelos in South Africa is entirely understandable. However, it appears that the State, driven by the need to punish such conduct, lost sight of international and domestic legal principles, as well as considerations of fairness and reasonableness, and the accused, on the back of a favourable plea agreement, only pleaded guilty in a bid to finalise the matter and to limit the damage brought about by the incident (all indications are that Catzavelos did not plead guilty because he conceded to any of the issues that he had raised in his defense before). During this time he was fired from the family business and the business suffered losses and was temporarily closed for the protection of its staff (Eyewitness News "Adam Catzavelos fired from family business after racist video, Nike reponds" 21 August 2018 https://ewn.co.za/2018/08/22/adam-catzavelos-fired-from-family-business-after-racist-video (accessed 10-07-2020); Times Live "Restaurant group cuts ties with Adam Catzavelos's family business after k-word video" 22 August 2018 https://www.timeslive.co.za/news/south-africa/2018-08-22-restaurant-group-cuts-ties-with-adam-catzavelos-family-business-after-k-word-video/ (accessed 10-07-2020).

The Constitutional Court has since 1994 applied a restrictive approach to the application of extraterritorial jurisdiction. In *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) [40] the court found that when the application of a national law would infringe the sovereignty of another state, it ordinarily would be inconsistent with, and not sanctioned by international law. In *S v Basson supra* [222], [223] the court held that jurisdiction was ordinarily territorially limited and that it could only be exercised extraterritorially in limited exceptional circumstances, generally related to the nature of the crime.

Finally, in *National Commissioner of Police v Southern African Human Rights Litigation Centre supra* [26] the court accepted a formulation of the classic position put forward in the case of *SS Lotus (Fr v Turk)* 1927 PCIJ (ser A) NO 10 (Sept 7) (the *Lotus* principle) to the effect that states could only exercise prescriptive, adjudicative and enforcement jurisdiction within the confines of their own territory. Remarkably, the court did not confine the application of prescriptive and adjudicative jurisdiction with regard to universal jurisdiction. However, the formulation may well have been inconsistent with the *Lotus* principle (see also Strydom *supra* 241).

In terms of the restrictive approach, states only have extra-territorial jurisdiction if there is a rule or doctrine under international law allowing them to do so (Shaw *International law* (2008) 656; Strydom *supra* 236–237).

In this instance, the South African authorities could not have relied on the effects doctrine as the Constitutional Court in *National Commissioner of Police v Southern African Human Rights Litigation Centre supra* [27] did not recognise this doctrine as a ground on which domestic jurisdiction may be founded.

Due to the jurisdictional limits or nature of the crime committed, none of the statutory provisions mentioned, or other statutory provisions creating extra-territorial jurisdiction, applies in this matter.

It is accordingly reasonable to postulate that the South African authorities relied on the fact that a part of the offence took place in South Africa to prosecute Catzavelos. In this regard, the South African courts' application of the territoriality principle, where the offence was partially committed within the borders of South Africa, has not been entirely consistent. Most recently the Constitutional Court held that a significant portion of the activities constituting the offence must have taken place in South Africa (*S v Basson supra* [228]). For purpose of this note, it is accepted that the video was received by members of the WhatsApp group in South Africa, that the video was leaked to social media, and that the complainant saw and found the video offensive in South Africa. This requirement was therefore met, and accordingly the prosecution was lawful under international law with regard to jurisdiction.

However, this is not the end of the story. When states decide whether to exercise jurisdiction, the question whether there is a basis in international law for the exercise of jurisdiction is not the only consideration. States also consider other international law principles, domestic law and policy considerations with regard to the exercise of jurisdiction in the circumstances (Strydom *supra* 238–239). In the United States of America, the approach is to also consider the reasonableness of the exercise of jurisdiction in the circumstances (*Restatement (Third) of Foreign Relations Law, Part IV* – Jurisdiction and judgements).

