The conviction was appealed to the Supreme Court of Appeal.[209] At the outset, Navsa JA set out his stall to investigate

> ... whether the boundaries of the defence in question have been inappropriately extended, particularly in decisions of Provincial or Local Divisions of the High Court, so as to negatively affect public confidence in the administration of justice.[210]

Thus, it is clear that the perspective of the court is a policy-based assessment of the legal rules governing non-pathological incapacity based on provocation or emotional stress. It is unfortunate that the formal adoption of this approach, however laudable the purpose underlying it, seems to have obscured and undermined the application of the existing legal rules. It is regrettable that the court did not simply state that the ambit of the defence of non-pathological incapacity was unacceptable, and that this necessitated a radical departure from the principles governing this area of the law, in order to bring it into line with the perceived community sentiment.[211] Such judicial frankness would be commendable, whatever the merits of the enterprise. Instead, in attempting and, it is submitted, ultimately failing, to marshal existing authority in its cause, the judgment ushers in significantly more confusion than that which it purports to counteract. The grave implications of the Supreme Court of Appeal fostering legal uncertainty are manifest.

There are a number of features of the judgment that bear highlighting. First, the court sets out to deal with its own previous decisions relating to non-pathological incapacity, 'in the quest for greater clarity and precision'.[212] However it proceeds to cite, as part of its reasoning, the cases of *Potgieter*,[213] *Cunningham*,[214] and *Henry*.[215] In each of these cases the defence in question was in fact sane automatism.[216] Furthermore, the terminological imprecision in two

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[209]The judgment was handed down by Navsa JA, with Olivier JA and Streicher JA concurring. From this point, unless otherwise indicated, all references to paragraphs are references to this judgment.

[210]At par [3].

[211]Snyman n 6 above at 15 makes this point, adding that this would be the best argument for rejecting the defence of non-pathological incapacity.

[212]At par [29].

[213]Note 163, cited at par [36].

[214]Note n 154 above, cited at par [39].

[215]1999 2 SACR 13 (SCA), cited at par [38].

[216]Whilst non-pathological incapacity, curiously raised as 'irresistible impulse', a term both dated and inaccurate in relation to liability arising from a non-pathological cause, formally constituted an alternative defence in the *Potgieter* case (n 163 above at 72f–g), this defence was never argued on appeal (84e), and it is clear that the court's judgment is entirely focused on the defence of automatism, as is evident from the discussion relating to matters of proof (73b–d, 73i–74b), the expert evidence led on behalf of both the appellant and the State (82c–84c), and Kumleben JA's concluding comment (on behalf of the court) on liability that he could not accept that the appellant had acted 'automatically' (84d). This is despite the fact that Kumleben JA saw fit to cite the cases of *Wiid* (n 148 above), and *Kalogoropoulos* (n 154 above) in particular in respect of the discussion on evidential matters (72h–73b, 73e–g). Burchell n 186 above at 38 also erroneously discusses the evidence adduced by the appellant in the context of non-pathological incapacity. With regard to *Cunningham*, the question of non-pathological incapacity does not arise at all, and the court deals specifically with the automatism defence (ultimately rejected on

further cases cited by the court, the cases of *Francis*[217] and *Kok*,[218] does not render either helpful authority.[219] It is significant, in the light of these difficulties, that the court baldly states that

> ... [i]t is clear from the decisions in the *Potgieter*, *Henry*, *Cunningham* and *Francis* cases that the defence [of non-pathological criminal incapacity] has been equated with the defence of automatism.[220]

As indicated, this statement is simply incorrect insofar as the first three decisions are concerned, and rather less than compelling in respect of the fourth. This difficulty is compounded where the court engages in a critique of the decisions of *Arnold*,[221] *Moses*[222] and *Gesualdo*,[223] and concludes that the approach 'adopted by this Court in the decisions discussed earlier' was not followed in these three cases.[224] It is evident that the problem which the court has with these three cases is that in each it is accepted that it is possible for a person to 'act consciously but at the same time not be able to act in accordance with one's

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the basis of a lack of factual foundation (n 154 above at 638j–639a)). In *Henry*, the court (per Scott JA) clearly and carefully distinguished the defence of non-pathological incapacity (which was not raised) from the defence of sane automatism, which was in issue (n 215 above at 19h–i). It follows that all subsequent references in *Eadie* to the *Henry* case as authority for the defence of non-pathological incapacity do not carry any weight (see *eg* paras [43], [45], [64]).

[217]1999 2 SACR 650 (SCA), cited at par [40].

[218]Note 159 above cited at par [41].

[219]The case of *Francis* was cited by Griesel J in the court *a quo* (n 146 above at 178c–d) as authority for the indistinguishability of sane automatism and non-pathological incapacity, and in particular Schutz JA's simple equation of the concepts by placing the term 'sane automatism' in brackets after the term 'non-pathological criminal incapacity' (at par [1]), despite the clear indication that the plea related to whether '... he was unable to distinguish right from wrong or, if he could, that he was unable to control his actions' (*ibid*). Later (at par [25]) Schutz JA confirms that the issue under discussion is sane automatism, but despite this categorisation, in discussing the criminal liability of the appellant, the language is exclusively that of capacity: 'concerning his ability to appreciate the wrongfulness of his actions ...' (par [27]), '... he could control himself...[a]lthough his powers of self-control were substantially diminished, his actions show they were not lost ...' (par [30]). Perhaps it could be suggested that the court's treatment of the appellant's 'awareness of what he was doing' (par [26]) indicates that it did canvass the actual content of the notion of sane automatism. However, it is patently clear that the court confused and conflated the concepts of automatism and incapacity, and, crucially, did not do so in any thoughtful or rational way, as in the course of a reasoned comparison or equation of the concepts. Similarly, the case of *Kok* seems to equate these concepts without justifying this approach in its statement (at par [25]) that the appellant '... had the necessary criminal capacity and that the defence of so-called "sane automatism" had to be rejected', particularly since the appellant had pleaded that he 'lacked the necessary criminal capacity' (par [3]) and the judgment discusses the appellant's liability in the context of capacity, despite the defence of automatism being dealt with exclusively in the court *a quo* (n 164 above at 546d–e). Once capacity has been established, then automatism is naturally excluded, and so the judgment can be explained on this basis. However, it does not add any clarity to the matter at hand. For discussion of how the comments of the court in *Kok* may negatively impact upon legal development in relation to mental illness, see SV Hoctor '"Just a spoonful of sugar ...": glycaemia, insanity and automatism' (2001) 22 *Obiter* 241 at 254ff.

[220]At par [42].

[221]Note 119, discussed at par [46].

[222]Note 80 above, discussed at par [49].

[223]Note 154 above, discussed at par [50].

[224]At par [51].

appreciation of what is right and wrong',[225] as a result of provocation.[226] However, this approach is entirely consistent with the views expressed in the following cases cited by the court: *Van Vuuren*;[227] *Campher*;[228] *Laubscher*;[229] *Calitz*;[230] *Wiid*;[231] and *Kalogoropoulos*.[232] This begs the question – with which decisions of the Supreme Court of Appeal do the three censured decisions conflict? Bar one,[233] the remaining cases are those discussed earlier[234] which either relate to automatism rather than incapacity, or are somewhat conflicted and conflicting in their treatment of the notion of non-pathological incapacity. In any event, not one of the remaining decisions criticise the approach adopted in the three censured decisions. A final puzzle relates to the case of *Nursingh*.[235] The result in this case has been trenchantly criticised by writers such as Burchell and Milton,[236] and Louw,[237] and indeed Navsa JA acknowledges that the case leaves one 'with a sense of disquiet'.[238] Why then is the court prepared to accept the result (and the expert evidence) in this case, but reject the decisions (and relevant expert evidence) in the three censured decisions? Why is this case 'easier to explain'?[239] The judgment in *Eadie* does not enlighten the reader, beyond a statement that the combination of factors in *Nursingh* was 'extreme and unusual'.[240] It is submitted that by accepting that the accused in *Nursingh* was entitled to a defence, the court is applying an inconsistent criterion, which ultimately subverts the rationale of the decision in *Eadie*.[241]

[225] At par [46], referring to *Arnold*.

[226] 'In the *Moses* and *Gesualdo* cases we appear to have moved from the fundamental position that provocation is a mitigating factor to a position where it has become an exculpatory factor' (at par [51]). See n 345 below.

[227] Note 112 above, discussed at par [30].

[228] Note 93 above, discussed at par [31]. This was the view expressed by Viljoen JA and Boshoff AJA.

[229] Note 94 above, discussed at par [32].

[230] Note 149 above, discussed at par [33].

[231] Note 148 above, discussed at par [34].

[232] Note 154 above, discussed at par [35].

[233] The Appellate Division case of *S v Kensley* n 153 above, discussed at par [37]. Whilst it is clear that the court (per Van den Heever JA) accepted that the defence of non-pathological incapacity raised by the appellant existed in South African law (658e–g), which the State refuted *in casu* (660c), the court made some pertinent remarks relating to policy factors, which will be discussed nn 415–423 below.

[234] See the preceding discussion, notes 213–218.

[235] Note 183 above, discussed at par [47]–[48].

[236] Note 186 above at 286.

[237] Note 187 above at 208–9.

[238] At par [48].

[239] The phrase employed in par [49].

[240] At par [48]. This is essentially the same sentiment expressed by Burger J in *S v Arnold* n 119 above – see n126 – which case is trenchantly criticised in *Eadie*.

[241] The modified test for incapacity proposed by the court in *Eadie* will be discussed below. In terms of this test, the erstwhile subjective assessment of the element of conative capacity is replaced by the objective test for sane automatism, which means that an accused can only escape liability on the basis of non-pathological incapacity if his actions are involuntary. Given that the accused in *Nursingh* is described by Navsa JA (at par [48]) as having exhibited 'goal-directed actions' in respect of the multiple shooting, and that he was thus not acting automatically, he could not rely on the test formulated in *Eadie*, and ought to have been found criminally liable on an application of this test.

As noted, the disregard of existing precedent in *Eadie* is hard to explain.[242] One could speculate that this approach amounted to a sort of judicial ground-clearing for the theoretical edifice which was to follow. However, this begs the question why the court did not simply declare that the previous decisions dealing with the defence of non-pathological incapacity in terms of established practice were all mistaken?

Theoretical aspects

And so, to the theory. Having criticised the operation of the defence of non-pathological incapacity in the cases of *Arnold*, *Moses* and *Gesualdo* as misconceived, and out of line with existing authority, the court sets out its own view, which in essence is that there is no distinction between the notions of conative capacity and automatism. This view finds support in the testimony of the expert witnesses for the State, and in particular that of Dr Kaliski, whose scepticism about the existence of the defence of non-pathological incapacity leads to the conclusion that there is no distinction between this defence and sane automatism.[243] Further support is found in Louw's analysis of the defence, and in particular his statement that

> Logic ... dictates that we cannot draw a distinction between automatism and lack of self-control. If the two were distinct, it would be possible to exercise conscious control over one's actions (the automatism test) while simultaneously lacking self-control (the incapacity test).[244]

Navsa JA states the court's position in the clearest possible terms following the reference to Louw's argument:

> I agree with Ronald Louw that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation.[245]

The plain corollary of this point of view is that it would have to be established that an accused was acting involuntarily in order for her defence of lack of conative capacity to prevail. The court does not shy away from this conclusion:

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[242]Almost inevitably one is drawn to the American realist assumption that judges work backwards, being liberated rather than inhibited by rules, since by resorting to rules judges are able to retroactively furnish their instincts with authority. See in particular the work of Frank *Law and the Modern Mind* (1949). See also Snyman n 6 above at 15.

[243]At par [14], where Kaliski's description of sane automatism is set out. Kaliski further describes the statement that someone 'lost control' as one which is used too loosely (par [15]). This view is shared by Lay, a psychologist who testified in support of the State's case (par [13]), who describes this expression as vague, too general, and not a clinical term. The need to ensure clarity of expression is underlined by the reference to the testimony of the expert witness for the defence, Dr, as negativing 'any suggestion of automatism' (par [21]), despite the earlier statement (at par [19]) that the 'essence of Jedaar's conclusions' was that the appellant's actions were 'involuntary'.

[244]Note187 above at 210–211, noted at par [56] of the *Eadie* judgment. Louw states (at 211) that Burchell and Milton n 186 above at 105–6 'also argue that the two concepts are not distinct', but this appears to be unfounded.

[245]At par [57].

> It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence…In the present contest [sic] the two are flip sides of the same coin.[246]

The court acknowledges that this approach constitutes a fundamental reinterpretation of the formulation of the defence of non-pathological incapacity set out in *Laubscher*:

> It appears to me to be clear that Joubert JA was concerned to convey, in the second leg of the test set [out] in the *Laubscher* case, that the State has to prove that the acts which are the basis for the charges against an accused were consciously directed by him. Put differently, the acts must not have been involuntary.[247]

This approach, the court states, flows from the previous decisions of the Supreme Court of Appeal,[248] and on the basis of the decisions referred to by the court

> it is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence, in relation to the second leg of the test in *Laubscher's* case, from which an inference can be drawn that the act in question was not consciously directed, or put differently, that it was an involuntary act.[249]

Thus it follows that the dissenting view – that automatism and conative capacity are distinct concepts – is fundamentally flawed. Moreover, this view

> ... followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law…[n]o self-respecting system of law can excuse persons from criminal liability on the basis that they succumbed to temptation.[250]

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[246] *Ibid.*

[247] At par [58]. The court further clarifies this statement later in the same paragraph by citing, from JM Burchell *South African criminal law and procedure* Vol I (General principles) (3ed 1997) 42, a list of synonyms used by South African courts for 'involuntary conduct': 'mechanical activity', 'unconsciousness', 'automatic activity', 'onwillekeurige handeling', 'involuntary lapse of consciousness'.

[248] Or Appellate Division. In par [57] the court avers that decisions of 'this Court' make it clear that there is no distinction between sane automatism and non-pathological incapacity, and that the equivalence between the concepts ('flip sides of the same coin') is founded on the 'judgments of this Court referred to earlier, as the highlighted parts of relevant *dicta* show'. In these decisions the court was required to determine whether the accused was 'truly disorientated – an indicator of temporary loss of cognitive control over one's actions and consequent involuntary behaviour' (par [44]). Earlier in the judgment (at par [43]) the court states that Dr Kaliski's view that automatism and non-pathological incapacity are equivalent, and that 'the only circumstance in which one could "lose control" is where one's cognitive functions are absent and consequently one's actions are unplanned and undirected' is consistent 'with the decisions of this Court'.

[249] At par [42].

[250] At par [60].

It is clear that the court envisaged a narrowing of the defence of non-pathological incapacity on grounds of policy. The stated objective of the judgment was to consider whether the boundaries of the defence had been inappropriately extended so as to negatively affect public confidence in the administration of justice,[251] and it is clear that this perspective is maintained throughout. Thus, in relation to the landmark case of *Chretien*,[252] which is foundational to the development of the defence of non-pathological incapacity, the court approvingly cites Burchell's comment that whilst sound in principle, the judgment 'might well have miscalculated the community's attitude to intoxication'.[253] It is evident that the court would apply similar criticism to the defence of non-pathological incapacity in the context of provocation or emotional stress from some of the sources cited in the judgment. First, the statement of the Appellate Division (per Van den Heever JA) in the case of *Kensley*:[254]

> Criminal law for purposes of conviction – sentence may well be a different matter – constitutes a set of norms applicable to sane adult members of society in general, not different norms depending upon the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do. Compare *S v Swanepoel* 1983 2 SA 434 (A) at 458A–D.

