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1. INTRODUCTION

1.1 CENTRAL ISSUES AND FRAMING OF THE DISCUSSION

Cannabis use and possession is prohibited by the overwhelming majority of states¹ and South Africa is no different. However, recently some states have decriminalised the use and possession of cannabis or have fully legalised its use and possession. It is necessary here to explain the difference between decriminalisation and legalisation. Decriminalisation is a process where the use and possession of cannabis is, subject to certain conditions and regulations, removed from the legislation of the relevant state as an offence, and it is therefore permissible to possess and consume small quantities of the plant (or at least some of its constituent parts). Typically, a state which has decriminalised the use and possession of cannabis will allow private adult individuals to use and possess small amounts of the plant without being subject to the threat of prosecution, but still prohibits the trafficking and commercial sale of cannabis.

In certain instances (for example for medical use) cannabis may be traded under medical exemption, but the position under this type of regime is still that, although cannabis may be possessed and used (subject to conditions) without the possibility of criminal sanction, its commercial cultivation and sale are still prohibited by law. Legalisation, by contrast, implies that cannabis use, possession or commercial sale is no longer prohibited by law, and rather the substance occupies the same status as substances like alcohol and tobacco, such status being that use, possession, commercial cultivation and distribution of the substance is permissible under law but nonetheless may be subject to government regulation.

In South Africa the use and possession of cannabis is neither decriminalised nor fully legalised. The case of *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (CC) ('Prince') sets out the

¹ New Health Guide 'Where is Marijuana Legal?' 2014 accessed from: <http://www.newhealthguide.org/Where-Is-Marijuana-Legal.html> accessed on: 2015-12-14. See table produced at the end of Chapter 5.

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legislative framework which prohibits the possession, use and distribution of cannabis in South Africa, as follows:

*'Cannabis is listed in Part III of Schedule 2 to the Drugs Act as an undesirable dependence-producing substance. Its use or possession is prohibited by section 4(b)... The stated purpose of the Drugs Act is to prohibit the use or possession of dependence-producing substances and dealing in such substances... Possession for medicinal purposes is exempted under section 4(b) but this exemption is subject to the provisions of the Medicines Act... Section 22A (10) of the Medicines Act read with Schedule 8 of that Act, also prohibits the use or possession of cannabis except for research or analytical purposes... Its stated purpose is to regulate the registration of medicines and substances... The substances listed in Schedule 8 of the Medicines Act are substantially the same as those listed in Part III of Schedule 2 to the Drugs Act...'*²

Briefly stated, the purpose for the prohibitions, per *Prince*:

*'...are aimed at prohibiting the use of harmful dependence-producing drugs. Cannabis is the target of both statutes, primarily because it has the potential to cause harm in the form of psychological dependence when consumed regularly and in large doses.'*³

The enforcement of these two statutes' prohibition on use or possession of cannabis is provided by section 40(h) of the Criminal Procedure Act⁴ insofar as it relates to the arrests for possession, consumption and transportation of cannabis for personal use, as well as arrests for possession, consumption and transportation of cannabis for profit or otherwise. Any potential challenge to the prohibition of cannabis therefore, would ultimately amount to a challenge to the relevant provisions of the Drug and Drug Trafficking Act and the Medicines and Related Substances Act, read with the enforcement provisions in the Criminal procedure Act.

² *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (CC) at paras 22-25.

³ *Supra* at para 24.

⁴ Criminal Procedure Act 51 of 1977.

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It is therefore apparent that the relevant provisions in these two statutes form the essential basis for the illegal status of cannabis in South Africa, subject to certain very specific exemptions for medical research purposes. The medical exemptions, or indeed any current exemptions regarding the use or possession of cannabis, are beyond the scope of this dissertation. Instead, the purpose of this dissertation is to investigate whether a successful constitutional challenge could be formulated to completely remove the prohibition of cannabis in South Africa (as it relates to personal use and consumption of cannabis), rather than merely to obtain an exemption for whatever purpose. The reasoning to this end is discussed further in this work, under the chapter addressing the findings in *Prince*.

To effect the decriminalization of cannabis therefore, a challenge to the constitutionality of the legislative scheme read as a whole (insofar as it relates to cannabis) would be necessary. The purpose of this dissertation then, is to investigate what the prospects of success of a challenge to the constitutionality of the legislative scheme would be if the matter were brought before a court with the necessary jurisdiction to decide the issue. The question of whether it is time to revisit the *Prince* case can therefore be addressed by investigating the prospects of success of a challenge to the constitutionality of the legislative framework.

The central argument is that the relevant provisions of the Bill of Rights *require/mandate* the decriminalization of cannabis in South Africa. The only ground on which a successful challenge to the prohibition of cannabis may be sustained is if the legislative scheme which governs the prohibition is held to be unconstitutional and therefore invalid. For a declaration of invalidity per section 172 of the Constitution⁵, it would need to be proved on a balance of probabilities that a legislative scheme infringes upon rights in the Bill of Rights.

⁵ Constitution of the republic of South Africa, 1996 s172(1) and (2).

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1.2 INIMICAL BEGINNINGS: A BRIEF HISTORY OF CANNABIS PROHIBITION IN SOUTH AFRICA

If one is to trace the history in Africa of the use and cultivation of cannabis, it becomes obvious that despite certain disagreements as to origin and proliferation of the cultivation and use of the plant, cannabis has been widely used and cultivated for centuries within South Africa, much like alcohol and tobacco. It is frequently (incorrectly) contended that the Khoikhoi were the 'main cultivators of the plant in southern Africa'.⁶ Paterson instead propounds the view that '*cannabis almost certainly entered Africa through Arab trading circles...The diffusion of cannabis throughout Africa came in two distinct phases*'.⁷

The disputed origin of cannabis cultivation in Southern Africa aside, it is nonetheless clear on a reading of Paterson's research that whatever the origin of cannabis cultivation, it nevertheless found a place in the indigenous societies living in Southern Africa around the time of the first colonial presence in the region. Whether cultivation generated any cultural significance seems as likely to be disputed as the origins of cannabis cultivation seem to be, however Paterson's comments regarding the history of cannabis smoking within the indigenous communities seem to suggest that at the very least, the smoking of the plant did come to achieve some culturally significant place in the customs of the indigenous communities.⁸ It is thus clear that cannabis smoking, and cannabis cultivation (as a necessary antecedent to smoking) both found some significance in the indigenous cultural life of their pre-colonial societies.