The principle of double jeopardy is furthermore widely accepted internationally and in domestic law, and forms part and parcel of the accused's right

to a fair trial under South African law (see eg art 50 of the European Convention on Human Rights and art 19(1) of the Arab Charter on Human Rights; Andrews *Human rights in criminal procedure: A comparative study* (1982) 85–86 and 286–288; s 35(3)(m) of the Constitution, 1996; and Du Toit *supra* 14-6).

It can hardly be disputed that it is unfair and unreasonable to try someone twice for the same offence. The fact that the pleas of *autrefois acquit* or *autrefois convict* are not yet available to the accused (as in the case under discussion) because the other criminal prosecution has not been concluded, further does not release the prosecution of its paramount constitutional duty to ensure that the decision to prosecute the accused is in accordance with the basic principles of equity and justice, and that the accused is treated fairly (*Connelly v DPP* [1964] AC 1254; *S v EA* 2014 1 SACR 183 (NCK) paras 8, 10 and 12; and Du Toit *supra* 1-40E to 1-40F).

The same considerations come into play as where the pleas of *autrefois acquit* and *autrefois convict* are available to the accused. It is in the general interest of justice that there should be finality in the criminal justice process and that one should not be punished twice in respect of the same facts (*Interest rei publicae ut sit finis litium*; *Green v United States* 355 US 184 (1957); Watney "*Ne bis in idem* and procedural errors" 2016 *TSAR* 364; and Du Toit *supra* 1-40E and 15-29). Citizens should be protected from the inconvenience, anxiety and insecurity of repeated prosecutions in respect of the same cause of action (*nemo debet bis vexari pro una et eadem causa*; *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA) para 28; and *Plaatjies v Director of Public Prosecutions, Transvaal* [2013] ZASCA 66 (unreported SCA case no 043/2013, 27 May 2013) para 1). The accused must be protected from abuse by the State (*S v Basson* 2004 1 SACR 285 (CC) 313e–g). Individuals should be treated with dignity and respect (*Director of Public Prosecutions, KwaZulu-Natal v The Regional Magistrate, Vryheid* 2009 2 SACR 117 (KZP) para 25). This enhances the possibility that the accused may be convicted even though he may be innocent (*Green v United States supra*; *Director of Public Prosecutions, KwaZulu-Natal v The Regional Magistrate, Vryheid supra* para 25; and *Connelly v DPP supra*; *Regina v JFJ* [2013] EWCA Crim 569).

It is even more unfair and unreasonable to hold someone accountable in the Equality Court and ordered to pay a substantial fine, and then be subjected to two criminal trials for the same wrongdoing. It accordingly can be argued that the South African authorities' decision to prosecute Catzavelos was unfair and unreasonable, offended the principle of legality, and was consequently illegal (*National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) [26(e)]; *National Director of Public Prosecutions v Freedom Under Law* 2014 2 SACR 107 (SCA) [28], [29]). No doubt, the South African authorities should in the spirit of mutual respect of sovereign equality and cooperation, first have settled the jurisdiction issue with Greece before prosecuting Catzavelos.

It is furthermore submitted that the conduct of Catzavelos did not comply with the requirements for *crimen injuria*. *Crimen injuria* can only be committed intentionally with regard to every aspect of the crime. This means that the perpetrator must have known that he is violating the complainant's dignity (this also implies that he must have known that the complainant did not consent to his conduct) or he must have at least foreseen that his conduct might impair the complainant's dignity, and he reconciled himself with the possibility (*dolus eventualis*). Where such knowledge or foresight is lacking and the perpetrator

accidently or negligently impaired the complainant's *dignitas*, there is no *crimen injuria* (*S v S* 1964 3 SA 319 (T) 321; *S v Naude* 1977 1 PH H9 (A); Milton *supra* 516; Snyman *supra* 467; and Burchell *supra* 658).

Catzavelos sent the video to a private WhatsApp group. The video was not accessible to the public or other parties. He did not want anybody else to see the video and it was never his intention to impair the dignity of anyone. He also did not foresee that any member of the group would object to the video. He was furthermore ignorant of the complainant's existence. It can accordingly hardly be said that he had the intention to directly or indirectly impair the personality rights of the complainant.