This dictum is cited by the court in *Eadie* as authority for the proposition that a court should assess an accused person's evidence about his state of mind by weighing it against his actions and the surrounding circumstances, and considering the evidence against human experience, societal interaction and societal norms.[255] Navsa JA states that whilst critics may describe this as 'principle yielding to policy',[256] this is an acceptable method for testing 'the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence'.[257]

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[251] At par [3].
[252] Note 17 above.
[253] At par [27], citing Burchell n 247 above at 188.
[254] Note 153 above at 658h–j, cited in par [37].
[255] At par [45]. Navsa JA notes that this approach was followed by Griesel J in the court *a quo* (n 146 above at 183h–i) when he stated: 'Hundreds of thousands of people daily find themselves in similar or worse situations, yet they do not go out clubbing fellow-motorists to death when their anger may be provoked.'
[256] At par [64]. This is the corrected wording of the judgment in the South African Criminal Law Reports, effected by the corrigenda in 2002 (2) (September) SACR, xiii.
[257] At par [64].

The reference to the *Swanepoel* case in the above dictum from *S v Kensley* in fact primarily consists of a quote from Snyman on why provocation could never be regarded as a complete defence.[258] In part it reads as follows:

> Die rede waarom provokasie nooit kan dien as 'n volkome verweer nie, hang saam met die oorweging dat van die mens verwag word om sy emosies in toom te hou, en dat opvlieënde en ongeduldige mense nie hierdie karakterskete mag aanvoer as verskoning vir kriminele gedrag nie. Indien hulle dit wel sou kon doen, sou dit beswaarlik 'n aansporing vir die res van die gemeenskap wees om hulle humeure te beteuel in die aangesig van versoeking.

Further, the court cites Burchell's comments regarding the policy concerns associated with provocation:[259]

> The general approach in most legal systems is that provocation does not excuse from criminal liability. People are expected to control their emotions. Furthermore, in many cases the response to the provocation is in the nature of a revenge for harm suffered. Since it is a fundamental principle of modern systems of criminal justice that vengeance for harm suffered must be sought through the public criminal process and not by personal self-help, the criminal law is precluded from admitting the provocation should be a justification for unlawful conduct.

It appears that the court is also concerned with the spectre of the defence being the convenient first resort of multiple accused.[260]

In the light of the approach set out above, it could be expected that the court would dispose of the second element of the test for capacity, the inquiry into conative capacity, as nugatory. However, Navsa JA insists that this inquiry should remain,[261] and that whilst it may be difficult to envisage a situation where a person is able to distinguish between right and wrong, but is unable to control her actions, this is 'notionally possible'.[262]

Analysis

The central tenets of the approach adopted by the Supreme Court of Appeal in *Eadie* may be briefly interrogated. First, the court insists that there is no difference between conative capacity and automatism. This is clear from the

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[258] *Strafreg* (1981) 158. In translation (in CR Snyman *Criminal law* (1984) 146): 'The reason why provocation can never be a complete defence is that the law expects people to keep their emotions in check; the fact that certain persons are quick-tempered and impatient is no excuse for their criminal behaviour. If it were otherwise, people would have little incentive to control their emotions in the face of insult or affront.'

[259] Note 247 above at 202, cited at par [51].

[260] At par [28] the court notes that the defence of non-pathological incapacity based on provocation or emotional stress 'has become a very popular defence', and at par [65] it comments further that '[i]t is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity'.

[261] At par [57].

[262] At par [59].

unequivocal statement in the penultimate paragraph of the judgment to the effect that

'[i]t must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism'.[263]

The court relies for its conclusion on the expert evidence led by the State (and in particular the testimony of Dr Kaliski), along with the arguments of Louw. However, neither of these sources is entirely compelling. Dr Kaliski concedes that courts have accepted the defence of non-pathological incapacity in certain circumstances (such as 'stress, provocation and the disinhibiting effects of alcohol').[264] Despite his own severe scepticism about the defence, Kaliski further concedes that 'in the face of compelling facts' he may be prepared to concede the validity of such a defence.[265] Thus it follows that, in the right circumstances (in other words where the evidence supports it), even Kaliski accepts the possibility of a defence of non-pathological incapacity.

Placing reliance on Louw's views is also problematic for the court. Though the court is entirely correct in stating that Louw does not distinguish between lack of conative capacity and automatism,[266] the writer is nevertheless critical of the *Eadie* judgment in the Cape High Court, criticising the judgment for not properly distinguishing between automatism and incapacity, and for introducing an objective test for the provocation defence.[267] He further warns against objective factors intruding on the test for incapacity.[268] Louw's central thesis is that it is far from clear when 'self-control' is lacking,[269] and goes on to argue that in fact there is no real difference between conduct (voluntariness) and conative capacity, and that consequently the second leg of the capacity test should simply fall away.[270] It is on the basis of the perceived difficulty in

[263] At par [70].
[264] At par [16].
[265] *Ibid.*
[266] The relevant passage (discussed at par [56]) may be found at 210–211 of Louw's article n 187 above: 'Logic too dictates that we cannot draw a distinction between automatism and lack of self-control…If there is no distinction, then the second leg of the capacity inquiry should logically fall away…Capacity should then be determined solely on the basis of whether a person is able to appreciate the difference between right and wrong. Once an accused is shown to have capacity, the accused may then raise involuntariness as a defence.'
[267] Note 187 above at 207. Louw opines that this 'adds to the confusion' which he argues is a feature of the defence of non-pathological incapacity resulting from provocation and emotional stress. The court acknowledges this criticism, citing the relevant passage at par [55]. Louw's comment on the case is devoid of any consideration of the development of the defence, and focuses in its entirety on the cases of *Moses* and *Nursingh*, along with the *Eadie* judgment.
[268] Louw is at pains to emphasise that the capacity inquiry is subjective (n 187 above at 211 and 216), and proceeds to opine that the reassessment of this test (to incorporate objective factors) is not necessary (at 212).
[269] Note 187 above at 207. The unfortunate use of terminology, leading to such obfuscation, is evident in, *eg*, *S v Aspeling* n 179 above, where having decided that the appellant had not acted on the spur of the moment, but rather having had time to reflect (at 574d–e), the court proceeds to state that the inference is unavoidable that the appellant 'lost control of himself' (575f–g).
[270] Note 187 above at 211.

defining the issue of 'control' that Louw advances his solution, and thus any appropriation of his reasoning by the court needs to take this into account.

It is hardly surprising, given that the SCA referred extensively to his views, and adopted a central tenet of his argument, that in his note on the SCA judgment in *Eadie*,[271] Louw is laudatory, praising the judgment for 'tellingly exposing the fallacy of many loss-of-control defences'[272] and for bringing clarity to this area of the law.[273] Nevertheless, Louw criticises the judgment for not relinquishing the second leg of the capacity test.[274] Somewhat curiously, Louw also continues to criticise the court for adopting an objective test for provocation, based on policy.[275] It is an inevitable consequence of his point of departure that the same test should be employed for sane automatism (which is objectively assessed) and conative capacity that objective policy factors must intrude. Louw concludes that the effect of *Eadie* is to entirely exclude provocation as a defence.[276]

To its credit, the SCA sets out the difficulties that Louw has with the approach of the court *a quo*,[277] even though much of the criticism applies equally to its own judgment. However, this inevitably detracts from the value of Louw's arguments as authority for its approach. After all, unlike Louw, the court holds firm to the possibility of a defence based on provocation excluding capacity, which still consists of a two-stage inquiry into cognitive and conative capacity. The court further chooses not to address the internal inconsistencies of Louw's approach, quite possibly to avoid further undermining the authority of his views, but it is submitted that this oversight, whether deliberate or not, does not render the court's views any more convincing.

There being no difference between sane automatism and non-pathological incapacity, the accused must have acted involuntarily in order to rely on non-pathological incapacity as a defence.[278] In adopting this approach the court does

[271] R Louw '*S v Eadie*: The end of the road for the defence of provocation?' (2003) 16 *SACJ* 200.
[272] *Id* at at 202.
[273] *Id* at 206. This complimentary assertion does not sit well with Louw's criticism of the judgment however.
[274] *Id* at t 205. This criticism should be seen in the light of Louw's equation of the second leg of the capacity inquiry and the inquiry into voluntariness.
[275] *Id* at 206.
[276] *Id* at 204. Louw states that the approach in *Eadie* (involving the adoption of an objective test for capacity) is not the right solution.
[277] See paras [55] and [63].
[278] At par [57]. See Snyman n 6 above at 14, who derives the same conclusion from the court's comments. In the recently reported case of *S v Scholtz* 2006 2 SACR 442 (E), Froneman J interprets the court's comments at paras [57] and [58] as a warning against the tendency to interpret the two legs of the test as separate defences (444h–445b). With respect, such an interpretation is simply not tenable. These paragraphs in *Eadie* deal specifically with the purported overlap between sane automatism and lack of conative capacity. Unfortunately it seems that the court in *Scholtz* has also fallen victim to the same faulty reasoning evidenced in *Eadie*: after finding (at 445h) that the appellant acted consciously and voluntarily ('bewustelik en vrywillig' *ie* not in a state of *sane automatism*), the court concludes that in the absence of further evidence establishing a factual foundation to disturb such finding, the appellant's defence of *non-pathological incapacity* could not succeed (at 445h–i, my emphasis).

not always appear to interpret the term 'involuntary conduct' consistently,[279] yet if it is assumed that the words 'not conscious' and 'involuntary' are used as synonyms, rather than as distinct conditions, then it is evident that the dictum in *Laubscher* must be reinterpreted.[280] The difficulty with this process is that by reading the second leg of the *Laubscher* test as applying to involuntary conduct, one is simply subverting the clear meaning of the dictum. Joubert JA is plainly referring to the mental faculties (*geestesvermoëns*) or psychological condition (*psigiese gesteldheid*) of the accused when he sets out the psychological characteristics (*psigologiese kenmerke*) of criminal capacity: the capacity to distinguish between right and wrong, and the capacity to act in accordance with such distinction. It is submitted that there is no room for the argument that in this context the description of conative capacity as

> [d]ie vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die weerstandskrag (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan ...

can refer to involuntary conduct, as opposed to capacity to control the urge to offend, subjectively assessed.[281]

What of the court's statement that the equivalence between sane automatism and non-pathological incapacity is founded on the previous decisions of 'this Court'? As indicated earlier, this assertion is not supported by previous

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[279]For example, in par [57] the court refers to a person who was unable to exercise control over his movements and acted as an automaton as a result of disintegration of the psyche as follows: 'his acts would then have been unconscious *and* involuntary' (court's emphasis). It is not clear how someone's acts could be unconscious and yet be voluntary, or involuntary and yet be conscious. Snyman's helpful analogy is pertinent: if X's conduct is involuntary, it means that 'X is not the "author" or creator of the act or omission; it means that it is not X who has acted, but rather that the event or occurrence is something *which happened to X*' (writer's emphasis) (n 17 above at 55). This throws into relief a further puzzling comment by the court, that 'the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is with respect, an over-refinement' (par [58]). Once again, if the conduct in question is not voluntary, by definition the mind is non-functional. As Rumpff CJ stated in *Chretien* n 17 above at 1104F–G, in the context of intoxication: 'In die strafreg is 'n handeling alleen dan 'n handeling wanneer dit deur die gees beheer word. In die geval van die onwillekeurige spierbeweging van 'n papdronke is daar geen sweem van beheer nie en is dit dus nie eens nodig om oor skuld te filosofeer nie. Daar is net geen plek vir skuld nie. Ook toerekeningsvatbaarheid kom nie hier te sprake nie'.

[280]See paras [42] and [58], referring to the dictum at 166G–167A of *Laubscher* n 94 above, cited at par [32].

[281]For examples of the applications of the *Laubscher* dictum relating to 'toerekeningsvatbaarheid' see S v Van der Merwe n 81 above at 134–5; *S v Calitz* n 149 above at 126e–f; *S v Wiid* n 148 above at 563h–i; See further the discussion in the *Rumpff Commission Report* n 66 above at par 9 33 and Snyman n 17 above at 162. Thus, where the court seeks to consider whether 'in terms of our law a purely subjective test should be applied when the question of incapacity is raised', there is no indication in the relevant case law preceding *Eadie* (save perhaps *Kensley* – see n 153 above) that any other test could be determinative of this question. As has been pointed out elsewhere (Hoctor n 205 above at 202), there are instances of terminological imprecision in *Laubscher* (n 94 above) – see 171D, 173B – where the court uses the term '(on)willekeurig' ((in)voluntary) in circumstances where incapacity is being discussed. It is evident that no such carelessness has crept into the formulation of the test.

authority.[282] Further, it is noteworthy that the court, despite citing the case of *Chretien*,[283] fails to discuss this decision, and the exposition of the law set out therein,[284] which clearly demarcates the distinct nature of the concepts of automatism, capacity and fault.[285]

The court proceeds to argue that 'the unsatisfactory state of affairs' which allowed the accused in *Moses* to successfully rely on a defence of non-pathological incapacity based on provocation 'arose because of a misapplication and a misreading of the decisions of this Court'.[286] As regards the case law, the court states that in some instances courts have 'resorted to reasoning that is not consistent with the approach of the decisions of this Court', as a result of sympathy with the accused.[287] The court elaborates on its difficulty with the decisions in question:

> When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the

[282]In par [57], Navsa JA refers to 'the highlighted parts of relevant *dicta*' in support of the statement that there is previous authority asserting the equivalence of the concepts. However, it is submitted that all the indicated 'highlighted parts' can be distinguished or explained: the passage from *Chretien* (n 17 above at par [26]) refers to evidential concerns; the inconsistency of the use of the highlighted term 'willekeurig' (voluntary) found at 173B of *Laubscher* (n 94 above, cited at par [32]) with the test at 166G–167A indicates (it is submitted) sloppiness rather than a proper equation of the concepts; similarly the use of the term 'willekeurig' at 569c–d of *Wiid* (n 148 above, cited at par [34]) in the light of the use of the *Laubscher dictum* setting out the test for criminal capacity, and the eventual finding of 'ontoerekeningsvatbaarheid' (569g) should not be regarded as a true equation of the concepts; the judgments in *Potgieter* (n 163 above, cited at par [36]), *Henry* (n 215 above, cited at par [38]) and *Cunningham* (n 154 above 154, cited at par [39]) dealt with automatism and not incapacity (see n216) and all references to 'willekeurig'/'voluntary' conduct should be interpreted accordingly; and the interchangeable discussion of the concepts in *Francis* testifies more to confusion than true equation of the concepts (see n219).

[283]At par [26].

[284]Despite acknowledging the difference between automatism and incapacity as set out in *Chretien* (n 17 above, at par [26]), the court fails to address this statement of the law.

[285]See 1104F–G, 1106E–G.