The colonial powers did not take any moral exception to the trading of intoxicating substances until the second half of the 1800s under British rule, although Paterson notes that by this stage '*the trade of opium averaged 15% of total revenues for British India*'.⁹ The

⁶ C Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade, c. 1850 – the present* (A thesis in fulfilment of the requirements for the degree of Master of Arts in History) 2009 Rhodes University at p20-24. See Paterson's full thesis for a detailed analysis of the suggested origins of cannabis in Southern Africa.

⁷ Ibid at p 21-22

⁸ Ibid. Paterson discusses the potential cultural significance of cannabis at pp26-31

⁹ Ibid at p32: '*Prior to this time, the sale of drugs was seen by the colonial powers as a purely commercial exercise*'.

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Dutch colonial period saw trade of cannabis between the VOC and the Khoi-Khoi as not only being increasingly less worthwhile financially for the VOC than that of alcohol and tobacco but effectively damaging for the colonists financially. This damage was attributed to the effect of Khoi-Khoi cultivation of cannabis on the VOC's much prized tobacco monopoly, such effect facilitated by cannabis replacing tobacco as the smoking product of choice among the Khoi people, after the Dutch prohibited the independent cultivation of tobacco by the Khoi.¹⁰ Despite this damage to the Dutch tobacco trade, cannabis continued to be traded between indigenous people and the colonists. Paterson summarises the colonists' subsequent shift in attitude toward cannabis as follows:

*... [Cannabis] was not considered of particular value to settlers and was simply grown for labourers...the settlers were willing to use cannabis for this purpose – that is, that cannabis was considered as a legitimate commodity in trade. However, this attitude began to change in the early decades of the 19th century, as one begins to find references to the settler's cultivation of cannabis being rendered with disdain...'*¹¹

The second half of the 18th century and the early part of the 19th century saw the colonial attitudes towards cannabis shifting ever more toward the negative, and much of this shift in thinking can be attributed to the prevailing anthropological and psychological views of the colonial powers of period.¹² Summarised, the prevailing view was that many characteristics found to be present in the subjects of criminology studies were identical to characteristics of the 'savage' native population, as viewed by the European psychological and criminological authorities of the time.¹³ Proximity to, and integration with, the 'savage' indigenous population by the European settlers was feared to affect the so-called morality of the settlers. The studies of the time linked integration to adoption by the settlers, of

¹⁰ C Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade, c. 1850 – the present* (A thesis in fulfilment of the requirements for the degree of Master of Arts in History) 2009 Rhodes University.

¹¹ Ibid at p34.

¹² Ibid at pp33-39. For further particulars of the prevailing psychiatric and criminology research of the time, see also, M Chanock, *The Making of South African Legal Culture, 1902-1936: Fear, Favour and Prejudice* 2001 Cambridge; C. J. G Bourhill, *The Smoking of Dagga (Indian Hemp) among the Native Races of South Africa, and the Resultant Evils* (PhD Thesis, University of Edinburgh) 1912 cited in Paterson above.

¹³ Ibid at pp37-39.

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those characteristics of the indigenous people, which were then (incorrectly) viewed as synonymous with criminal attributes.¹⁴ Paterson illustrates that the adoption of these characteristics was thought to directly stem from social interaction between the settlers and the indigenous population:

*'The overlap between psychology and criminology at the time (and the corresponding fields of psychiatry and penology) resulted in the acceptance of a specific psychological type associated with criminality. Moreover, the instantiation of this psychological type was seen as being dependent on social experience. According to this view...the psychology of a person may change, and this change occurs through their social interactions...The use of the asylum system to control 'undesirables' in the colonies can be seen in the case of British India, and it also marks a major point in the process of cannabis prohibition. It was through the Indian asylum system that the connection between cannabis use and insanity was first brought into colonial politics.'*¹⁵

It becomes apparent then, that the politicization of the use and trade of cannabis, and the prohibitionist attitude toward it can be directly linked to the racialized psychological attitudes of the time. The connection between the racialized psychological views and the criminology of the period created the view that the indigenous people were by nature more predisposed to exhibit criminal characteristics, owing to the already-present similarity between their perceived characteristics and those of criminals. Moreover, these characteristics were capable of being absorbed by those who originally did not possess them (the European settlers) through sustained interaction with the indigenous people. The trade in, and use of, cannabis was one such type of interaction. It must be stressed that this kind of thinking has been emphatically rejected by any intelligent society in recent times. This can leave one in no doubt that at least the attitudes which led to the prohibition of substances like cannabis, stemmed partially from fundamentally incorrect and racialized institutional ideas which had as their result, policies of segregation. This already erodes the

¹⁴ Ibid at pp37-39.

¹⁵ Ibid at pp39-41.

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legitimacy of the purpose of early cannabis prohibition, but even more so does the history of medical research on the effects of cannabis.