It can also not be said that Catzavelos must have foreseen that his conduct might impair the complainant's dignity, and that he reconciled himself with the possibility. An inference cannot be made from the fact that he sent the video to a private WhatsApp group, that he foresaw that the video could be leaked to social media, that it could come to the attention of the complainant, result in an insult to the complainant's pride in himself and that he reconciled himself therewith. It is a purely subjective test and it must be guarded against subtly applying an objective test in determining his intention. What one must do is imagine oneself in Catzavelo's position when he committed the act and deduce whether he foresaw the possibility of the result, and reconciled himself with the possibility (*Mavhungu* 1981 1 SA 56 (A) 66; *Khoza* 1982 3 SA 1019 (A) 1041H, 1042C–D; and *Swanepoel* 1983 1 SA 434 (A) 456. See also Snyman *supra* 184–185). The answer is he did not. The question is furthermore whether Catzavelos foresaw it as an actual fact, and not whether he should have foreseen the result. To do the latter is to apply the test in respect of negligence (Snyman *supra* 184–85).

See, in this regard, *R v James* 1960 R and N 159 (SR) where the accused sent a pornographic photo to a 15-year-old girl. The mother of the girl intercepted the letter and charged the accused for impairing her (the mother's) dignity. The charge failed because the accused could not have foreseen the possibility that the mother might open the letter.

Furthermore, the attack must have been against the complainant personally, and not against a group to which he is affiliated, for example his home language, religion or race. In such circumstances, it will normally not constitute a violation of his *dignitas*, unless there are special circumstances from which an attack on his self-respect may be deduced (Snyman *supra* 463; and *Tanteli supra* 1975 2 SA 772 (T)).

A person may well regard the action of another as ignominious, but he cannot complain that such action is an *injuria* if the utterance of the words is not an impairment of his person or reputation. In *Tantelli supra* the words used by the appellant were extremely disparaging of the Afrikaans language with the implication that Afrikaans was a k-word language, a medium suited only to kitchen menials. The court set aside the conviction in the magistrate's court because the remarks were an affront of his language and not an *injuria* to his person (774); see also De Villiers *The Roman and Roman Dutch law of injuries: A translation of Book 47, title 10, of Voet's Commentary on the Pandects, with annotations by Melius de Villiers* (1899) 22; *Walker v Van Wezel* 1940 WLD 68.)

The use of the offending word was disparaging of the black race, and there is no doubt that the complainant and other people of the same race would have

found the remark offensive. However, there was no basis or special circumstances for finding that the complainant's proper pride in himself was impaired. The attack was not, and it was not understood as being, an attack on the complainant. It was an attack on his race.

Therefore, even though the words were racially offensive and hurtful in the general sense, it did not, in relation to the person of the complainant, have the degrading, insulting (in a narrow sense; *Tanteli supra* 774) or ignominious character which is a requisite for *crimen injuria*.

It is furthermore significant there are no other cases of *crimen injuria*, apart from *Tanteli*, where the court set aside the conviction, on record arising out of such remarks. Given the mixed nature of South African society with regard to religion, language and race, and our political history, there must unfortunately have been innumerable instances where individuals felt affronted by such offensive remarks. This points strongly to the conclusion that a remark such as that now in question, has never supported a criminal charge of *crimen injuria*. Where there has been a practice for such a long time of not treating the conduct of Catzavelos as an *injuria*, it cannot now be treated as conduct supporting a charge of *crimen injuria* (see, in this regard, *R v Umfaan* 1908 TS 62 68; *R v Terblanche* 1933 OPD 65 71; *S v A* 1971 2 SA 293 (T); and *Tanteli supra* 775).

For the sake of completeness, it is also mentioned that the *injuria per consequentias* doctrine under Roman-Dutch law, in terms of which a person could complain that he suffered an *injuria* as a consequence of a wrongful act against another, does not apply. The doctrine only applied where the complainant was in the requisite relationship with the person immediately affected, for example that of man and wife. An *injuria* directed at the wife could therefore *ipso facto* have been an *injuria per consequentias* to the husband because of their relationship. The doctrine does in any event not exist under modern South African criminal law (Milton *supra* 508; *R v James supra*.).