[286]At par [53], where the court, in apparent justification of this statement, refers to the following passage from Burchell, Milton and Burchell n 13 above at 274, cited at par [24], which clearly distinguishes between automatism and incapacity: '…it does not have to be shown that the accused's conduct was involuntary in the sense that it was automatic or purely reflexive, for then the accused would be exempt from criminal liability on the ground that his act was not one of which the criminal law takes cognisance, and the question of criminal capacity ("toerekeningsvatbaarheid") does not arise. The determining factor, it seems, is the question of self control – whether, in all the circumstances of the case…the accused *"could not resist or refrain from this act, or was unable to control himself to the extent of refraining from committing the act"*.' (court's emphasis). The court states (at par [53]), using the same terms which it highlighted, that the second leg of the test in *Laubscher's* case (n 94 above) 'is read to mean that one looks to see whether in all the circumstances of the case the accused could not resist or refrain from this act or was unable to control himself to the extent of refraining from committing the act'. The difficulty with this statement is simply that the writers were commenting on the law as at 31 December 1982, whilst the *Laubscher* decision was only handed down in 1988! The writers can thus hardly be criticised for 'misreading' this decision. In par [54] Snyman is cited as being culpable on charges of 'misapplication' and 'misreading' for his explanation of the distinction between absence of capacity and involuntary behaviour in *Criminal law* (3ed 1995) 151–2 (and not 152–3, as cited in par [54]).

[287]At par [61] – 'either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being'.

> difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manouevre [sic] he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred. As demonstrated courts have accepted such version of events from accused persons.[288]

If taken at face value, this statement appears to be saying that someone who acts with the necessary capacity, and then subsequently claims that he lacked capacity, should not be able to escape liability. This interpretation would however be so self-evidently true that it would scarcely merit mention,[289] and so inevitably one returns to the dictum for an alternative interpretation. Could it be that the court is trying to point out that the acceptance of such a defence is intrinsically problematic? If so, then the response is simply that, confronted with evidence, it is a court's duty and prerogative to evaluate such evidence, and draw conclusions from it. Thus it appears that the concerns raised relate to matters of evidence, rather than to substantive legal rules. Further support for this interpretation can be derived from the court's statement that 'the greater part of the problem lies in the misapplication of the test [for capacity]', including 'a too-ready acceptance of the accused's *ipse dixit* concerning his state of mind'.[290] Once again, it may simply be noted that a court, as final arbiter of fact, has the discretion whether to accept such evidence, and as to what weight should be attached to it. A final comment in this regard is that where an accused raises a defence based on loss of control due to provocation or emotional stress, in terms of the ordinary principles of antecedent liability the accused can still be held liable on grounds of his voluntary conduct and mental state prior to the actual causing of the harm. Thus the spectre of the court being cabined in respect of the assessment of liability by the accused's plea of non-pathological incapacity has no basis in reality, either in respect of the court's treatment of evidence, or in relation to the principles of liability.

The court thus rejects the view allowing a defence of non-pathological incapacity, distinct from automatism, and founded on such factors as 'loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions', as one which 'does violence to the

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[288]At par [61].

[289]The court perpetrates a similar misstatement at par [70], where it holds that ' [t]he message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law'. This plain meaning of this statement is however so obviously true that one wonders whether this is indeed what the court intended to say. One assumes that the court wished to reiterate the 'message' which forms the rationale of the judgment, such that persons not acting automatically cannot rely on lack of conative capacity as a defence. See Snyman n 6 above at 18.

[290]At par [64]. The court is responding here to Louw's suggestion (n 187 above at 212, cited at par [63]) that the problem with the test for capacity lies not in the subjective aspect of the test, but its application.

fundamentals of any self-respecting system of law'.[291] Despite the reference to 'fundamentals', it is clear that the court does not have in mind the principles foundational to criminal liability, but that instead it is issuing a judgment premised on policy considerations.[292] This is further elucidated by the court's point of departure:

> [I]t is with respect, absurd to postulate that succumbing to temptation may excuse one from criminal liability. One has free choice to succumb to or resist temptation. If one succumbs one must face the responsibility for the consequences.[293]

In response to this, two short comments. First, the policy decisions of the courts,[294] which shape and refashion the common law, 'must ... reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people'.[295] It is ultimately the responsibility of the judge to apply the common values and norms of the community in making his or her decision.[296] In doing so, the judge will often be required to 'perform a balancing act between two competing values, each in itself a worthy and desirable one'.[297] Corbett refers in this regard to the case of *Chretien*, where Rumpff CJ delivered 'a very important policy decision',[298] and where it was necessary to balance 'the need to punish criminal conduct versus the undesirability of penalising a person for conduct for which, owing to voluntary drunkenness, he was not responsible'.[299] It is evident that in *Eadie* it was incumbent on the court to effect a similar balance in relation to provocation or emotional stress. Whether the court arrived at a satisfactory balance (or even set out to do so, referring as it does to 'the message that must reach society'[300]) is indeed questionable – whilst concerns about crime control are indubitably valid, they should not simply be regarded as determinative. In respect of capital punishment, for example, the Constitutional Court did not merely reflexively adopt the majority community view favouring the death penalty.[301]

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[291] At par [60].

[292] Thus, the court refers to the possibility of being excused from liability as a result of 'being overcome by temptation' (and includes the refrain raised by a disgraced former national cricket captain: 'the devil made me do it') (*ibid*). The court later (at par [65]) refers to the need to 'maintain the confidence of the community in our system of justice', an evident policy concern.

[293] At par [60].

[294] Public policy was equated with the legal convictions of the community by Rumpff CJ in *S v Chretien* n 17 above at 1105F–G.

[295] MM Corbett 'Aspects of the role of policy in the evolution of our common law' (1987) 104 *SALJ* 52 at 67.

[296] 'It is these values and norms that the judge must apply in making his decision. And in doing so he must become "the living voice of the people"; he must "know us better than we know ourselves"; he must interpret society to itself' (*ibid*).

[297] *Ibid* 68.

[298] At 66, such that 'public policy...did not require a person to be punished merely because he had voluntarily reached a state in which he could not act juristically or was no longer criminally responsible'.

[299] At 68.

[300] At par [70].

[301] See *S v Makwanyane* 1995 2 SACR 1 (CC).

Second, the statement of the court reflects a misunderstanding of the nature of the defence of non-pathological incapacity. It is precisely where someone does *not* have 'free choice to succumb to or resist temptation' that the defence operates. Where a person is unable to resist the urge to act or to exercise self-control, then there is no capacity to act in accordance with the distinction between right and wrong, and indeed no capacity to choose whether or not to succumb to temptation.

Finally, despite its antipathy towards the notion of conative capacity, the court insists on retaining the two-stage form of the concept of criminal capacity, stating that it is 'notionally possible' albeit 'difficult to visualise' a situation where despite the presence of cognitive capacity, conative capacity is absent.[302] Indeed, despite the court's stated difficulty in conceptualising such a situation, the retention of the traditional test for incapacity by the court necessarily requires that such a situation may arise. By accepting that the current test can still prevail, despite being fundamentally reinterpreted, the court appears to be able to avoid the ticklish problem of overruling the considerable body of contrary precedent which has developed from the case of *Chretien* onwards. However, the solution offered by the court in *Eadie* to resolve the 'vexed question of automatism versus non-pathological criminal incapacity'[303] is in fact, it is submitted, no solution at all. This is because the purported retention of the second leg of the test is nothing of the sort, since the negation of the second leg is effected by a totally different defence, viz automatism, and thus the content of the notion of conative capacity, *ie* whether the accused was able to act in accordance with the distinction between right and wrong, is simply not assessed. Moreover, the subjective test for capacity is replaced by an objectively assessed criterion in the form of the test for sane automatism. If one accepts that the first stage of the inquiry into criminal liability involves the question whether there is an unlawful act (*actus reus*), and that any inquiry into whether there is a blameworthy state of mind is a futile quest until the presence of an unlawful act has been established, then it is clear that the same test – assessing voluntariness – will be employed twice: initially, to establish that the accused acted voluntarily (and that his conduct is thus legally relevant), and then once again, once cognitive capacity is established, in lieu of the test for conative capacity. In the result there is unnecessary duplication and confusion.

It is submitted, in the light of the above criticism, that the revised test for conative capacity, far from presenting a workable solution to any perceived problem with the notion of non-pathological incapacity, only confuses and complicates the legal position, and is thus most unwelcome. Nonetheless, some solace could be found in the fact that there is nevertheless recognition for a place for the defence of non-pathological incapacity, albeit that the defence is severely attenuated by the approach in *Eadie*. Unfortunately even this limited consolation falls away on a closer evaluation of the implications of the solution

[302] At par [59].
[303] At par [55].

proposed in *Eadie*. As Navsa JA has stressed, in terms of the approach in *Eadie*, 'an accused can only lack self-control [*ie* conative capacity] when he is acting in a state of automatism'.[304] However, where automatism is present, this by definition means that the accused's mind is not functioning, or (to use the synonym favoured by Navsa JA) that his acts are 'unconscious'. Hence, where automatism is established, not only would there be a lack of conative capacity (as suggested in the *Eadie* approach), but a total lack of any capacity at all.[305] The incorporation of the test for automatism into the test for capacity must mean that the entire test for capacity is defeated, and falls away. This conflation creates a further difficulty in application in that whilst the presence of automatism defeats the notion of capacity, lack of capacity does not necessarily mean that there is no voluntary conduct.[306] This begs the question, if the same test now applies to both automatism and incapacity, how does one distinguish between the two? Thus, the consequences of the application of the *Eadie* approach is the demise of the defence of non-pathological incapacity based on provocation or emotional stress. Liability will only be excluded where the provocation or emotional stress is of such a nature as to exclude the voluntariness of the accused's conduct.

The writers: Professors Burchell and Snyman

Both Professors Burchell and Snyman have commented at length on the *Eadie* judgment, and on the defence of non-pathological incapacity in general, and so it is very important to briefly consider their views at this juncture.

Burchell

Burchell has praised the judgment in *Eadie* as 'bold' and 'most encouraging' for its emphasis on the 'objective norms of behaviour as a barometer against which to test ... lack of criminal capacity'.[307] This perspective could be anticipated, as over the past two decades, Burchell has consistently argued for a reasonableness standard to be applied in relation to provocation. Thus in 1988 it was argued that 'everyone is capable of controlling his or her emotions even under severe provocation',[308] and that where a person's condition is under his control, the appropriate standard to assess whether criminal liability should follow is

[304]At par [70].

[305]If the accused is acting automatically, there is no question of her having the capacity to distinguish between right and wrong, and thus cognitive capacity cannot be present. As Dr Kaliski testified (at par [14]) in *Eadie*; '[w]hen one acts in this state one's cognitive functions are absent'. Louw's comment (n 187 above at 208) regarding the defences of automatism and incapacity is also apposite: '... either the two defences are distinct or they are the same: they cannot be both the same in some circumstances and distinct in others'.

[306]In the judgment of the court *a quo* (n 146 above at 178b, cited at par [22]), Griesel J evidently does not recognise this point when equating automatism and incapacity in the following terms: '..a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity'.

[307]JM Burchell 'Criminal justice at the crossroads' (2002) *SALJ* 579 at 587n44, 592n73.

[308]JM Burchell 'Heroes, poltroons and persons of reasonable fortitude – juristic perceptions on killing under compulsion' (1988) 1 *SACJ* 18 at 28.

'whether a reasonable man would have succumbed to the pressure'.[309] Burchell elaborates as follows:[310]

> This approach might also provide an antidote for the untenable, and yet arguably logical, conclusion reached in certain recent South African judgments that extreme provocation (or even emotional distress) can serve to exclude criminal capacity. Surely everyone is *capable* of restraining his or her emotions and so provocation should not be permitted to exclude criminal capacity? However, if provocation impairs the actual exercise of free will to such an extent that a reasonable person in the circumstances would not have been able to control his emotions, then the accused could be acquitted.

This approach was refined and slightly reformulated a few years later where, as an alternative to the 'problem' of provocation and emotional stress possibly leading to an acquittal on the grounds of non-pathological incapacity, it was suggested that a possible approach would be

> ... to accept that *in fact* provocation or emotional stress can exclude capacity in regard to *all* crimes (including murder) but *on grounds of policy* only provocation or emotional stress which would have induced a reasonable person to succumb to the pressure will excuse...in the interests of the security of the community, in cases of violence perpetrated under provocation or emotional stress, only reasonable lack of capacity for self control or reasonable loss of self control should excuse.[311]

Thus, in accordance with the approach in Anglo-American systems, Burchell advocates a 'normative evaluation of how a reasonable person would have acted under the same strain and stress'.[312] By 2001, he goes so far as to flirt with the adoption of the normative fault test, suggesting that legislation be enacted which would institute an objective assessment of conduct, allowing further for an objective assessment of intention in certain circumstances (including provocation or emotional stress), or for negligence to become the fault element in such circumstances.[313] The benefits of allowing a 'judicial value judgment' in dealing with violent conduct committed in these circumstances may, in the author's view,

> ... help to facilitate adherence to norms of reasonable behaviour implicit in the common law of South Africa, and other countries, and reflected in a Constitu-

[309] *Id* at 29.
[310] *Id* at 30 (writer's emphasis).
[311] Burchell and Milton n 8 above at 240 (writers' emphasis)..
[312] Note 186 above at 41.
[313] JM Burchell 'Unravelling compulsion draws provocation and intoxication into focus' 2001 *SACJ* 363 at 370. The normativist hat fits somewhat uneasily however, as is evident from the telling phrase that the suggested approach, allowing for a normative exception to the traditional subjective approach to capacity and intention, would not 'unduly impair' the overall integrity of the general principles of criminal liability (at 371). Any approach which 'impairs' the functioning of the principles of liability is immediately open to question. This approach further envisages a 'return to the pre-1977 position' (*ibid*). However it should be noted that an entirely subjective approach to provocation was established by the Appellate Division by 1971, in the *Mokonto* case.

> tional Bill of Rights that protects the life, physical integrity, dignity and freedom not only of persons accused of criminal conduct, but also of the victims of crime.[314]

In the context of these writings, along with the author's criticism of the 'obsession with subjectivity' which allows a person who commits a crime of violence whilst provoked, voluntarily intoxicated or suffering severe emotional stress, to be assessed against an 'exclusively subjective' concept of capacity and intention,[315] the author's enthusiasm for the judgment in *Eadie* is hardly surprising.

Moreover, it appears that Burchell's discussion of *Eadie* is primarily concerned with buttressing the judgment against any criticism by explaining away apparent inconsistencies. Although Burchell regards himself as 'critical of the apparent approach of the Supreme Court of Appeal in *Eadie* of eliding the voluntariness and conative inquiries',[316] such criticism is limited to describing this feature of the judgment as 'difficult'.[317]

Burchell identifies three possible interpretations of the *Eadie* judgment, which will be examined in turn. The first interpretation, which Burchell submits is the one 'most likely to find resonance in future courts' essentially posits that the judgment should not be seen as an attempt to change the law, but merely an endeavour to emphasise the need to take into account objective factors in the process of inferential reasoning by which the presence or absence of the subjective notion of capacity is assessed.[318] Burchell advances the view that the focus of the *Eadie* judgment is to issue a warning that 'in future the defence of non-pathological incapacity will be scrutinised most carefully',[319] and that the courts must not too readily accept the accused's evidence about her state of mind.[320] Anticipating the argument that *Eadie* has introduced an objective approach to capacity (which he deals with directly later), Burchell argues instead that what is at issue in the judgment is the process of drawing legitimate inferences of the presence or absence of subjectively assessed capacity from objective circumstances, which serves to 'rein in the application of the purely subjective concept of capacity':[321]

> The drawing of legitimate inferences (using objective criteria) helps to place the rule in its true perspective: Every person is presumed to act voluntarily and should control their emotions but, *in very special circumstances*, a person who succumbs to persistent emotional abuse might escape liability by leading

[314]Note 307 above at 592.
[315]Note 313 above at 369; n 307 above at 592.
[316]JM Burchell 'Preface' 2003 *Acta Juridica* xii.
[317]JM Burchell 'A provocative response to subjectivity in the criminal law' 2003 *Acta Juridica* 23 at 34; Burchell n 82 above at 436.
[318]Burchell n 317 above at 27; Burchell n 82 above at 430.
[319]Burchell n 317 above at 431; Burchell n 82 above at 431
[320]Burchell n 317 above at 28; Burchell n 82 above at 430 where par [64] is cited.
[321]Burchell n 317 above 317 at 31; Burchell n 82 above at 434.