Some early studies undertaken on the effects of cannabis were conducted at asylums in British India, and here it must be highlighted that the studies on the effects of cannabis were heavily influenced by the prevailing views of the psychology discipline of the time, as detailed above. Therefore at the outset, the research and studies undertaken on the effects of cannabis were skewed completely by the incorrect prevailing psychological attitudes. In short, it was believed that cannabis induced or exacerbated insanity in the Indian asylum patients, and the prevailing studies seemed to suggest that this conclusion stemmed from the fact that more and more admitted patients happened to be users of cannabis.¹⁶ Naturally, these studies made the mistake of assuming that correlation between the increased number of patients and the increase in number of patients who smoked cannabis were indicative of a causal link, however, such beliefs based on statistics of the time did entrench the apparent link between insanity and cannabis consumption, and were disseminated throughout the British Colonies:

*'The view that cannabis caused insanity amongst the 'natives' in India was quickly adopted throughout the British colonies, especially in places where indentured Indians were shipped... one of the earliest available government discussions on cannabis is found in the Natal Indian Immigrants Commission Report (RIIC). This was published in 1887, at the height of 'criminal anthropology', religious zealotry, and concern about cannabis causing insanity amongst Indians.'*¹⁷

Despite the increasingly negative attitude toward cannabis and its consumers, and the increasingly racialized psychology surrounding the cannabis trade and all interactions flowing therefrom, Burchell notes that until 1922, there was effectively still no legislation which in any way prohibited cannabis trade and consumption.¹⁸ Other than a 1903 Ordinance of the Orange Free State which prohibited the cultivation and possession of cannabis, and a 1905 Ordinance which outlawed the trade in opium, there was a total lack

¹⁶ Ibid at pp41-42.

¹⁷ Ibid at pp42-43.

¹⁸ J M Burchell *Principles of Criminal Law Vol 4* 2014 Juta & Co. Ltd at p798.

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of anti-substance legislation in South Africa (at the time a British colony).¹⁹ Paterson however points out that:

*'This was not the case in the Cape Colony, where cannabis was prohibited under Act 34 of 1891...It was not until around 1912 that the panic around the use of cannabis grew to the point that there were calls for the enforcement of that law.'*²⁰

Paterson also notes, citing Chanock, that *'there was a marked tendency to consider [and view] dagga in relation to the racially marginal Indian and coloured populations.'*²¹ It is therefore not surprising that *'by 1921, there was real panic [by the ruling powers] surrounding cannabis use in South Africa...this was mainly a concern in the Western Cape, where cannabis is said to have 'caused' criminality.'*²² This evidence illustrates quite clearly that the advent of cannabis prohibitions in South Africa stemmed directly from concerns regarding integration with and control of, the indigenous population, as well as from reliance on (understandably) inaccurate medical and psychological research. The difference between cannabis prohibition prior to 1922 and thereafter, lies in the fact that prior to 1922, there was still debate occurring as to whether these concerns justified prohibition of cannabis, despite the dangers it was thought to have the potential to create. After 1922, the matter began to devolve from one where commissions and institutions applied to the government to set prohibitive measures in place, to one where the government in a blanket fashion began to prohibit cannabis use and trade without bothering to justify its prohibitive measures.

The adoption of the Customs and Excise Duties Amendment Act 35 of 1922, constituted the first blanket prohibition by the government on the use, cultivation and sale of cannabis, cocaine and a number of other substances which could be deemed 'habit forming drugs' and this amendment also made provision for search and seizure in the enforcement of the new substance prohibition legislation.²³ Additional comprehensive

¹⁹ Dagga Prohibition Ordinance of 1903 (O) cited in Burchell *Ibid* at p798.

²⁰ Op cit note 10 at p47.

²¹ M Chanock *The Making of South African Legal Culture* 2001 cited in Paterson *op cit* note 10 at p47.

²² Op cit note 10 at p52.

²³ Op cit note 18 at p798.

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legislation was issued in the form of the Medical, Dental and Pharmacy Act 13 of 1928 ('the Pharmacy Act'), following a rise in the use of cannabis by the general population which led to increased calls for more stringent measures against the use of drugs.²⁴ The Weeds Act 42 of 1937 was later passed, and this established cannabis prohibition to a greater extent in South Africa. Paterson explains that:

*'This Act placed the onus on the occupier or owner of a property to prevent land being used to produce cannabis, or any other plant declared a 'weed' in South Africa. If the occupier or owner failed to do so they were guilty of an offence, and furthermore, the government was empowered to remove the plant from their land at the owner or occupier's expense. Imprisonment was allowed for a second offence concerning the same weed species, and it was required that the declared weed was destroyed on observation. It also made the movement and trade of seeds of declared weeds illegal.'*²⁵

Thus the Pharmacy Act and the Weeds Act served firmly to establish the government's early prohibition of cannabis use and trade. These statutes served to give the impression that the issue of cannabis was settled in South Africa. What is of particular interest is that in the wake of cannabis prohibition in South Africa circa 1922 and beyond, cannabis prohibitions went unenforced in rural areas owing to the fact that *'moderate dagga smoking [was] of little importance from the point of view of public order and welfare'*.²⁶

Internationally across the developed world, from the 1960s the use of cannabis and other 'dependence-producing' substances became more popular, and widely consumed. South Africa increasingly became a country that exported cannabis.²⁷ International organisations, such as the United Nations and their representative states began to clamp down on the international trade of drugs including cannabis, and various international treaties and protocols began emerging as a means to encourage (and if not, to strong-arm)

²⁴ Op cit note 18 at p798.

²⁵ Op cit note 10 at p54.

²⁶ M Chanock *The Making of South African Legal Culture* 2001 cited in Paterson *op cit* note 10 at p124.

²⁷ Op cit note 10.