It can furthermore not be said that there was the required causal link between the initial conduct by Catzavelos, and the ultimate consequence. For an act to be regarded as the cause of a consequence it must be the factual and legal cause of the consequence (Snyman *supra* 79; Burchell *supra* 95). For purposes of the *conditio sine qua non* (or factual) test it is accepted that the initial conduct by Catzavelos causally or materially contributed to the ignominy suffered by the complainant (see the test formulated in *Minister of Police v Skosana* 1977 1 SA 31 (A) 34 [25], [32]).

However, with regard to legal causation it cannot be said that there was a sufficient close connection between the initial conduct by Catzavelos, and the ignominy suffered by the complainant (see the test formulated in *Mokgethi* 1990 1 SA 32 (A) 40 [36]). The recording and sending of the video to a private WhatsApp group will in the normal course of events not tend to bring about the ignominy suffered by the complainant (adequate cause test). The independent unlikely leaking of the video to social media was the direct or proximate cause of the ignominy suffered and, as such, constituted a *nova causa* in this instance with regard to the ultimate result (*novus actus interveniens* test; see Snyman *supra* 79 and further; and Burchell *supra* 100–105 with regard to the tests for causation).

It is finally submitted that criminalising the type of utterances made by Catzavelos is not in accordance with international law and the constitutional and legislative approach to the prevention and prohibition of hate speech. It also negates the purposely-drafted provisions of the Equality Act.

Since the Second World War international agreements have striven to restrict freedom of expression as little as possible, reserving criminalisation for the most extreme expressions under strictly defined circumstances. It is submitted that section 16(2)(c) of the South African Constitution, 1996, which closely follows article 20 of the International Covenant on Civil and Political Rights ((ICCPR) adopted by the United Nations General Assembly in 1976) in this regard, read with section 10 of the Equality Act, also reserves criminalisation only for the most extreme expressions.

In terms of section 16(2)(c) read with section 16(2)(1), constitutional protection is afforded to hate speech that does not constitute incitement to cause harm (albeit subject to limitation) and constitutional protection is denied to hate speech that constitutes incitement to cause harm. By implication the two categories must be treated differently. Giving effect to this, section 10 of the Equality Act in general provides for appropriate orders which are civil in nature to be made aimed at transformation (ss 10; 21(1) and (2)). However, it also provides for the possibility of referring the issue to the relevant Director of Public Prosecutions under appropriate circumstances (s 21(2)(n)).

Considering the approach by the international agreements that provide for the criminalisation of hate speech only under strictly-defined and extreme circumstances, the distinction drawn by the Constitution, 1996 between hate speech that enjoys constitutional protection and that which does not enjoy constitutional protection, and the transformative provisions and remedies in the Equality Act, it is submitted that criminalisation was only meant for hate speech that constituted incitement to cause harm. Any other interpretation would negate the distinction drawn between the two categories in the Constitution as well as the carefully designed transformative provisions and remedies aimed at healing our injured society in the Equality Act.

W DE VILLIERS
University of Pretoria

WITHOUT A REGISTRATION OF BIRTH A NAME MEANS NOTHING: UNMARRIED FATHERS MAY GIVE NOTICE OF THEIR CHILD'S BIRTH

Centre for Child Law v Director-General Department of Home Affairs
2020 6 SA 199 (ECG)

OPSOMMING

Sonder 'n registrasie van geboorte het 'n naam geen betekenis nie: Ongetroude vaders mag kennis van hul kind se geboorte gee

Hierdie vonnisbespreking ontleed die *Centre for Child Law v Director-General Department of Home Affairs* 2020 6 SA 199 (ECG) uitspraak. Die bespreking fokus op die regsvraag of artikel 10 van die Wet op Registrasie van Geboortes en Sterftes 51 van 1992 ongrondwetlik is. Alhoewel die hof die aspekte nie in besonderhede bespreek nie, is dit wel duidelik dat sowel die beste belang van die kind (soos vervat in a 28(2) van die