> evidence of non-pathological incapacity or automatism, sufficient to raise a reasonable doubt as to the existence of criminal liability. This evidence would, however, have to be tested, at the outset, against the court's expectations drawn from experience.[322]

The use of inferential reasoning would further counteract the inherent dangers in accepting the *ipse dixit* of the accused, according to Burchell.[323]

Whilst it is tempting to adopt this interpretation of *Eadie* – the judgment could then be readily reconciled with the development that preceded it – it is submitted that ultimately this option is not open to the reader. The objectivity issue will be examined in detail below, but at this stage it might simply be noted that employing inferential reasoning is an uncontroversial standard practice in South African criminal law, where direct evidence of state of mind is lacking.[324] Given that these are well-established evidential principles, which have been applied for many years to the defence of provocation,[325] one may wonder why, if Burchell's suggestion is followed, the Supreme Court of Appeal should see fit to engage in a lengthy discourse on the matter? In the course of discussing this argument, Burchell makes two further points relating to scrutiny of evidence that should be noted: firstly, that it is implicit in the *Eadie* judgment that a distinction is drawn between instances of emotional stress that have built up over a long period and instances relating to a sudden flare-up flowing from provocation;[326] and secondly, that psychiatric or psychological evidence as to state of mind is 'notoriously unreliable' as it is based on the accused's *ipse dixit*.[327]

The second interpretation involves a redefinition of capacity, shifting the test for conative capacity from the subjective to the objective domain. Burchell concedes that it is a 'difficult feature' of the *Eadie* judgment that at times it

> seems to regard the second part of the capacity inquiry (*ie* the conative inquiry) as equivalent to the enquiry into voluntariness.[328]

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[322]Burchell n 317 above at 33; Burchell n 82 above at 435 (author's emphasis). Burchell posits that whilst this process is not without its dangers, inferential reasoning might provide the best route for courts concerned to curb an 'unbridled' subjective test of capacity (n 317 above at 34; n 82 above at 435).

[323]Burchell n 317 above at 34; Burchell n 82 above at 436. Burchell refers to cases such *Henry* and *Kok* n 317 above at 30 (also n 82 above at 432) in explaining that this approach relates to the inherently objective process of proof, as opposed to the introduction of an objective test. Unfortunately, as noted above, these cases hardly provide a convincing basis for this argument.

[324]Indeed, Burchell eloquently says as much in the course of his discussion of inferential reasoning, n 317 above at 32; n 82 above at 434.

[325]In 1949, Schreiner JA held in *R v Thibani* (n 30 above) at 731 that provocation was to be regarded as a special kind of evidential material (see n33 for full citation).

[326]Burchell n 82 above at 432; (see also n 317 above at 29) where Burchell comments: 'naturally, a gradual disintegration of one's power of self-control is more condonable than a sudden loss of temper'. See Snyman n 65 above at 14, who draws the same distinction in the wake of the 1988 *Laubscher* decision (n 94 above).

[327]Burchell n 317 above at 34; Burchell n 82 above at 436. It is however notable that such evidence was strongly relied on in *Eadie*.

[328]Burchell n317 above at 34; Burchell n 82 above at 436.

Nevertheless, Burchell concludes that the court ultimately adopts the view that the conative inquiry has an independent reason for existence,[329] an approach of which he approves.[330] Burchell notes Navsa JA's conclusion that 'numerous' judgments prior to *Eadie* tend to elide the two defences,[331] as well as Navsa JA's statement agreeing with Louw that there is no distinction between the two defences with regard to provocation and emotional stress.[332] However, Burchell is at pains to stress that the agreement with Louw is limited in nature, in that it merely relates to the fact that where a person acts involuntarily, she will inevitably completely lack *mens rea*.[333] According to Burchell, it is only in this 'limited, and self-explanatory sense' that Navsa JA agrees with Louw.[334] Unfortunately, this is not borne out by the text that follows the stated agreement. Navsa JA states that to require that involuntariness would have to be successfully raised in order to escape liability once cognitive capacity has been established would be 'logical'.[335] It is on the next statement that Burchell's perception of the agreement (with Louw) being limited in nature rests:

> However, the result is the same if an accused's verified defence is that his psyche had disintegrated to such an extent that he was unable to exercise control over his movements and that he acted as an automaton – his acts would then have been unconscious *and* involuntary.[336]

Whatever else one can derive from this statement, this much seems clear: that havingpreviously stated that involuntariness would have to be successfully raised to rely onconative incapacity, the court states that 'the result would be the same' in relation to thedefence of automatism. Thus the inquiries are 'flip sides of the same coin' – same test (involuntariness), same result (acquittal only if, given a factual foundation forinvoluntariness, voluntary conduct is not proven by the State). This is entirely consistentwith Louw's view that the inquiries are equivalent. Whatever doubt remains that this is the court's approach in *Eadie*, is eradicated in the following paragraph, where it is unequivocally stated that, in relation to the second leg of the incapacity test set out in *Laubscher*, the State must prove that the accused's acts were 'consciously directed…the acts must

[329]Burchell cites in this regard the statement by Navsa JA at par [57], that he (Navsa JA) is 'not persuaded' that the second leg of the capacity inquiry should fall away (n 317 above at 34; n 82 above at 436), as well as the statement at par [59] that although difficult, it appears 'notionally possible' that one can retain cognitive capacity but lack conative capacity (n 317 above at 36; n 82 above at 438).

[330]Burchell n 317 above at 35 (also n 82 above at 436). Burchell submits that a distinction needs to be drawn between 'the capacity to act voluntarily or rationally' (conative capacity inquiry) and 'whether the accused actually did act voluntarily' (voluntariness inquiry).

[331]Although, as pointed out (at n216), this conclusion is questionable, given that the cases of *Potgieter*, *Henry* and *Cunningham* all deal exclusively with the defence of sane automatism.

[332]Burchell n 317 above at 35 (also n Burchell n 82 above at 437), referring to par [57].

[333]*Id* at 36; Burchell n 82 above at 437.

[334]*Ibid.*

[335]At par [57]. This statement follows on the assertion that the second leg of the *Laubscher* test should not fall away, which Burchell cites, along with the similar statement at par [59] that the absence of conative capacity where cognitive capacity has been established is 'notionally possible', in support of his interpretation (n 317 above at 36; n 82 above at 438).

[336]At par [57]. See Burchell n 317 above at 36; n 82 above at 438.

not have been involuntary'.[337] Given that the tests are indeed the same, the rationale for the retaining of the conative capacity inquiry becomes slim indeed.Burchell makes it clear, using the example of an eight-year-old child,[338] that his own view is that the two defences are indeed distinct,[339] and that there is thus a place for an inquiry into conative capacity, but notably he then proceeds to describe the condition of lack of conative capacity as not being able to 'reconcile the voluntariness of his conduct with its wrongfulness'.[340] Unfortunately, this formulation does not add clarity where one is seeking to distinguish involuntary conduct from incapacity. Further, Burchell adds that

> ... this inability of the child to control irrational acts might also be compatible with the conduct of the hypothetical reasonable child, in the same circumstances – an additional normative evaluation that, it is submitted, is implicit in the second part of the capacity formulation.[341]

Burchell then deals with the criticism levelled by Navsa JA at writers such as Snyman who support the distinction between the two defences,[342] highlighting the statement that to allow for someone who gives into temptation to be excused from criminal liability 'because he may have been so overcome by the temptation that he lost self control' constitutes 'a variation on the theme: "the devil made me do it"'. Burchell argues that it is clear from the words cited that Navsa JA's criticism is

> ... levelled more at the suggestion that a self-respecting system of law might allow an accused to offer as an excuse for his conduct "temptation" or the exhortations of the "devil", than at challenging the theoretical basis of the distinction...Surely, it is beyond question that the injunction of every system of criminal law must be to resist "temptation", or the "devil" (whoever this entity might be), and to adhere to civilised patterns of behaviour? It is the *criminal law* that sets the standards of normative behaviour that determine the line between innocent and guilty conduct – not the *devil*.[343]

Indeed this is so, but perhaps, after all, the devil is in the details. Navsa JA's statement must be interpreted in the light of the discussion that precedes it, and in the sentence immediately antecedent to that which is cited in part above, Navsa JA states plainly that the view that the defences of non-pathological incapacity and automatism are distinct,

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[337]At par [58].
[338]The child, who is poor and starving, takes a loaf of bread from a shop without paying for it. Whilst his conduct is voluntary, and he can distinguish between right and wrong, on this example the test for conative capacity 'might not be satisfied as the child may be so driven by hunger...[as to] not be capable of acting in accordance with the perceived wrongfulness of his conduct' (n 317 above at 36; n 82 above at 438).
[339]Burchell points out that a conflation of the two defences is 'too simplistic' (n 317 above at 36; n 82 above at 438).
[340]Note 317 above at 36; n 82 above at 438.
[341]Note 317 above at 36; n 82 above at 438. Burchell cites no authority for this interesting proposition, which arises in the context of the third of his possible interpretations of *Eadie* below.
[342]Note 317 at above 37 (also n 82 above at 438), referring to the text at par [60].
[343]Note 317 above at 37 (also n 82 above at 438), author's emphasis.

> followed by an explanation that the former defence is based on loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law.[344]

It is hard to imagine a more forthright rejection of the distinction between the defences.

Burchell concludes his consideration of the second possible interpretation of *Eadie* by noting that a number of statements in Navsa JA's judgment 'seem to indicate a drastic curtailing, or even abolishing, of the defence of provocation',[345] in the light of the applicability of the first interpretation (such that the court was concerned with evidential rather than substantive matters) and the extreme unlikelihood that the court in *Eadie* would be unaware of the consequences of overruling existing precedent in favour of a drastic revision of the test of capacity.[346] Any such overruling of precedent would no doubt have a profound effect on South African criminal law, and the consequences that would result would be extraordinary in the extreme where the dismantling and *de facto* abolition of an entire defence occurred by implication. Yet, despite Burchell's valiant efforts to place this judgment in a workable context, the court in *Eadie* is very clear in its intentional rejection of the distinction between sane automatism and non-pathological incapacity, which is consistently upheld throughout the judgment.[347]

Burchell advances a third possible interpretation of *Eadie*, which may be summed up as follows:

> Was Navsa JA in *Eadie*, in fact, simply unearthing an objective aspect of the capacity inquiry, *which had always been implicit in the concept of capacity but not until now judicially acknowledged*?[348]

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[344]At par [60].

[345]Burchell refers (n 317 above 317 at 37–8; n 82 above at 439), without comment, to the astonishing statement of the court in par [51], that in the *Moses* and *Gesualdo* cases '... we appear to have moved from the fundamental position that provocation is a mitigating factor to a position where it has become an exculpatory factor', thus (conveniently) ignoring the entire development of the defence of non-pathological incapacity based on provocation or emotional stress prior to these cases.

[346]Note 317 above at 38 (also n 82 above at 439), where Burchell points out that established precedent would have to be revisited by implication, an approach with potentially grave consequences for the principle of legality by restricting the scope of the defence, and thus increasing the scope of criminality. Earlier, n 317 above at 31(also n 82 above at 433), Burchell argues that the test of capacity remains subjective, otherwise the court would have to specifically overrule all of the provocation case law, including not only those cases where the defence of non-pathological incapacity succeeded, but also those where the defence failed, but the court acknowledged that in principle it was available.

[347]*Eg* the statement in the final paragraph of the judgment ([70]): 'It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism'. It is submitted therefore that Burchell's statement (n 317 above at 31; n 82 above at 433) that Navsa JA 'acknowledged that it was not the principle that was at fault, merely its application' cannot be regarded as correct.

[348]Note 317 above at 39; see also Burchell n 82 above at 440, author's emphasis.

Thus Burchell postulates that the court in *Eadie* merely identified an essential, qualified objective aspect in an otherwise subjective test of capacity that had always been lurking there, but had hitherto not been fully recognised by the courts. Though an interesting argument, this 'interpretation' cannot be taken seriously as a rationale for the judgment in light of the fact that the court, by Burchell's admission, was oblivious of this alleged teasing out of such an as-yet-undiscovered objective aspect.[349] In essence, what Burchell is proposing is a new[350] test for conative capacity, comprising both a subjective and an objective criterion:

> If it is correct to regard the second leg of the capacity inquiry as "the capacity to act differently" then this inquiry must imply an evaluation of the accused's conduct against some other standard of conduct, extrinsic to the accused himself or herself. In other words, the test for capacity must have a normative or evaluative dimension, as well as the subjective aspect of determining the accused's conduct *in the circumstances* and against the standard of persons falling into a *particular grouping*.[351]

In adopting this test, Burchell envisages adopting a similar approach to that followed in English law,[352] and incorporating the German concept of 'excuse',[353] without entirely excluding the existing South African law which has been remedied by the adoption of a normative inquiry.[354] As indicated earlier, this approach is entirely consistent with the view that Burchell has held for some time regarding the necessity of an objective element in the test for non-pathological incapacity.[355]

Snyman

Snyman's approach to provocation has evidenced considerable development. Initially, citing the position that provocation does not exclude criminal capacity (*toerekeningsvatbaarheid*),[356] he predicted that the courts would not go as far as to allow provocation to operate as a complete defence,[357] as it would be regarded as relating to affective capacity,[358] rather than cognitive or conative capacity.

[349]Note 317 above at 43; n 82 above at 444–5.

[350]Burchell however suggests that the objective, normative dimension to the subjective test of capacity in South Africa was '*always implicit* in the test and not judicially invented' and that it merely required an observant court to 'identify the already *pre-existing* normative aspect of the test of capacity' (n 317 above At 47; n 317 above 82 at 448, author's emphasis).

[351]Note 317 above at 40; n 82 above at 441, author's emphasis.

[352]Burchell refers to the work of V Tadros 'The Characters of Excuse' (2001) 21(3) *Oxford Journal of Legal Studies* 495 in developing this argument, who works in this tradition.

[353]Note 317 above at 46; n 82 above at 447–8.

[354]*Ibid.* Burchell acknowledges n 317 above at 47n72 (also n 82 above 82 at 448n92) that he is choosing not to 'venture into the murky waters of determining the precise list of factors that are relevant to the "reasonableness" or "normative" inquiry'.

[355]S Pather 'Provocation: acquittals provoke a rethink' (2002) 15 *SACJ* 337, relying on Louw and Burchell, similarly favours a 'partial objective test' for capacity (at 352).