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those states who were somewhat still undecided as to the extent their prohibitions should be increased.²⁸ Kruger et al in their position paper on cannabis sativa, compiled for the South African National Council on Alcoholism and Drug Dependence ('SANCA'), describe the international obligations which started binding the international community as follows:

*'The adoption of the United Nations Single Convention on Narcotic Drugs 1961 is regarded as a milestone in the history of international drug control as it successfully pulled the majority of the world's governments, including South Africa, into line in one comprehensive drug treaty. Earlier treaties had only controlled opium, coca and derivatives such as morphine, heroin and cocaine. The Single Convention, adopted in 1961, consolidated those treaties and broadened their scope to include cannabis and drugs whose effects are similar to those of the drugs specified.'*²⁹

The judgment of the Cape High Court in *Prince* sets out the position of the Single Convention regarding cannabis as follows:

*'Cannabis is listed as a drug in two of the schedules to the Single Convention. The Convention obliges the parties to it to adopt any special measures of control which in their opinion are necessary, having regard to the particularly dangerous properties of a drug included in the schedules. One of the principal features of the controls required to be implemented by the Single Convention is that the parties to it are required to implement provisions aimed at limiting the possession and use of drugs (including cannabis) to medical and scientific purposes. The Convention further requires each party to adopt such measures as will ensure that, inter alia, possession of those drugs shall be a punishable offence.'*³⁰

Although not a party to the Single Convention at the time of its inception, South Africa did become a party to the United Nations Convention on Psychotropic Substances

²⁸ G Kruger et al. *SANCA National Position Paper on Cannabis Sativa 2014* Compiled at the request of the SANCA National Treatment Portfolio accessed from <http://sancanational.org/index.php/position-papers.html#edn1> at Ch2.

²⁹ United Nations Single Convention on Narcotic Drugs 1961 cited in Kruger et al *ibid* at Ch 2. A full discussion of the domestic legislative framework and international law instruments governing cannabis is undertaken in chapter 5 of this dissertation.

³⁰ *Prince v President of the Law Society of the Cape of Good Hope* 1998 (8) BCLR 796 (C) at 985.

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(1971) which listed cannabis as a psychotropic substance in Schedule 1.³¹ According to this convention, the parties to it were, and are mandated to prohibit all use of cannabis other than specifically limited scientific and medical use.³² Another international instrument, the United Nations Convention against Illicit Traffic in Narcotic Drugs and other Substances (1988), required parties to establish the possession and personal consumption of psychotropic substances and narcotics as an offence in their domestic law, and again cannabis was listed as such a substance.³³ These international instruments are discussed in more detail regarding their applicable articles in Chapter 5. From the 1960s all through the height of the Apartheid era, South Africa therefore ostensibly acquired international obligations under these instruments to not only continue the cannabis prohibition, but to ensure that the prohibition measures in domestic law were even more comprehensive.

During the apartheid era, following inception of the various international obligations (devised to bind states to a programme of drug eradication), the prohibition of cannabis in South Africa became more strictly enforced. This was owed partially to the fact that the banned political parties of the time resorted to illicit means (including trading in cannabis and other drugs) to raise income for their resistance activities.³⁴ Added to this, the rise of the libertarian 'hippie' culture in many capitalist states during the height of the Cold War became associated with drug use, particularly cannabis.³⁵ Therefore, using or possessing cannabis became intimately linked in the mind of the State with political activism and radicalism, which further heightened the State's attempts to eradicate cannabis use throughout South Africa. Paterson stresses the racialisation of cannabis politics during the Apartheid era and even prior to Apartheid being formalised into law:

'...cannabis use was not a political issue until such a time as the 'non-white' population came into great enough contact with the politically dominant 'white' population to make this contact seem like a threat that needed to be reduced.

³¹ *Supra* at 985.

³² *Supra* at 985.

³³ *Supra* at 985.

³⁴ *Op cit* note 10.

³⁵ *Op cit* note 10 at pp121-127.

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*Cannabis use was not a problem unless there was great enough contact between the 'white' colonists and the cannabis-using 'non-white' population, and, in this sense, cannabis laws may be located in the greater schema of the so-called 'grand apartheid' design. At the very least, both cannabis law and apartheid law rest on the same ideological foundation. Stemming from this 'scientifically-justified' racism and (not coincidentally) the prohibition of cannabis, we find a direct correlation between resistance to institutionalised racism and resistance to cannabis laws.*³⁶

The primary instrument in South African domestic law which served to entrench cannabis prohibition in the post-Apartheid era (circa 1990 and thereafter), was and still is, the Drugs and Drug Trafficking Act 140 of 1992, which is reinforced by the earlier Medicines and Related Substances Control Act 101 of 1965 as well as other legislation aimed at combating general and drug-related crime.³⁷ At present, this legislative framework is still the source of the cannabis prohibition in South Africa. As mentioned previously, it is this framework and the State's claimed purpose in maintaining it which must be challenged if cannabis is to successfully be decriminalized using the courts as a mechanism. It is precisely because of this history of racialized prohibition that the issue of cannabis legalisation is of particular meaning and importance to South Africa, its citizens and their basic human dignity, culture and freedom. I will argue in this dissertation that the prohibition even in present terms violates several fundamental and inalienable human rights of people within South Africa's borders, particularly the equality right, with its internal requirement of rationality. The prohibition of cannabis, whilst the State continues to permit consumption of alcohol and tobacco, is not rational, particularly in light of the manner in which the State's alleged purposes for the differentiation between the two, have developed directly from the attitudes discussed in this part.

³⁶ Op cit note 10 at pp117-118.

³⁷ Drugs and Drug Trafficking Act 140 of 1992; Medicines and Related Substances Control Act 101 of 1965; Mutual Assistance in Criminal Matters Act 86 of 1992; Prevention of Organised Crime Act 121 of 1998; Tobacco Products Control Amendment Act 12 of 1999; Prevention of and Treatment for Substance Abuse Act 70 of 2008. A full discussion of the domestic legislative framework and international law instruments governing cannabis is undertaken in chapter 5 of this dissertation.

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This violation is exacerbated by the very history of racialized politics, psychology and criminology which led to the current prohibition. Put differently, it is irrational that cannabis is prohibited, while other substances (like alcohol and tobacco) which also had a flourishing early trade and culture of consumption, are permissible. It is even worse yet, when one considers that cannabis was likely only treated differently owing to early inaccurate pseudo-psychological and criminological attitudes which were almost entirely misinformed by racist thinking.