[356]Note 258 above (1981) 157; (1984) 145.

[357]*Ibid* (1981) 163; (1984) 151.

[358]*Ibid* (1981) 163n44; (1984) 151n44. Snyman refers to the *Rumpff Commission Report* n 66 above at par 9.19, where it was stated that a disturbance of the affective mental functions does not lead to incapacity.

Snyman further articulated policy concerns as to why provocation cannot be regarded as a complete defence – that everyone is expected to control his/her temper – and that any defence of provocation would result in people having little incentive to control their emotions.[359]

Writing in 1985,[360] in a note critical of the decision in *Arnold*,[361] Snyman reiterates his views that provocation (or emotional stress) should not be allowed to exclude capacity,[362] and that any such defence would amount to a disturbance in the affective functions excluding liability, which would run contrary to the *Rumpff Commission Report*.[363] Interestingly, Snyman finds support for his view in the writings of De Wet, the foremost protagonist of the notion of *toerekeningsvatbaarheid*).[364] Snyman argues that the policy grounds in support of provocation not being considered a complete defence to murder are 'strong and persuasive',[365] and that to allow such a defence would herald 'another victory for the subjective approach to criminal liability', which in turn raises the concern whether it is not becoming progressively easier 'for those who fall below the standards required by the law to contravene the law with impunity'.[366]

However, by the time the second edition of *Criminal Law* appeared in 1989, it is evident that Snyman's views towards the provocation defence had softened considerably. Snyman acknowledges that provocation[367] and emotional stress[368]

[359] *Ibid* (1981) 158; (1984) 146.
[360] CR Snyman 'Is there such a defence in our criminal law as "emotional stress"'? 1985 *SALJ* 240.
[361] At 243–4, Snyman argues that the accused in *Arnold* n 119 above, should not have been acquitted, but rather should have been held liable for culpable homicide on the basis of antecedent liability.
[362] At 245.
[363] At 249.
[364] *Ibid*. This is as good a place as any to briefly consider De Wet's views on provocation. In the first edition of *De Wet & Swanepoel Strafreg*, n 17 above at 81, De Wet states unequivocally that intense emotional upheaval does not, without more, exclude criminal capacity. Further, it is stated that it is expected of each person to control his urges and passions. However, De Wet then proceeds to state that if a person cannot restrain his urges and passions, he would then lack criminal capacity ('As hy sy drifte en hartstogte nie kan beteuel nie, dan, natuurlik, is hy nie toerekeningsvatbaar nie…'). This statement is in line with De Wet's championing of the psychological approach to criminal liability. Thus it is not significant *why* the accused lacks criminal capacity, but simply that this is so. It is not the urge or passion which serves to render the accused not blameworthy, but rather the fact that he lacked capacity, and therefore could not control his urges (*ibid*). Significantly, the quoted statement is absent from the later editions of *Strafreg*, and thus De Wet is (understandably, if paradoxically) regarded by writers such as Snyman as not supporting a defence based on provocation or emotional stress.
[365] Note 360 above at 248, where the following considerations are set out: that the law expects people to keep their emotions in check, that quick temper or emotional upheaval or impatience is no excuse for criminal conduct, that if such factors did amount to a defence people would have little incentive to control their conduct.
[366] Note 360 above at 250.
[367] *Criminal law* (2ed 1989) 188.
[368] At 195.

could exclude capacity[369] or intent[370] or serve as a mitigating factor.[371] Significantly, the paragraph expressing the policy concerns against provocation constituting a complete defence is excised in this edition, and instead Snyman emphasises that provocation is less morally reprehensible than intoxication, and thus ought to be regarded as a complete defence to liability, as intoxication can be.[372] Snyman further opines that fears of the defence of non-pathological incapacity being abused are unfounded, as the courts can be trusted to analyse the evidence carefully and to guard against any such abuse occurring.[373] He anticipates the establishing of a general defence of non-pathological incapacity which would incorporate provocation and emotional stress,[374] and stresses that provocation should not be viewed as a separate doctrine with its own rules, but rather as

> ... a set of facts to be judged in the light of the general requirements for criminal liability such as an act, unlawfulness, criminal capacity and *mens rea*.[375]

Snyman has consistently advocated these same views in both the third[376] and fourth[377] editions of *Criminal Law*: that the defence of non-pathological incapacity should be viewed as a general defence;[378] that the cause or description of the cause of incapacity is not significant, merely the fact thereof;[379] that the defence should not succeed easily;[380] that expert evidence is not essential for this defence;[381] that the 'general principles' approach is favoured for the defence over the 'separate doctrine' approach;[382] and that provocation or emotional

[369]At 189, 195. Snyman adds the proviso that a proper factual foundation should be laid for such a defence (at 189, 196). See also Snyman n 65 above at 13.
[370]Note 367 above at 190. However, it is pointed out that provocation could also serve to confirm the existence of intention (at 191).
[371]At 191.
[372]At 188.
[373]At 195. See also Snyman n 65 above at 13.
[374]Note 367 above at 195. Snyman states that such a defence would be in accordance with the emergence of a systematic approach to the general requirements of criminal liability (*ibid*). See also Snyman n 65 above at 12.
[375]Snyman cites the writings of Bergenthuin in this regard (at 188). At n 65 above at 11, Snyman states (sharing De Wet's view – see n 364 above) that with regard to this general defence the focus is not on the *cause* of the incapacity, but rather on whether the accused lacked capacity at the time of acting.
[376]The third edition was published in 1995.
[377]The fourth edition was published in 2002.
[378](1995) 152; (2002) 163.
[379](1995) 152; (2002) 164.
[380](1995) 154; (2002) 165. Once again Snyman emphasises that the courts can be trusted to carefully scrutinise the evidence ((1995) 154; (2002) 166).
[381](1995) 154; (2002) 166.
[382](1995) 222; (2002) 235. The 'general principles' approach simply involves an application of the ordinary principles of liability to the defence, whereas the 'separate doctrine' approach seeks to apply a distinct set of rules applicable only to provocation to the defence.

stress can exclude capacity,[383] exclude intent,[384] and serve as a mitigating factor.[385]

In his most recent writing on the subject, Snyman draws a distinction between two differing approaches to provocation:[386] the 'theoretical approach', which focuses solely on the state of mind of the accused, and the 'policy approach', which incorporates objective factors.[387] He states that the 'policy approach' held sway until about 1987 in South African law, when it was replaced by the theoretical approach.[388] It is clear that Snyman's own sympathies lie with the policy approach, and in this regard he praises the judgment in *Eadie* as a 'triumph' for the policy approach to provocation,[389] marking a turning point in the courts' emphasis on subjectivity, and possibly heralding

> ... a long-awaited reintroduction of more objective considerations, thereby ensuring a better balance between subjectivity and objectivity in the construction of criminal liability.[390]

This conclusion is not unexpected given Snyman's long-standing support of the normative approach to liability, as opposed to the prevailing psychological approach.[391] However, notwithstanding this ideological position, Snyman's work has always been characterised by a conscientious adherence to principle, and the above-mentioned systematic approach to liability.[392] Although he would have favoured a policy-based rejection of the defence of non-pathological incapacity,[393] and praises the movement towards a policy approach, Snyman is unable to countenance the fundamental theoretical errors that mar the *Eadie* judgment. He therefore engages in an excoriating critical analysis of Navsa JA's

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[383](1995) 224; (2002) 237. It may be noted that Snyman does not discuss the possibility of extreme provocation giving rise to a state of sane automatism in any of his publications discussing the defence of provocation. JG Bergenthuin 'Provokasie in die Suid-Afrikaanse strafreg' (1986) 98 *De Jure* at 267 specifically excludes the possibility of a defence of sane automatism based on provocation. However, if the 'general principles' approach is to apply, then it must be accepted that provocation can result in automatism. Moreover, *Arnold* is authority for this proposition, as indeed is *Eadie*.

[384](1995) 225; (2002) 237. Provocation may also serve to confirm the presence of intent ((1995) 226; (2002) 238).

[385](1995) 226; (2002) 239.

[386]Note 6 above at 12.

[387]Ibid. Snyman refers in particular to the '...important objective factor...that the law expects people to control their tempers; the ill-tempered should not be afforded the luxury of being treated on a different, more lenient footing; to do so would be tantamount to punishing those who exert themselves to control their behaviour when angered in that they are judged by a more stringent criterion than the ill-tempered'. He cites what he refers to as the eloquently formulated argument of Van den Heever JA in *S v Kensley* n 153 above at 658g–i in this regard.

[388]Note 6 above at 13.

[389]And, concomitantly, 'a defeat of the purely theoretical approach' to provocation (n 6 above at 14).

[390]Note 6 above at 22.

[391]Note 17 above at 150ff.

[392]It is somewhat paradoxical that despite his antipathy for what he terms the 'theoretical approach', Snyman has for some years been the foremost theoretician in South African criminal law.

[393]Note 6 above at 15.

judgment in *Eadie*.[394] His criticism of the conflation of the objective test for automatism and the subjective test for capacity in *Eadie* is incisive, caustic and, it is submitted, compelling.[395] Snyman concludes that despite the court's insistence that the defence of conative incapacity remains intact, the further existence of the defence borders on the theoretical, and may have a ripple effect on other topics within the general principles of criminal law.[396] Despite his unrelenting dissection of the legal flaws in the *Eadie* judgment, in order to accord with the policy approach Snyman feels constrained to welcome the selfsame judgment.[397]

CONCLUSION

If we are to take the words of the *Eadie* judgment at their face value, and it has been argued that there is no reason not to, then we must accept the consequences of Navsa JA's exhortation that 'it must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism'.[398] It is submitted that the decision of the SCA in *Eadie* is most unwelcome. Far from bringing clarity, as Louw argues, it distorts the clear principled approach developed and applied by the courts.

Louw's point of departure, which is accepted by the court in *Eadie* and finds support in the views of a number of psychiatrists and psychologists,[399] is that the notion of conative capacity and specifically the issue of 'loss of control' cannot be given effective content. On this basis it cannot be distinguished from sane automatism, and thus becomes a redundant and misleading concept, which is best dispensed with.

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[394]At 15: 'navsa JA's treatment of criminal-law theory is unimpressive and unconvincing. He distorts the rational, well-founded arguments underlying criminal-law theory to suit the conclusion he wanted to arrive at, namely that the operation of the defence of non-pathological incapacity should be terminated'.

[395]Snyman explains the difference between voluntary conduct and conative capacity (at 15), making use of examples to illustrate the difference between the concepts – whilst young children between seven and fourteen are able to act voluntarily, they are often found to lack conative capacity (at 16); voluntary conduct in the form of an omission cannot be equated with conative capacity (at 19). Conflation of these notions is incompatible with the provisions of s 78(1) of the Criminal Procedure Act 51 of 1977, as well as the provisions of s 1 of Act 1 of 1988 (at 16), and may lead to 'some of the keystone concepts of criminal liability losing their meaning', as the conduct requirement and capacity requirement would, following *Eadie*, merge into 'one vague, amorphous requirement' (at 17). Snyman further criticises the terminology used in the judgment (at 18), and the court's statement (at par [60]) that a 'loss of control' defence in the form of conative capacity 'does violence to the fundamentals of any self-respecting system of law', the latter criticism in the light of legal systems such as German, Swiss and Austrian law which have such a defence (at 19–20). See also CR Snyman *Criminal law case book* (3ed 2003) 137.

[396]At 22.

[397]'The judgment in *Eadie* marks a turning point in our courts' emphasis on subjectivity, and might herald a long-awaited reintroduction of more objective considerations, thereby ensuring a better balance between subjectivity and objectivity in the construction of criminal liability' (*ibid*).

[398]At par [70].

[399]For a recent example of an expert witness conflating the defences of sane automatism and non-pathological incapacity, see the unreported case of *S v Singh* (2005) (D) CC88/03, at 89.

The idea that the notion of conative capacity lacks content is however mistaken, and may be refuted by an examination of the relevant case law. In a number of cases, the courts define conative capacity in accordance with the formulation in s 78(1) of the Criminal Procedure Act,[400] that is, the ability to act in accordance with the distinction between right and wrong.[401] Numerous cases adopt Joubert JA's classic formulation of the notion in *Laubscher*,[402] which adds the corollary that this ability is premised on the fact that the actor has the capacity for self-control (*weerstandskrag (wilsbeheervermoë)*) such that he can resist the temptation to act unlawfully.[403] Joubert JA adds that another way of describing this capacity is that the actor has the ability to exercise a free choice to act lawfully or unlawfully.[404] It is this notion of capacity for self-control, or ability to exercise a free choice to act lawfully or not, derived from the *Rumpff Commission Report*,[405] that is at the heart of the description of conative capacity in numerous judgments. Whilst some judgments simply cite the dictum in *Laubscher*,[406] others employ the terminology of *weerstandskrag*,[407] others speak of *wilsbeheervermoë (of weerstands-vermoë)*,[408] while others make use of *die vermoë ... om ooreenkomstig daardie onderskeidingsvermoë te handel deur die versoeking om wederregtelik op te tree te weerstaan*.[409] Other judgments have phrased the description of conative capacity slightly differently, focusing on whether the accused had the capacity to exercise restraint or control over his actions.[410]

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[400]Act 51 of 1977.

[401]See, *eg*, *S v Lesch* n 73 above at 823B; *S v Campher* n 93 above at 966D–E; *S v Kalogoropoulos* n 154 above at 17c; *S v Els* n 155 above at 735c; *S v Shapiro* n 173 above at 123e–f; *S v Pederson* n 154 above at 397g, 399j–400a; *S v Kali* n 163 above at 204h. See also *S v Saaiman* n 72 above at 441D–E.

[402]166I–J, cited at n 145 above.

[403]'... deurdat hy die weerstandskrag (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan' (*ibid*). Navsa JA's comments at par [60] (cited at n250) are nothing less than a direct, if unstated, assault on this formulation.

[404]Note 94 above at 1661–J. The full expression is 'hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil'. However, it is submitted that the concluding phrase 'onderworpe aan sy wil' ('subject to his will') is at best redundant, and if incorrectly regarded as making reference to the voluntariness requirement, may further be the source of some confusion. The statement is entirely clear in meaning, and does not require any further qualification – after all, if the accused's acts are not subject to his will, then he simply is not acting for the purposes of criminal liability.

[405]See n 73 , where par 9.33 is cited. Snyman has usefully reformulated the essence of the statement in the report (n 6 above at 15): '..the ability to set himself or herself a goal, to pursue it, and to resist impulses or desires to act in a manner contrary to what his or her insights into right and wrong reveal to him or her'.

[406]See, *eg*, *S v Wiid* n 148 above at 563f–j; *S v Van der Sandt* n 158 above at 635e–i.

[407]*S v Lesch* n 73 above at 823H; *S v Campher* n 93 above at 949H, 950H–I, 951F–G, 956B.

[408]S v Van der Merwe n 81above.

[409]S v Calitz n 149 above at 128e–f.