*I am very grateful for the work of Craig Paterson, submitted as a thesis at Rhodes University, on which I have heavily relied in constructing this chapter.

2. *PRINCE II*: A CRITICAL ANALYSIS OF THE FINDINGS OF THE COURT AND DISTINGUISHING THIS CASE FROM A FUTURE CHALLENGE.

The case of *Prince* was brought to the Constitutional Court under the right in section 15(1) (read with section 31(1)) of the Constitution to freedom of religion, belief and culture. It was contended that the legislative scheme regulating the use and possession of cannabis (set out in the previous chapter), violated this right by being overbroad. Accordingly the court was asked whether the use of cannabis ought to be exempted from the prohibition contained in the legislative scheme, thereby allowing Rastafarians to be exempted from criminal prosecution for the consumption of the substance. A majority of the presiding Justices held that although the prohibition on cannabis did violate Prince's right to freedom of religion, this violation was properly justified by the State under the limitations clause in section 36 of the Constitution.³⁸

The case arose as a direct result of the Law Society of the Cape of Good Hope's refusal to register Prince's contract of community service owing to lack of proof that he was a fit and proper person under the terms of the Act in question. The reason for this was that Prince had two previous convictions for possession of cannabis. What added to the Law Society's decision to refuse his registration was the fact that Prince had also stated categorically that he would not cease to consume cannabis, as the consumption of cannabis

³⁸ Supra note 2.

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was a central and vital part of the Rastafari religion, of which Prince was a follower.³⁹ By the time the case reached the Constitutional Court, the constitutionality of the Medicines and Related Substances Control Act and the Drugs and Drug Trafficking Act was raised as the central challenge (both of which prohibited the use and possession of certain drugs, despite some exemptions contained in the Medicines and Related Substances Control Act). As Pillay notes, *'the essence of appellant's argument was that the two Acts violated the right to freedom of religion protected by the Constitution because there was no exemption for cannabis use by Rastafari'*.⁴⁰

The foremost divergence of opinion between the majority and the minority hinged on the question of whether there were less restrictive means to achieve the legitimate government purpose of drug abuse prevention, with the majority deciding the issue in the negative, with a focus on the practical implications of an exemption system.⁴¹ In essence, the majority decided that the limitation of the right was justifiable, grounded on the facts that: there is no objective way to distinguish between prohibited trade of cannabis and use of the substance for religious purposes; the financial and administrative implications of a permit system would place too onerous a burden on the State; and lastly, it is highly problematic to determine whether a person in possession of cannabis is genuinely a Rastafarian.⁴² In addressing these objections by the State, the appellant proposed the introduction of a permit system to regulate the exemptions, however these suggestions were not supported in any way by the majority. This was primarily because the use of a "prohibited substance" for medical reasons rested on a number of controlling mechanisms, such as limitation of the use of the substance by means of a prescription and oversight by

³⁹ Supra note 2.

⁴⁰ A Pillay discussing *Prince v President of the Law Society of the Cape of Good Hope* supra note 2 at paras 92-96 in the Oxford International Journal of Constitutional Law (2003) Vol 1 p152, accessed from <http://icon.oxfordjournals.org/content/1/1/152.full.pdf>.

⁴¹ Supra note 2 at para 114.

⁴² Supra note 2 at paras 114-120 and 128-133.

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medical practitioners⁴³. No such controlling mechanisms existed vis-à-vis the Rastafarian religion.⁴⁴

Ngcobo, Mokgoro, Sachs JJ, and Madlanga AJ for the minority, took a different approach to the majority, one which encompassed a 'reasonable accommodation' methodology.⁴⁵ The minority felt that the State had failed to show how an exemption would undermine the purpose of the law, and that when it came to remedy, the details of an exemption would be better left to the realm of the legislature.⁴⁶ It was stressed by the minority that there was a complete lack of evidence to support the State's contentions that any uses for cannabis other than smoking were dangerous, or indeed that smoking cannabis in small quantities could cause undue harm.⁴⁷ The vulnerability of the Rastafari community and tolerance in a pluralistic society were the central theme of the separate dissent given by Justice Sachs, who believed that "reasonable accommodation" in this case would ensure the protection of Rastafari and allow them to practice their religion while allowing the general prohibition to remain.⁴⁸ Justice Sachs favoured a decriminalization approach, stressing that this would be consistent with South Africa's international obligations under to the 1961 Single Convention on Narcotic Drugs (amended by the 1972 Protocol) the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Trade in Narcotic Drugs and Psychotropic Substances.⁴⁹ He emphasized, moreover, that "limited decriminalisation in appropriately controlled circumstances" would strike the necessary balance between the interests of the State and the right of freedom of religion.⁵⁰

The minority was clearly more sanguine about decriminalizing cannabis, yet it must be clearly stated that the minority in no way intended their judgments to mean that they

⁴³Supra note 2 at para 133.

⁴⁴Supra note 2 at para 133.

⁴⁵Supra note 2 at paras 75 and 76.

⁴⁶Supra note 2.

⁴⁷Supra note 2.

⁴⁸Supra note 2 at para 148.

⁴⁹Supra note 2 at paras 147, 164-169.

⁵⁰Supra note 2 at paras 164-169.

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supported a blanket decriminalization – rather, they merely accepted the position that an exemption for Rastafari users of cannabis would not affect the general prohibition, and left open for what purpose the cannabis would actually be used. This is where the majority was more correct – arguably the majority’s ultimate decision did no justice regarding the freedom of religion and culture of Rastafarians, but their reasoning was sound regarding the implications of an exemption regime insofar as regulation thereof is concerned. The majority was likely correct that policing an exemption would be entirely the responsibility of the State, and therefore when it came to ensuring that the exemption system was not abused, the State would bear the ultimate burden and cost thereof.