[410]S v Ingram n 154 above at 4f, 7b–c, 8b–c. In *S v Van Vuuren* n 112 above at 17F–G the court cites the *Chretien* (n 17 above) dictum at 1106, where the enquiry is whether the accused's inhibitions had 'wesenlik verkrummel' ('essentially crumbled'); in *S v Adams* n 90 above at 903D the court held that the appellant's 'inhibitions were completely disintegrated'; in *S v Nursingh* the court held (n 183 above at 338h–i) that the accused's rage was 'irrational, unthinking and blind to all restraint'; and in *S v Moses* the court accepted the expert evidence that the accused's rage had 'collapsed his controls' (n 80 above at 709g–h) and impaired (see n201) his 'capacity to retain control' (710h–i). In *S v Campher* n 93 above at 957H–I, Viljoen JA refers

Thus, it is submitted, the judicial interpretation of the notion of conative capacity (and 'loss of control' in this context) is clear, and such authority is further buttressed by the views of the writers,[411] and even psychologists,[412] who give content to the notion. To adopt Ashworth's turn of phrase, in each case the court will have to decide whether the accused's behaviour during his or her loss of self-control is 'uncontrollable' (indicating a lack of choice and thus a lack of conative capacity) rather than merely 'uncontrolled' (indicating a choice to give vent to his or her passions or emotions).[413] Furthermore, it is submitted that any distinction between provocation or emotional stress as a source of the defence of non-pathological incapacity must relate to only evidential matters only, for in principle it does not matter what excludes capacity, but rather that capacity has been excluded, for the purposes of the defence.[414]

What then of the policy-based objections to provocation being a complete defence? Prior to *Eadie*, it seems that the strongest authority for a policy-based approach may be found in Van den Heever JA's statement in *Kensley*,[415] which appears to posit that the subjective lack of self-control flowing from provocation be assessed against a normative standard.[416] Stressing the need to keep one's emotions in check, Van den Heever JA indicates that the danger of a subjective assessment of the accused's capacity is that

> virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother.[417]

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to the appellant's defence as 'onweerstaanbare drang' ('irresistible urge or impulse'), which he elaborates on at 958I: '..die remmende effek teen of inhibering van die drang om die monster…te vernietig, heeltemal meegegee het' ('the braking effect against or inhibition of the urge to destroy the monster completely gave way'). A more generic loss of self-control is referred to in *S v Kalogoropoulos* n 154 above at 24a, 26a; and *S v Gesualdo* n 154 above at 75b, 77g. See also *S v Makete* n 72 above at 215D–E for an earlier formulation of conative capacity in these terms.

[411]See FFW van Oosten 'non-pathological criminal incapacity versus pathological criminal incapacity' 1993 *SACJ* 127 at 129; PA Carstens & J le Roux 'The defence of non-pathological incapacity with reference to the battered wife who kills her abusive husband' 2000 *SACJ* 180 at 181; Snyman n 6 above at 15; Burchell n 82 above at 425.

[412]See, *eg*, Dr Plomp in *S v Calitz* n 149 above at 125f–g, Mr Carr in *S v Gesualdo* n 154 above at 75a–b, and Professor Schlebusch in *S v McDonald* n 167 above at 499e–g. See also RP van der Merwe 'Sielkundige perspektiewe op tydelike nie-patologiese ontoerekeningsvatbaarheid' 1997 *Obiter* 138 at 139:

'Onder "weerstand" moet dus verstaan word die vermoë van die dader (sy selfbeheer of wilsbeheer) om op grond van sy insig in die verkeerdheid van 'n bepaalde handeling, die uitvoer van daardie handeling teen te werk. Ontbreek die nodige weerstand in die individu, dan beskik hy nie oor die vermoë, en is hy gevolglik nie in staat tot 'n vrye wilskeuse, 'n wilsbesluit of 'n wilshandeling teen die uitvoer van die daad nie.'

[413]See A Ashworth *Principles of criminal law* (3ed 1999) 236.

[414]See n364 and n379 for further support of this view.

[415]Note 153 above at 658h–j, cited at n254 .

[416]N Boister 'General principles of liability' 1995 *SACJ* 367 at 368. This is essentially the approach that Burchell sets out in his third 'interpretation' of *Eadie* (see n348-351), although not discussed in this context by the author. The discussion will proceed on the assumption that this interpretation of the dictum in *Kensley* is correct, although it is submitted that the context of the dictum should not be overlooked – see n 428 below.

[417]Note 153 above at 658h–i. See also Snyman n 360 above at 248, 251.

It should, however, be noted that there are difficulties with this argument, as the good-tempered person does not fall within the bounds of a test penalising unreasonable response to provocation.[418] As Christie points out, the real objection is to allow the bad-tempered man to use his bad temper as an excuse:

> But to refuse to allow this "may be in effect to inflict punishment not so much in respect of the particular act of deliberate malice, as of a want of habitual control over a mind naturally impetuous and ready to break forth on slight occasions". It would be as illogical as punishing a drunk man for his drunkenness by convicting him of murder ... .[419]

Further, it may be argued that the broadening of the defence of non-pathological incapacity is indeed a positive development on policy grounds. In the words of Milton:

> punishment is only properly inflicted when it is deserved; ... desert follows from individual blameworthiness; ... blameworthiness is a function of decisions made with a mature free will and a conscious awareness of wrongdoing. One who because of ... emotional turmoil is unable to distinguish right from wrong or control his actions accordingly, is not blameworthy and thus ought not to be punished.[420]

Milton notes that the preference for the principle-based or psychological approach to liability over the 'socially expedient doctrines that denied exculpatory effect' to such matters as ignorance of the law or voluntary intoxication reflects 'characteristic due process of law value'.[421] Moreover, it has

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[418]As MGA Christie states (*The criminal law of Scotland* (3ed 2001) Vol II par 25.33) in response to the statement that a subjective test for provocation may give rise to a situation where 'a bad-tempered man would be acquitted and a good-tempered man would be hanged': '[T]he good-tempered man will never need to invoke the plea of provocation, because he will never be provoked into killing anyone. If the good-tempered man *is* the reasonable man he will be provoked only by what would provoke the reasonable man, and so will never be hanged. The good-tempered man cannot be hanged on the objective test, and no man, good- or bad-tempered, can be hanged on the subjective test if he was in fact provoked so as to lose control. The good-tempered man cannot be affected by the extension of a rule of law which at its narrowest is sufficient to protect him'. See also Dugard n 55 above at 265–6 and the authorities cited there. As Schreiner JA stated in *R v Krull* n 43 above at 397A: 'I do not find it unreasonable that...a bad-tempered man should be acquitted while a good-tempered one should hang. The latter is no doubt a more satisfactory human, but the accused in a murder case is not being tried on his general merits or demerits'.

[419]Note 418 above at par 25.33, citing the Fourth Report of the Criminal Law Commissioners, xxxviii, Parl Papers, 1839, xix, Digest, Art. 43, n (i).

[420]JRL Milton 'Criminal law in South Africa 1976–1986' 1987 *Acta Juridica* 34 at 43. These remarks were made in the context of the cases of *Chretien* n 17 above and *Arnold* n 119 above.

[421]*Ibid*. Earlier (at 35), Milton distinguishes between the crime control model and the due process model as follows:

'The crime control model, in essence, has as its central value the effective, efficient prevention of crime. Its methods and techniques are structured and applied to this end, valuing efficiency above formality, speed above deliberation, results above means. The due process model, by contrast, in essence has as its central value the protection of the constitutionally recognised civil liberties and human rights of the citizenry. Its methods and techniques are thus structured as a system of checks designed to ensure that the citizen taken up in the process is not denied any constitutional right to which he is entitled under the law of the land. The due process model thus values reliability above efficiency, formality above speed, means above ends.'

been argued that provocation 'almost invariably entails no moral wrong in itself on the accused's part',[422] and indeed, Aristotle has argued that anger is a socially respected emotion which may, within limits, constitute a proper response to certain behaviour by others.[423]

It is submitted that the subjectively assessed defence of non-pathological incapacity based on provocation or emotional stress developed by the courts over a period of some three decades is not in need of amendment. Such difficulties as there are have arisen in relation to evidential matters and thus if amendment is required this is where the focus should be.[424] Even in *Eadie*, the court acknowledged the importance of a proper application of the legal rules,[425] although this did not prevent the court from trying to effect a change to the substantive law. It is significant that in the case on which much of the development of the defence of non-pathological incapacity is based, *Chretien*, Rumpff CJ was at pains to stress the importance of proper application of the law, and that any perceived problems with the defence of non-pathological incapacity based on voluntary intoxication lay with the application of the principle (that voluntary intoxication could be a complete defence), rather than with the principle itself.[426] Rumpff states that a court which too readily or easily accepted that an intoxicated person who, for example, rapes or attempts to rape a woman was not aware of what he was doing, and thus lacking criminal capacity and deserving of an acquittal, would quickly bring the law into disrepute.[427] Surely the same argument applies to a defence based on provocation or emotional stress? Navsa JA in *Eadie* stressed the too-ready acceptance of the accused's evidence as to his state of mind.[428] However, whilst no one would dispute that 'the courts must be careful to rely on sound evidence',[429] it

[422]Burchell and Hunt n 33 above at 241n17.
[423]*Nicomachean Ethics* Bk V 8, cited in Ashworth n 413 above at 237–8.
[424]This argument could certainly be raised in respect of the cases of *Arnold* (n 119 above) and *Nursingh* (n 183 above), where the State failed to lead any psychiatric evidence. The need to deal with evidentiary issues in the light of questionable acquittals is acknowledged in the second edition of *Principles of Criminal Law*, where (n 186 above at 287) Burchell and Milton propose some practical solutions to deal with the problems associated with the leading of expert evidence in cases relating to provocation or emotional stress. This discussion is however not carried forward into the third edition.
[425]At par [64].
[426]Note 17 above at 1105H.
[427]*Ibid.*
[428]At par [64]. It is noteworthy that the dictum in *Kensley* (n 153 above) at 658h–i, discussed at n 415 and accompanying text above, appears in the course of a discussion of evidential matters (such as the onus of proof (at 658f–g), the need for great caution where the only basis for the defence is the accused's *ipse dixit* (at 658g–h), and the need to subject the evidence on which a defence of non-pathological incapacity flowing from provocation or emotional stress is based to careful scrutiny (at 658j)) in the course of the court's evaluation of the evidence of the appellant's conduct. It is submitted that the references to normative factors, which appear in the midst of these cautionary remarks relating to evidentiary matters, and are not identified as being distinct from or unrelated to these remarks by Van den Heever JA, should be interpreted in this light. Thus these comments are perhaps rather less significant from a substantive criminal law perspective than might appear to be the case if they were excised from this context and examined at face value.
[429]At par [70].

is equally incumbent on the court to apply sound principles, and certainly, not to alter the principles in order to somehow resolve evidential difficulties.

It is axiomatic that irrespective of the expert psychiatric evidence that is led on behalf of the accused, it is the court that is the final arbiter of the accused's state of mind at the time of her unlawful act.[430] Thus a court should neither be carried away nor cowed by expert evidence,[431] but should simply see such testimony as one part of the evidence before it. As Kriegler J (as he then was) explained in relation to the enquiry into *mens rea* in *S v Makhubele*:[432]

> It is, of course, a subjective enquiry. What is to be investigated is the accused's state of mind at the time he inflicted the stabwound. That being the case, the accused's evidence of what was going on in his mind, what his thoughts were, what emotions he felt, what urges or impulses, is of vital importance. That evidence is to be evaluated in the context of the evidential material as a whole, the ultimate objective being to establish as best as one can, from fallible data and with imperfect knowledge of the functioning of human volition, what the accused's state of mind was at the time in question.

Certainly the process of inferential reasoning would play a crucial role in establishing state of mind. For example, it was held by Smalberger JA in *S v Ingram* that

> [t]he longer the time lapse before the shooting, the more complex the intervening actions, the less likely it becomes that the appellant acted out of control because of an inability to restrain himself.[433]

In the same vein, in *S v Van der Sandt* the court examined the evidence of the accused's conduct, and concluded that he had acted in a logical and purposeful manner.[434]

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[430]In *R v Harris* n 167 above at 365B-C, Ogilvie Thompson JA stated the following:'… in the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue, the Court – initially the trial Court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.'

[431]The recent case of *S v Engelbrecht* 2005 2 SACR 41 (W) at par [26] provides a useful summary of the principles applicable to the admissibility of such evidence: 'Firstly, the matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge. Secondly, the witness must be a person with experience or skill to render her or him an expert in a particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the Court. Fourth, the expertise of any witness should not be elevated to such heights that the Court's own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others. Sixth, the opinion of such a witness must not usurp the function of the Court'.

[432]1987 2 SA 541 (T) at 546F–G.

[433]Note 154 above at 7b–c.

[434]Note 158 above at 640i–j.

A final word on evidential matters: it is submitted that the confusion that has arisen in the *substantive* law regarding the distinction between sane automatism and non-pathological incapacity has its roots in the indiscriminate use of *evidential* dicta, which have tended to deal with the defences in the same terms.[435] Whilst the respective defences may well use similar evidential principles, it is important not to blur the crucial substantive distinction between the defences by undiscriminating citation of dicta relating to matters of proof. The fundamental distinction bears iteration in this context: in establishing the presence of automatism, the court resorts to an *objective* test focusing on the nature of the accused's conduct, whereas in relation to non-pathological incapacity the test is *subjective*, notwithstanding the invariable use of inferential reasoning to seek to establish the accused's *state of mind*.[436]

In the final analysis, the *Eadie* decision's equation of automatism and incapacity is extremely problematic. By blurring the fundamental distinction between objective and subjective elements of liability, the court has marched our law straight back into the past, where intention could be established on the basis of objective factors.[437] Moreover, as argued above, it has essentially abolished the defence of non-pathological incapacity.[438] Notwithstanding Navsa JA's assurance that the test for capacity retains both a cognitive and conative leg, the practical effects of the *Eadie* judgment militates against this.

Far from ushering in a constitutionally sensitive policy approach based on reasonableness,[439] the *Eadie* judgment subverts the foundational requirement that it is as autonomous moral agents[440] with an entitlement to freedom of action and the ability to exercise self-determination in their choice of actions that persons are assessed.[441] Thus any attempt to assess criminal liability without the

[435]See, *eg*, *S v Potgieter* n 163 above at 72h–73b, where although the judgment deals with sane automatism, sources relating to non-pathological incapacity (*S v Kalogoropoulos, S v Laubscher, S v Calitz, S v Wiid)* are cited. In *S v Cunningham* n 154 above at 635i, sources dealing with non-pathological incapacity (*S v Campher*) are cited, although the judgment deals with sane automatism. Likewise in *S v Henry* n 215 at 19j *(S v Kalogoropoulos, S v Kensley*). On the other hand, *eg*, dicta relating to proof of sane automatism in *S v Cunningham* are cited in the Cape case of *S v Eadie* n 146 above at 177h–j, and in *S v McDonald* n 167 above at 500d–e. Moreover, in *Eadie* (at par [2]) Navsa JA cited the cases of *Potgieter*, *Cunningham*, and *Francis* as authority for the evidential matters relating to the defence of 'temporary non-pathological criminal incapacity', despite the fact that these cases all deal with the defence of sane automatism. Contrast this with the eminently sound approach to evidential matters in the context of a defence of non-pathological incapacity in *S v Kalogoropoulos* n 154 above.

[436]And, as Lord Justice Bowen robustly asserted, 'the state of a man's mind is as much a fact as the state of his digestion' (*Edgington v Fitzmaurice* (1885) 29 Ch D 459, cited by Hart n 4 above at 188).

[437]See n 26 above and accompanying text . Further, the practical effect of the judgment is to further limit the legal options of a battered spouse or partner who kills her abuser, by excluding the one defence properly available to the accused in this situation.

[438]See n 305 above and accompanying text.

[439]See Burchell's comments n 82 above at 439–440.

[440]Ashworth n 413 above at 27 notes that '[o]ne of the fundamental concepts in the justification of criminal laws is the principle of individual autonomy – that each individual should be treated as responsible for his or her own behaviour'.

[441]SV Hoctor 'Dignity, criminal law and the Bill of Rights' 2004 *SALJ* 304 at 309.

subjectively assessed capacity to choose how to act is a clear infringement of the right to dignity, which is the constitutional basis of the principle of culpability.[442] As Kremnitzer states:

> Basic to constitutional law and criminal law is a shared image of human beings. It is a conception of human beings as "morally" autonomous, with the basic faculty to understand reality and distinguish right from wrong, able to contribute to developing social norms and to understand and internalize them, competent to decide how to act and capable of realizing that decision. This conception dictates the boundaries of the penal law and influences the principles of criminal responsibility, both qualitatively and quantitatively: A person who lacks such basic ability (lack of competence), or who, in a given situation, cannot refrain from acting (lack of control) is not subject to the criminal law.[443]

In the light of these concerns, it is submitted that an attempt to institute an objective test for conative capacity is susceptible to constitutional challenge for unjustifiably infringing the accused's rights to dignity[444] and freedom and security of the person.[445]

What then should be made of *Eadie*? Snyman has indicated his concern for the potential 'ripple effect' that the judgment might have,[446] and has sought to limit its application to factual scenarios involving provocation.[447] Whilst a clarificatory judgment from the Supreme Court of Appeal overruling *Eadie* would undoubtedly be the first prize, perhaps, in the absence of such a direct ruling, there is yet cause for optimism. It is hoped that a similar development will occur as with the case of *S v Goosen*,[448] where the Appellate Division held that a mistake as to the causal chain of events does exclude intention, where there is a material difference between the actual chain of events and the chain of events

[442]See also JMT Labuschagne 'Strafregtelike menseregte' 1987 *Tydskrif vir Regswetenskap* 215: 'Tog is daar twee strafregtelike reëls wat myns insiens tot die vlak van menseregte verhef behoort te word. Eerstens behoort 'n mens slegs gestraf te word vir handelinge (en lates) wat hy kan beheer. Tweedens behoort 'n mens slegs gestraf te word vir dit wat tot sy bewussyn herleibaar is. Dit skend die menslike individualiteit en waardigheid om hom te onderwerp aan die (sosiale) vernedering van bestraffing vir aangeleenthede waaroor hy nie beheer gehad het nie of waarvan hy nie bewus was nie.'

[443]M Kremnitzer 'Constitutional principles and criminal law' 1993 *Israel Law Review* 84. Hart n 4 above at 152 states that where the capacities for doing what the law requires and abstaining from what it forbids, and the fair opportunity to exercise these capacities, are absent, 'the moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice"'.

[444]Section 10 of the 1996 Constitution.

[445]Section 12(1)(a) of the 1996 Constitution. VV Ramraj 'Freedom of the person and the principles of criminal fault' 2002 *SAJHR* 225 at 241 points out that retributive justice is rooted in a concept of the person as a responsible moral agent who, in normal circumstances, can freely choose to do wrong, and that it is precisely this free choice to do wrong which justifies the imposition of punishment.

[446]Note 6 above at 22.

[447]CR Snyman *Strafreg* (5ed 2006) 167.

[448]1989 4 SA 1013 (A).

envisaged by the accused.[449] In the subsequent cases of *S v Nair*[450] and *S v Lungile*[451] the Supreme Court of Appeal has simply (and tellingly) ignored the precedent in *Goosen* in finding the accused guilty of murder. The hope is thus that the courts will continue to build on the strong precedent pre-*Eadie* and that ultimately this judgment will become, in the evocative words of the great US Supreme Court judge Felix Frankfurter, 'a derelict on the waters of the law'.[452]

[449]For cogent criticism of the *Goosen* decision, with which I respectfully concur, see Snyman n 17 above at 193 5.
[450]1993 2 SACR 451 (A).
[451]1999 2 SACR 597 (SCA).
[452]*Lambert v California* 355 US 225 (1957) at 232.

Trafficking in human beings

Barbara Huber[*]

THE ACTUAL PROBLEM

Now and then e-mails appear on my screen, saying: 'We are Russian marriage agency. We are looking for business partner from Germany. You can earn some cash for the small help in one matter.' (Accepting this offer would probably make me a member of an organisation that trafficks in women.)

Organised crime in Europe takes many forms and involves a large variety of criminal activities, a number of European countries offering a diversity of cultural, economic, and social dispensations at divergent levels of development. Amongst the three main crime markets common to most countries, however, we find – next to fraud and other forms of economic crime, drug production and trafficking – the smuggling of persons and trafficking in human beings.[1] Unlike drug trafficking and economic crime, the trade in humans and the smuggling of persons have only recently been perceived as a key problem of organised crime. This is despite the fact that the Council of Europe has sounded the alarm for over ten years, and has drawn the attention of the member states and other international organisations to the vital need for cooperation in combating trafficking. The topic increasingly attracted the interest of researchers (mainly from interested groups lobbying for victims[2]) during the nineties.[3]

Nearly all countries in Europe are involved: the Eastern countries provide the trafficked persons, who are then exploited in the more affluent markets of Western societies. On the providing side are the networks in Albania, Bulgaria, Croatia, the Czech Republic, Latvia, Lithuania, Moldova, Romania, Slovakia, Macedonia, Turkey, and the Ukraine. The 'receiving countries' are Belgium, Finland, Germany Norway and Switzerland. One can also add Spain, Italy, and Great Britain to this list, because in these countries there is a great demand for sexual and other services offered by organised groups.[4] However, trafficked persons also come from sub-Saharan African countries, via northern Africa, to Italy and Spain; from Asian countries, through the Central Asian Republics, to Russia, and from there, via Ukraine, Slovakia, and the Czech Republic, to western Europe. Another route from Asia runs via Iran and Turkey along the

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[1]Council of Europe *Organised crime situation report 2004* Strasbourg 23 Dec 2004, 14.

[2]F Laczko, E Gozdziak, (eds) 'Data and research in human trafficking: global survey' 2005 *Special Issue of International Migration* 43.

[3]F Laczko 'Introduction' in: Laczko, Gozdziak n 2 above at 5*ff*.

[4]According to the observations of the Guardia Civil in Spain, the number of prostitutes working in the chains of brothels alongside the roads has doubled between 1999 and 2004; 98 per cent of the women originate from Romania, Russia, Nigeria, Ethiopia, Brazil, Colombia, and Venezuela. The turnover/returns achieved by this business are estimated at 40 million Euro per day. See *Frankfurter Allgemeine Zeitung* 22.09.2005.

classical Balkan route to western Europe while Latin American countries are the countries of origin for people who end up mainly in Spain or Portugal.[5] The thriving sex industry in Japan remains a lucrative destination for those who traffic women from Thailand, the Philippines, Colombia and Belarus.[6]

The factors that make migration possible are the fall of communism, ethnic and religious conflicts like the wars in the Balkans, the impoverishment of populations subjected to new market economics, political instability, the crisis of welfare systems and the general developments of the past fifteen years in central and eastern Europe which, in turn, have given a great boost to the trafficking of human beings in Europe. Albrecht points out that the opening of borders[7] and organised crime groups and their networks exert a lesser influence, because such groups only take advantage of the demand in the market.[8] Illegal immigration to western European countries is fuelled by the demand for work, safer social security systems and political stability. The sexual services market is considered a major force in encouraging trafficking, and the large majority of victims is found in the ever-expanding prostitution sector.

Although major trafficking takes place trans-nationally, domestic trafficking from rural to urban areas in many central and eastern European countries is on the increase owing to the growing demand for sexual services.[9]

What then is the dimension of the crime problem and the figures we have to confront when dealing with those who have been subjected to trafficking in Europe? There are no accurate statistical figures available to account for these modern slaves in the heart of Europe, a fact confirmed by the various police services, NGOs and various international organisations. Estimates put the number of women trafficked from eastern to western European countries at 200 000 to 500 000.[10] Global estimates of transferred women and children approach 700 000 to one million.[11] Other estimates involve one to two million females trafficked each year globally, for the purposes of forced labour, domestic servitude and sexual exploitation.[12] The number of children used for

[5]Www.interpol.org.
[6]In 2000 120 000 foreign women worked in Japan's sex industry, 75 000 of whom were being held against their will. The underground sex trade is described as being worth £43 billion; see *The Times* 11.10.2005.
[7]Another opinion, however, is that of V Musacchio 'Migration connected with trafficking in women and prostitution: an overview' (2004) 9 *German Law Journal* 5; see also L Brussa *Survey on prostitution, migration and traffic in women: history and current situation* Eur Consult Ass (1991).
[8]HJ Albrecht 'Trafficking in humans' (unpublished paper 2005) 13.
[9]Council of Europe n 1 above at 25.
[10]See Albrecht n 8 above at 13 for further references.
[11]US Department of State *Trafficking in persons Report 2001* Washington 2002; see also Albrecht n 8 above at 13.
[12]See Albrecht note 8 above at 13 for references.

commercial sexual exploitation is estimated at some 650 000.[13] UNICEF provides a figure of 1.2 million children trafficked every year for sexual and labour exploitation, illegal adoption, child soldiering and other forms of exploitation.[14] UNICEF estimates that in Indonesia alone 70 000 children are forced annually to deliver sexual services and the International Labour Organisation estimated that, in Vietnam, twenty per cent of all children are working in this field. Young boys from Cambodia are in demand as 'professional' beggars. The most recent trend is enforced marriages between women from Vietnam, Laos or Northern Thailand and Chinese men from rural China, where women are in the minority because of an official one-child policy and the abortion of female foetuses (a phenomenon deriving from the preference for male offspring).[15]

UNICEF's reaction also shows a growing awareness of the trafficking problem. In Africa, at least half of all countries report the existence of trafficking from and into other countries on the continent and also to Europe and Middle Eastern countries.[16]

What is certain is that most victims of trafficking activities are women and girls, including those under the age of eighteen.[17] Indeed, in some south-eastern European countries fifty per cent of victims are reportedly below the age of eighteen. Young women are enticed by offers of employment abroad as dancers, bar hostesses or au pairs and end up, sold and in debt, on the pavements of some foreign country. Even those who are aware that they are heading for prostitution have no idea of the violence involved and the working conditions they might encounter. When women are forced into other types of work, they have no residence or work permit and are thus totally dependent on their employers, administratively and financially while often having to endure inhumane conditions and constant intimidation as female domestic slaves.

[13] *Trafficking in women and girls: an international human rights violation* (Fact Sheet released by the Senior Coordinator for International Women's Issues, Department of State, 10 March 1998); see M Akullo 'Child trafficking:a Metropolitan Police Service perspective'(2005) 2 *SIAK Journal Zeitschrift für Polizeiwissenschaft und Polizeiliche Praxis* 24–37, presenting a feasible approach to the investigation of possible child trafficking cases.

[14] 'Oral report on the global challenge of child trafficking – background paper' UNICEF Executive Board, 1st regular session 2004.

[15] *Badische Zeitung* 17.1. 2005.

[16] For more details, see UNICEF Innocenti Research Centre *Media facts: trafficking in human beings, especially women and children in Africa* 23 April 2004.

[17] *Save the children* (2004); the regions of the Czech republic bordering Germany and Austria are an area of destination for children trafficked from other eastern European countries by organised crime networks and serving as prostitutes for clients from Austria, Germany and other European countries: see Bell/Pickar (2003). In Switzerland we find foreign children smuggled into the country for the purpose of drug trafficking, theft and prostitution as well as illegal adoption, see Council of Europe n 1 above at 24.

LEGAL FRAMEWORK – SUPRA-NATIONAL

We have seen that the problem is a global one: no region seems to have been successful at eradicating slavery. The phenomenon of modern slavery, which is inextricably linked with trafficking in human beings and illegal migration, has attracted the attention of the international community.[18] At the UN and in Europe it has been the subject of several instruments and other measures that focus increasingly on prevention, the human rights aspects of the problem, the harmonisation of national laws, stronger cooperation between investigating and prosecuting authorities and the creation of supplementary measures for the victims.

International instruments clearly differentiate between the two aspects of human trafficking between states: the trafficking of persons and the smuggling of migrants. While the latter (by which I mean the profit-motivated assistance of people seeking to illegally enter or stay in a country) is an offence against the state, trafficking of persons is the forced recruitment of emigrants (through trickery or false promises) for the sole purpose of economic or sexual exploitation. Trafficking is therefore seen as a crime against the personal integrity of the victim and is thus violation of his/her human rights.[19] This view is clearly reflected in the Rome Statute of 1998, where slavery is defined as a crime against humanity in article 7 section 2b which reads:

> Slavery is the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Sexual slavery is expressly mentioned amongst the crimes against humanity under article 7 section 1g. This differentiation between trafficking in human beings and smuggling is also a characteristic of international instruments.

United Nations

The *United Nations Convention on Trans-national Crime,* signed in Palermo/Italy in December 2000, deals with the subject of trafficking and the smuggling of persons in two additional Protocols[20] aimed at the prevention,

[18]Previous international instruments dealing with the problem of slavery, servitude and the slave trade were the 1926 Slavery Convention as amended by the 1953 Protocol, art 1(1); the 1948 Universal Declaration on Human Rights, art 4; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and International Practices Similar to Slavery of 1959; Intern. Covenant on Civil and Political Rights of 1966 art 8; European Convention on Human Rights art 4; ILO Convention (no 29) Concerning Forced Labour of 1930 art 2(1); as to children see UN Convention on the Right of the Child art 32.

[19]This differentiation is generally accepted in academic literature: see K Summerer 'Das neue italienische Gesetz über Sklaverei und Menschenhandel' (2005) 4 *ZStW* (forthcoming).

[20]Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Trans-national Organized Crime, adopted by resolution A/RES/55/25 of 15 Nov 2000; Text: Doc A/55/383, in force since 25 Dec 2003. On 6 Nov 2005 it was signed by 117 countries and 94 parties. From Europe the following countries have signed it: Austria, Belgium, Czech Republic, Croatia,

suppression and punishing of trafficking, especially of women and children.[21] Besides provisions to improve cooperation amongst states in the field of prevention, exchange of data and information, and border control measures, the instruments also contain several provisions dealing with the protection of victims. This signals a considerable progress in the direction of a human rights policy regarding trafficking. Article 3 of the Protocol contains an internationally binding definition of trafficking, which provides that it shall signify the following:

> recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of position of vulnerability of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at minimum, the exploitation of prostitution, of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Europe

In Europe the level of activity has been stepped up recently – the work of the EU in tackling trafficking has been outlined by the 2002 Brussels Declaration.[22] There is an abundance of legislative initiatives, action plans, conference declarations, financial programmes[23] and national reaction to supranational obligations imposed by the European bodies. Initiatives to combat trafficking in persons were introduced in many papers. For example, the Hague Declaration of Ministers of 26 April 1997, asking for European Guidelines regarding the prevention and combatting of trafficking women for the purpose of sexual exploitation; the call of the European Council in Tampere in October 1999[24] and – most importantly – the Brussels Declaration of September 2002, demanding the extension of European and international collaboration, concrete measures,

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Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Luxemburg, Malta, Netherlands, Norway, Poland, Moldova, Romania, Serbia & Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Macedonia, UK; but not all have ratified it, these are: Austria, Belgium, Bosnia-Herzegovina, Denmark, Estonia, France, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Moldavia, Romania, Serbia & Montenegro, Slovakia, Slovenia, Spain, Sweden. Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime, 2000.