That this was the main concern of the judges of the majority judgment is in no doubt, as the court does not only bear the responsibility to see justice done where it is called for, but to keep in mind the implications of their decisions which reach well beyond the date of judgment. How indeed, would it be possible to ensure that people did not merely pretend to be Rastafarian in order to benefit from the cannabis exemption? Furthermore, how would it be possible to ensure that Rastafarians did not abuse the system and begin selling their cannabis for profit?

It is understandable that the court saw the possible risk in allowing an exemption. This is likely so, because the court, even if relatively few cases of abuse could occur, did not want to assume the responsibility of allowing even a fraction of ‘wriggle-room’ under the exemption regime they were asked to order. It is further submitted that one of Prince’s fatal mistakes, was litigating in pursuance of an exemption in the first place. Exemptions are notoriously difficult in practical application, indeed short of qualified doctors bound by extensive protocol and institutional codes, it *would* be extremely laborious to devise an entirely new exemption regime without one already in place. Cannabis, in a medical setting, can be regulated and controlled in the same way any other medicine may be, and evidence of being qualified for an exemption requires little more than medical evidence that the patient requires cannabis as a treatment for a very visceral illness or condition. Another fatal flaw in the proceedings were a number of concessions made by Prince’s legal counsel at High Court level, including a concession to the legitimacy of the State’s purpose in prohibiting cannabis use and possession:

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“As far as the importance of the purpose of the Drugs Act is concerned, namely to control the use of dependence-producing substances which includes cannabis, Mr Trengove very fairly conceded that this was ‘an important objective’ ... As far as the relation between the limitation and its purpose is concerned, here again, Mr Trengove has very fairly conceded that the prohibition advances the purpose sought to be achieved.”⁵¹

By the time the matter reached the Supreme Court of Appeal and Constitutional Court levels, this concession would have formed part of the record of appeal and therefore would have had an indelible effect on the outcome of the limitations analysis. As stated above, providing the less restrictive means contemplated by the applicant could reasonably still achieve a *legitimate* state purpose, those means would be preferable to the means in place at the time. Working backwards, it is clear then that the best way forward would not have been to bring the matter under an application for a religious exemption on the basis of the prohibition being overbroad. The reason is that in asking for an exemption, it almost inevitably would lead to the necessity of concessions as to the purpose of the prohibition itself being legitimate, provided the prohibition was not overbroad in its application.

This concession therefore still acknowledged that the State’s declared purpose was legitimate, and moreover, that it was of paramount importance. This then made it much easier for the majority to place less weight on the side of the nature and importance of Prince’s rights when balanced against the importance of the purpose of the limitation imposed by the prohibition. Therefore, when it came to assessing the possibility of less restrictive means, Prince’s case was already heavily on the back foot. Faced with this, it would have been very difficult indeed for Adv. Trengove to convince the court that an exemption would be appropriate when balanced against the State’s purpose of prohibiting dangerous substances from consumption.

⁵¹ *Supra note 30* at 986.

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3. CHALLENGING THE LEGISLATIVE SCHEME: APPLICATION OF THE BILL OF RIGHTS, INTERPRETATION OF RIGHTS, AND IMPLICATIONS.

3.1 APPLICATION OF THE BILL OF RIGHTS: THE FRAMEWORK OF SECTION 8 OF THE CONSTITUTION.

Section 2 of the Constitution mandates that the Constitution is the 'supreme law' of the Republic, and further states that all law which is inconsistent with the Constitution is invalid.⁵² This is the foundation provision for any Constitutional challenge, as it is the authority of this section which establishes the barest possibility of declaring any law invalid, providing such law is inconsistent with the Constitution. This section, however, does not state what is meant by 'all law', or what the implications of invalidity would be, does not tell us how such law is declared invalid, and further does not indicate the consequences of invalidity. These answers are all sourced elsewhere in the Constitution's framework. The provision in the Bill of Rights which governs application, is section 8. Section 8 (1) of the Constitution provides that 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'⁵³ This is the section which explains what is meant by 'all law' in section 2.

The application of the Bill of Rights is, per section 8(1), expansive, and the Bill of rights accordingly applies to all law (including national legislation) and binds all organs of state. The Bill of Rights also applies horizontally, that is, to private persons per section 8(2), however given that the subject of this challenge would be to national legislation, there is no need to consider the complex debates governing sections 8(2) and 8(3) of the Constitution and the horizontal nature of the Bill of Rights. Two things which do merit discussion however, are the interplay between the direct and indirect application of the Bill of Rights, and consideration of the difference between the functions of section 8 and section 39(2) of the Bill of Rights. Section 8 deals with the application of the Bill of Rights, and section 39(2) deals with its interpretation, however courts and litigants have suffered under much

⁵² Constitution s2.

⁵³ Constitution s8(1).

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confusion as to the interplay between the two, which is represented by two different approaches to applying the Bill of Rights to rights litigation.

The starting point when challenging legislation is to assess how this legislation is to be tested. There are, simply put, two ways in which the Bill of Rights can apply to law or conduct. The first is the direct application, the second is the indirect application. Currie and De Waal state the difference between the two approaches as follows, according to their purposes:

*'The purpose of the direct application is to determine whether there is, on a proper interpretation of the law and the Bill of Rights, any inconsistency between the two. The purpose of indirect application is to determine whether it is possible to avoid, in the first place, any inconsistency between the law and the Bill of Rights by a proper interpretation of the two.'*⁵⁴

Currie and De Waal continue to illustrate the difference between the two approaches by explaining that a direct application of the Bill of rights typically generates constitutional remedies, and delineates certain types of specific interventions where invalidity exists, whereas an indirect approach does not generate these remedies.⁵⁵ The indirect application cannot generate these remedies, because its purpose is aimed at interpreting the law and the Bill of Rights in a manner which makes them consistent with each other, rather than declaring the law inconsistent.