[21]General Assembly Resolution 55/25, annex II; the UN Global Programme Against Trafficking in Human Beings contains three components: research and assessment, a data base on trafficking flows and a manual on promising practices, see Press Release SOC/CP/210 as of 11 March 1999.

[22]European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century, Brussels 18–20 September 2002.

[23]Agis & Daphne *Programmes to support the development and evaluation of politics, practices and cooperation in the EU and with accession countries.*

[24]The conclusions of the Tampere European Council 1999 have been evaluated and further developed in the Hague Programme in November 2004. For details see COM (2004) 401, 2.6.2004.

standard practices and mechanisms for the prevention and repression of trafficking in persons. The new Constitution for the EU, signed by the heads of state of the twenty-five member states and three candidate countries on 29 October 2004 (but not yet ratified) explicitly addresses trafficking in human beings, and erects framework laws establishing measures in the area of combatting trafficking in persons (article III–168(2)(d).[25]

The main instrument at the European supra-national level is the *Council Framework Decision on Combatting Trafficking in Human Beings of July 19, 2002.*[26] The definitions that have been agreed at EU level include largely the same elements as the definition in the UN Protocol, which formed the basic framework for the European instrument. Like the UN, the EU distinguishes between trafficking in human beings on the one hand and facilitating illegal entry into a country (smuggling of migrants).[27] The EU definition is more precise, in that the Framework Decision is a legally binding instrument, forcing EU-member states to adapt their national legislation in order to comply with obligations at EU level in the area of the harmonisation of criminal law. Another difference is that the UN Protocols address trafficking and smuggling in a comprehensive way, covering aspects of protection, assistance, repatriation of victims as well as prevention, cooperation, information exchange, border measures and security documents. The EU instruments, however, are mainly acts of EU legislation in the areas of criminal law and criminal proceedings.

Another common feature of both instruments, the Protocol and the Framework Decision, is the clear distinction between trafficking and prostitution: they do not imply a specific positive or negative position regarding non-coerced adult prostitution. Further, neither the Protocol nor the EU Decision clarify what they consider exploitation of another person's labour or services for the purposes of the instruments. On the other hand, terms used in both instruments such as 'compulsory or forced labour or services' 'slavery', 'practices similar to slavery', 'servitude' are sufficiently described to distinguish them from 'ordinary' bad working conditions, where a person might be socially or economically exploited.

Under Article 3(I) of the Framework Decision, every member state must introduce provisions for the effective punishment of such offences, or the incitement, aiding or attempt to commit such offences. Furthermore, these offences carry a penalty of imprisonment with a maximum of not less than eight years, where the victim's life was endangered wilfully or by gross negligence, where the victim was a particularly vulnerable person, where serious violence

[25]Treaty establishing a Constitution for Europe as set out in Document CIG 87/2/04 p 29 October 2004. See in particular Arts II–5, III–168(2)(d), III–172(1).
[26]OJ L 203, 1.8.2002.
[27]Council Directive 2002/90/EC of 28 November 2002, (OJ L 328, 5.12.2002, p 17), and Council Framework decision of the same day on the strengthening of the penal framework to prevent such facilitation, (OJL 328, 5.12.2002, p 1).

was used, or where the offence was committed within the framework of a criminal organisation.

Closely connected with the Council Framework decision are other instruments, such as the Council Regulation of 20 October 2003 on initiatives to combat trafficking in human beings,[28] which calls on the MS to ratify and fully implement all international instruments and conventions against trafficking and proposes monitoring systems in order to provide data for better cooperation. In March 2003 the commission adopted its decision,[29] setting up a Consultative Experts Group on Trafficking in Human Beings, which is a further implementation of the Brussels Declaration. This so-called Brussels Declaration on Preventing and Combatting Trafficking in Human Beings was the result of an important conference convened on 18–20 September 2002 at the initiative of the European Commission and the International Organisation for Migration (IOM).[30] The need for a comprehensive European policy was pointed out – addressing the entire trafficking chain (countries of origin, transit and destination), all persons involved and all forms of exploitation, including sexual exploitation, child labour and begging.

Other milestones on combating trafficking in human beings are the Directive of 29 April 2004 on a temporary residence permit for victims of trafficking who cooperate with the authorities,[31] and the Framework Decision of 22 December 2003, on combating the sexual exploitation of children and child pornography; the decision covers criminal activities directly connected with trafficking in children.[32]

I cannot conclude my remarks on what is happening at the supra-national level without taking note of the most recent and comprehensive instrument in this field. In May 2005, after many years of preparation, the Council of Europe issued its Convention on Action against Trafficking in Human Beings.[33] Its strategy adopts a multi-disciplinary approach that incorporates prevention, protection of human rights of victims and prosecution of traffickers, whilst at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively. The added value provided by the CA Convention lies, firstly, in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity. Greater

[28] *Official Journal* C 260 0f 29/10/2003 4–5.
[29] *Official Journal* L 79 of 26.3.2003 – Expert group in Trafficking in Human Beings.
[30] The conference brought together over 1000 representatives of the EU MS, candidate countries, neighbouring countries such as Russia, the Ukraine, as well as USA, Canada, China and several NGOs.
[31] Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 6.8.2004, 19,
[32] OJ L 13, 20.1.2004, 44.
[33] See Council of Europe Convention on action against trafficking in human beings, Explanatory Report, CM(2005)32 Addendum 2 final 3 May 2005 about the history of this legislation, §§ 11 *ff.*

protection is therefore needed for all victims. Secondly, the Convention's scope includes all forms of trafficking (national, trans-national, linked to or unconnected with organised crime, and for purposes of exploitation), in particular with a view to victim protection measures and international cooperation. The Convention is, therefore, wider in scope than the Palermo Protocol. Thirdly, the Convention sets up monitoring machinery to ensure that parties implement its provisions effectively.

As far as the definition of trafficking in human beings is concerned, the Convention closely follows the Palermo Protocol: in fact, article 4(a) of the Convention is identical to article 3(a) of the Protocol.

It is not within the scope of this article to deal with the details of criminal law provisions (chapter IV), the parts regulating the investigation, prosecution and procedural law (chapter V) or the measures to protect and promote the rights of victims (chapter III) and other issues of the Convention.[34]

LEGAL FRAMEWORK – NATIONAL

Experience has shown that putting legal instruments in place at a regional level greatly reinforces any action taken at the global level (Expl Report § 9); this is even more true at national level, because it is in the individual countries that offenders are investigated, tried, convicted, and punished. As mentioned earlier, approximation of criminal laws and some criminal procedures is the main purpose of the model instruments drawn up by the EU and the Council of Europe. Examples of new national laws against trafficking, formulated under the influence of the supra-national instruments, are the German and Italian Criminal Codes.

Germany

The government's most recent legislative proposal intends to apply international UN and EU instruments to German law, thereby creating a broader legal basis for the fight against the sexual exploitation of women and girls. German criminal law has already been reasonably successful in its aims, given the growing number of convictions in Germany for trafficking.

Trafficking in persons has been a crime under German criminal law since 1973[35] (§§ 180a III–IV, 181 StGB). In 1992, after the opening of the border, growing pressure from the media and various women organisations led to a thorough reform,[36] and to the creation of two separate offences of trafficking in persons and serious trafficking. In order to better protect foreign women and girls, the legislator reacted against the more sophisticated forms of trafficking by creating

[34]Prevention, cooperation, and other measures – Chap II; International cooperation and cooperation with civil society – Chap VI; Monitoring mechanisms – Chap VII; Relation with other international instruments – Chap VIII.
[35]4th Criminal law Reform Act of 1973.
[36]26th Criminal Law Amendment Act 1992.

more subtle offences and increasing the penalties. Previously, only the recruitment of women on a regular and profitable basis (*gewerbsmässig*) was punishable; today, a single case of forcing a woman into prostitution against her will is an offence when committed for profit. Recruiting women in a foreign country for prostitution was made an offence, even when they were already working as such at home. Recruitment under false promises *(eg* arranging a marriage or adoption) was also made a punishable act. New legislation will now consolidate the substantive provisions and facilitate their application by more lucid formulation. At the same time it was stressed that victims would receive more support and counselling when re-adjusting to a normal life in Germany or their home country

The actual reform of 2005 was caused by the obligation incurred by signing the additional Protocol to the Palermo Convention of 15.11.2001 and the signing of the Framework Decision of the Council of the EU of 19.7.2002 (both mentioned above).

The result of this reform is the new positioning of these offences in the structure of the Code. While, up to now, trafficking in persons has been an offence against sexual self-determination (focusing on the intent of bringing the trafficked person into prostitution), trafficking in persons has now been transferred into the realm of offences against personal freedom, thereby stressing the human rights aspect – with personal liberty as the legal interest now being protected. The new provisions of §§ 233 and 234 seek to afford protection of the victim against sexual and labour exploitation. Since slavery or slave-like circumstances are regarded as being less likely to occur in Germany, sexual exploitation takes a primary position in the new structure. By this arrangement the German legislature departs from priorities adopted in the supranational instruments.

Another departure from the supranational model is to be noted in the structure of the German provisions (*Tatbestände*), while in the Framework Decision the criminal acts constitute recruitment, transportation, reception, *etc*, under certain circumstances such as coercion, force or threat for the purpose of exploitation of that person's labour, *etc* (thus construing a 'purpose or intent offence' (*Absichtsdelikt*)). German law creates a 'success or result offence' requiring that the offender actually brings another person into prostitution or forces her to stay in this business. The earlier stages are punishable as an attempt (§ 232 (2), 233 (2)).

The other alternatives of article 3 of the Framework Decision are now covered by § 233 StGB, making it punishable to commit a person to slavery, serfdom/bondage or servitude as amortisation of debts (*Schuldknechtschaft*[37]); this was already covered by the former offence of kidnapping of a human being

[37]This is a dependent relationship in which a person abuses the debtor's working power for a considerable time for the purpose of repaying real or fictitious debts.

(*Menschenraub*). Another alternative of this offence, namely the introduction of a person to 'working relationships where the working conditions differ considerably from those enjoyed by other workers' is a German element and has no counterpart in the Framework Decision. Conscription to military service by a non-native country through force or threat is now punishable under § 234 StGB; enforced marriage is an example of § 240 StGB.

Penalties have also undergone some changes: for the basic offence of trafficking in human beings, imprisonment from six months up to ten years is provided for. Under special circumstances (if the victim is a child, the offender maltreated the victim and caused the risk of death; the offender is trafficking regularly or is member of a group) the minimum is one year's imprisonment.

Italy

Confronted with the fact of forced labour for the purposes of industry, coerced begging, an increase in the amortisation of debts, the trade in organs, and the buying and selling of children to cater for paedophilia, prostitution and pornography,[38] European jurisdictions have been compelled to review their laws in order to combat such practices.

Italy has reformed its slavery offences by law no 228 of 11 August 2003, because the former provisions in the *Codice Rocco* could no longer be applied satisfactorily, mainly because there was no officially and legally proscribed state of slavery as such. The Constitutional Court recognised the growing need for protection of exploited victims and offered protection against conditions of slavery, although such conditions were not legally recognised. Slavery *de iure* under article 600 was substituted by slavery *de facto* and was punished under article 603 CP.[39] The new law no 228/2003 on slavery and trafficking in human beings, completes the grand reform of measures for personal protection – that is, legislation against rape and sexual abuse (1996), against child pornography and against gaining from child prostitution (1998).

The new Act no 228 is characterised by a more precise description of new forms of exploitation that are generally connected with slavery and trafficking. The measure of punishment was extended in order to accentuate the reprehensible nature of the offence and the supreme value of the protected legal interest. Punishment is currently imprisonment in the range of eight to twenty years:

[38]According to IOM data, ten per cent to twenty per cent (2000 to 6000) of the 20 000 to 30 000 illegal female migrants who enter the sex industry in Italy each year are trafficked. In Greece research has shown that just over half the trafficked women are from Russia or Ukraine, while a third come from the Balkans and a small percentage from Asia and Africa. Trafficking to Belgium tends to be from Nigeria, China, Albania, Romania, Russia and Bulgaria. Most victims in Germany were from the former Soviet Union and elsewhere in eastern Europe. In France, according to the central anti-human-trafficking office, 12 000 to 15 000 people were engaged in prostitution in 2000. All the eastern European nationalities were involved. See Musacchio n 7 above at 88.

[39]For details and literature see Summerer n 19 above.

double that of Germany. An aggravating circumstance is the organised manner of commission (article 416). Legal persons can also be punished.

FINAL REMARKS

Criminal law is but one cog in the machinery required to combat these offences; the law has to be bolstered by other mechanisms, such as better cooperation and coordination at an international level, prevention by eliminating the root causes, awareness training, police and judicial cooperation and victim support. The long list of instruments, created by the European supra-national institutions is evidence of the growing significance attached to the problem of trafficking in women and children for sexual and economic exploitation.

I have attempted to describe but some of the normative developments in the European context – a wide-ranging topic with many more areas to explore. I have not touched upon the procedural aspects and difficulties connected with the investigation and prosecution of trafficking crimes against persons, the role of victims as witnesses and the possible incrimination of the customers in this field.

The legal wording of the Acts described in Criminal Codes as trafficking offences against persons seems fairly abstract; however, their unacceptable, morally reprehensible nature is revealed when observed in the context of criminal trials, television reports and films. The disregard that perpetrators of these crimes have for young lives by stigmatising and sometimes ruining them for life, for the sole purpose of sexual gratification, is difficult for the civilised, law-abiding citizen to comprehend. These criminals contribute to making an illegal trade profitable and obviously encourage the activities of organised crime.

An idealistic solution to this problem would be to wipe out the market by changing the sexual attitudes of the customers – an impossible task, alas. Equally illusionary would be the proposal to improve the economic and social situation in poor countries where even young children are driven to participate in prostitution and pornography by false promises of a better life in more affluent societies.

We have to therefore resort to the regular measures of traditional criminal legislation against trafficking. An increasing public awareness of human trafficking clearly shows a marked desire for retribution on the one hand, and victim protection on the other – both welcome harbingers of reform. However, criminal law may be a facile method of dealing with a complex issue. Criminalisation and the introduction of heavier penalties give a clear signal that governments have the instruments enabling them to react to situations where citizens are at risk.

However, besides criminal law and increased sanctions which, by themselves, are not sufficient to successfully fight against trafficking in human beings we need the following:

- preventive measures to be strengthened by enhancing public awareness, as well as education, and information of the targeted social group in the providing countries;
- the development and financial support of multi-disciplinary agencies and NGOs for the identification of exploitation of women and children and for appropriate support or treatment of the victims;
- encouraging the media to contribute constructively to a general awareness of trafficking and exploitation;
- the harmonisation of criminal laws, and global punishability of offences, whether they are committed on or outside the national territory;
- the effective international cooperation of investigating and prosecuting agencies; and
- to develop a system of protection and re-integration of the victims … and many more measures besides.