The direct application generates Constitutional remedies only because there is something which requires a remedy – if the law in question is interpreted in line with the Bill of Rights, then there can be no transgression and therefore no invalidity, which then negates the need for a constitutional remedy. A direct application therefore, does not attempt to interpret the law in such a way as to avoid inconsistency. Effectively, what an applicant does by pursuing a direct application of the Bill of Rights to offending law, is to propose to the court that there is no hope of reconciling the offending law with the Bill of Rights, and in so doing remove a lengthy consideration of possible harmonious

⁵⁴ I Currie, J De Waal *'The Bill of Rights Handbook 6th Edition'* 2013 Juta & Co Ltd at p67.

⁵⁵ Ibid.

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interpretations from the judicial table. Currie and De Waal explain why this is so: *'The direct application is aimed at exposing inconsistency between the Bill of Rights and law or conduct. If there is, the court then declares that law or conduct constitutionally invalid...When law or conduct is ruled to be inconsistent with the Constitution it can no longer form part of the law.'*⁵⁶

Despite the apparent differences between the direct and indirect applications, there is another construction of the application of Bill of Rights, which negates the differences between the two approaches, through use of a 'general approach'. Cheadle and Davis propose that there is little need for distinctions between an indirect and direct application of the Bill of Rights. They argue that instead a general approach ought to be adopted, which distinguishes between law and conduct, and further between state and private parties, rather than between types of application of the Bill of Rights.⁵⁷ On this approach, the Bill of Rights applies to all law, whether this is a piece of legislation or a common-law rule.⁵⁸ While the application of the Bill Rights is universal, the manner in which it engages with conduct of private persons differs from the manner in which it engages with legislation or the conduct of state bodies.⁵⁹

It is therefore clear that in order to establish in what way the Bill of Rights is to apply to a Constitutional challenge, the remedy which the applicant wishes to achieve ought to be considered first and briefly. In this instance, decriminalization of cannabis is the desired outcome, such only being possible if the court should declare the legislation invalid. This is because it is simply not possible to interpret the legislation as being permissive of cannabis consumption and/or possession. The reason for this, in turn, is that the prohibitive legislative scheme must *cease to be part of the law* of South Africa in its entirety before cannabis can be decriminalized. The desired remedy would therefore be one which involves, at a minimum, a declaration of constitutional invalidity which renders the prohibitive legislative provisions unlawful and of no force and effect. Since this desired remedy is a

⁵⁶ Ibid.

⁵⁷ H Cheadle et al, *'South African Constitutional Law: A Bill of Rights'* 2013 Lexis Nexis Chapter 1 at pp3-10.

⁵⁸ Ibid.

⁵⁹ Ibid at pp3-10.

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'constitutional' one, the Bill of Rights must be said in this case to apply directly to the offending law. If the offending legislation clearly imposes a prohibition which cannot be reconciled with the desired remedy, and cannot be interpreted so as to avoid conflict with the Bill of Rights, then this leaves an important question.

3.2 INTERPRETATION OF THE BILL OF RIGHTS: SECTION 39 OF THE CONSTITUTION

Section 39 of the Constitution reads as follows:

'Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.⁶⁰

Section 39(2) of the Constitution '*...obliges courts to interpret any legislation, irrespective of whether it implicates a provision in the Bill of Rights. This means that, when a piece of legislation is being tested for constitutional compliance, it must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights. As such, the provision provides the constitutional mandate to 'read down' – that is, to interpret the legislation in such a way that it conforms to the Bill of Rights and so avoids inconsistency between itself and the Bill.*'⁶¹ The issue then becomes one of what to do when legislation is so clearly in conflict with the Bill of Rights, or when the desired remedy is not one which can be achieved through section 39(2)'s approach? The correct answer would seem to be, that

⁶⁰ Constitution, s39.

⁶¹ Op cit note 57 at pp3-10.

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even if legislation stands to be tested for inconsistency against the Bill of Rights, the correct approach is first to attempt to interpret the legislation in conformity with the Bill before proceeding to declare the legislation invalid. Davis states as much in *Cheadle, Davis and Haysom*:

*'Section 39(2)...is applicable in at least two separate ways. It firstly contains a presumption of constitutionality; that is that all legislation must be interpreted to be congruent with the Constitution. Where this proves to be impossible, the legislation stands to be set aside as being unconstitutional. The presumption is designed to prevent the situation where the legislation is interpreted in the worst possible light so as to justify a finding of unconstitutionality.'*⁶²

This poses a problem for this case however, as it is difficult to see how a prohibition which limits several important rights could be interpreted in a way that could vindicate it. Put another way, if the rights in question are violated and limited by a prohibition and its supporting framework, how can a prohibition be interpreted as anything other than a prohibition? In this case therefore, an argument could be put forward for favouring an approach that goes straight to assessing whether the law in question is inconsistent with the Bill of Rights. The role of section 39(2) in this instance, would be to empower the court to conduct this assessment as section 39(2) mandates – through the prism of the Bill of Rights and in accordance with its spirit, objects and purports

Section 39(1)(a) instructs a court, when interpreting the Bill of Rights itself, to do so in accordance with the values that underpin our democratic society based on equality, human dignity and freedom. This is not an optional mandate – whenever the court is interpreting the Bill, it *must* do so in accordance with these principles. The rest of section 39(1) is also important for our purposes. Section 39(1)(b) is particularly valuable in litigating Bill of Rights disputes, for the role it plays in bringing international law and international human rights instruments to the fore in judicial adjudication. Section 39(1)(b) instructs the court, when interpreting the Bill of Rights, to consider international law. Again, this is not an optional directive. The use of the word 'must' in section 39(1)(b) indicates that a court has

⁶² Op cit note 57 at pp3-10.

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no option but to consider international law and its various instruments, when performing an interpretation or assessment of the Bill of Rights. Davis states the revolutionary and genius character of this provision regarding international law use and its breadth as follows:

*'The term "public international law", as contained in section 35(1), has been interpreted to allow recourse to treaties such as the European Convention on Human Rights to which South Africa is not a party. Accordingly, it would appear that the section allows South African judges to draw on the entire field of international human rights treaties even where South Africa is not a party, including international custom as evidenced by general practice, other international conventions which establish rules recognized by contesting states and the general principles of law recognized by civilized nations.'*⁶³

The Constitutional Court has itself recognised the importance of this provision through its jurisprudence. In *S v Makwanyane*⁶⁴ the court noted the following:

*'International agreements and customary international law accordingly provide a framework within which Chapter 3 can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments...may provide guidance as to the correct interpretation of particular provisions...'*⁶⁵

This makes it clear, that when interpreting the Bill of Rights, the court is mandated to draw on the wealth of international law instruments available to it, regardless of whether or not South Africa is signatory to the relevant instrument. Section 39(1)(c) is somewhat different, and is equally important for the purposes of a challenge to the legislative scheme prohibiting cannabis. Section 39(1)(c) stipulates that when conducting interpretation of the Bill of Rights, and when interpreting legislation, the court 'may' have recourse to foreign law. In this regard, our courts have taken a conservative and cautious approach to the use of foreign law in adjudication of South African Bill of Rights disputes. The statement of the

⁶³ Op cit note 57 at pp3-10.

⁶⁴ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

⁶⁵ *Supra* at 35.

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court in *Sanderson v Attorney-General, Eastern Cape*⁶⁶ illustrates the approach which the courts have taken, and ought to rightly take. In this regard, the court stated that ‘...*the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management...*’⁶⁷ A court should thus apply a cautious approach to the use of foreign law when it considers it, however an overly cautious approach has the potential to hinder the development of our law where there is a desperate need for it.

3.3 IMPLICATIONS: METHODOLOGY AND PROCESS

The implications of this chapter for the challenge to the cannabis prohibition are clear. When interpreting our Bill of Rights throughout the assessment of this challenge, a court may, and rightly should, consider foreign law in formulating and reasoning a decision on the matter, and must do so in a way which promotes the spirit, object and purport of the Bill. When undertaking a consideration of foreign law, however, the court must take a cautious approach regarding the methodology of consideration of foreign law, while at the same time not being overly cautious in its *use* of foreign law. While caution is recommended per *Sanderson* reasoning, it is submitted that the caution to be employed should concern the methodology of foreign law use, not in the decision of whether or not to use foreign precedent. If the ultimate conclusion reached by a court is in whatever small or large part influenced by the consideration of foreign law, there is the potential for legitimacy concerns to be sustained unless the proper methodology is employed.

It is therefore apparent that the manner in which this challenge ought to be undertaken is through direct application of the Bill of Rights to the issue, per section 8. The law under challenge is sourced in national legislation, and therefore it is the State who is a party to the dispute. Section 8(1) clearly indicates that the Bill binds the State, and applies to ‘all law’ including national legislation. Section 39(2), although mandating a reading of legislation which is harmonious with the Bill (which is not possible if legalisation of cannabis is the desired result), can be said to apply in this instance as a directive to the court to

⁶⁶ *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC).

⁶⁷ *Supra* at 26.

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conduct the assessment of the challenge through the prism of the Bill, and in accordance with its objects, spirit and purport.

4. THE INFRINGEMENT OF SECTION 9: AN ANALYSIS OF THE EQUALITY RIGHT AND OTHER CONSIDERATIONS.

4.1 INTRODUCTION

This chapter contains a full appraisal of the right to equality – one of the rights which is implicated in the challenge to the prohibition of cannabis. It was stated in Chapter II above that Prince's case failed for several reasons. One such reason is that Prince brought his challenge narrowly under the right to freedom of religion, and argued for an exemption for a small part of the population. As discussed, such a narrow challenge, coupled with the potential problems in effecting his desired remedy, brought the case to its inevitable conclusion against Prince, yet it remains to be seen what the outcome would be if a challenge were brought on the basis that to prohibit cannabis use constitutes a violation of the rights of every South African citizen, and not merely a violation of the rights of a small section of the population. Arguably, the parameters would be greatly different for several reasons.

First, a violation of the rights of the entire population (whether cannabis users or not) would arguably carry a greater burden of justification (to be discussed in Chapter V) by the State and would amount to a challenge with more potential to sway the court toward a positive conclusion. So much was suggested by the United Nations Human Rights Committee, following a communique by Prince to the Committee (after his unsuccessful litigation) alleging that his international human rights had been infringed by the State Party (South Africa). Prince, in his submissions, claimed violations by South Africa, of his rights under the International Covenant on Civil and Political Rights and its protocol, which South Africa became party to, and brought into force in South Africa on 10 March 1999 and 28 November 2002 respectively.⁶⁸ The Committee received Prince's information as well as that

⁶⁸ United Nations – International Covenant on Civil and Political Rights - Project CCPR/C/91/D/1474/2006 (ninety-first session; 15 October – 2 November 2007) para 1. He claimed violations of his rights under article 18 paragraph 1, article 26 and article 27 of the Covenant and protocol.

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of the State Party, and communicated its responses in a document on November 14 2007.⁶⁹ The Committee responded to an averment made by the State party, which response intimated that the State Party had not entirely barred the way forward for a broad-based challenge to the cannabis prohibition. The State Party's averment is reproduced as follows:

*'...domestic remedies have not been exhausted, as the author [Prince] did not, in his applications, to the domestic courts, seek to have the prohibition on cannabis declared unconstitutional and invalid, and to have such prohibitions removed from the respective act for the benefit of the whole population, as is the usual way in challenging legislative provisions which are believed to be inconsistent with the Constitution...'*⁷⁰

Prince employed a narrow attempt to declare the prohibition of cannabis unconstitutional, but restricted this attempt to the rights of the Rastafari, and the State Party placed emphasis on the fact that Prince did not challenge the general prohibition on the use and possession of cannabis. Prince was seen by the State Party to have accepted that the prohibition served a legitimate state purpose, and Prince further alleged that only Rastafaris should be exempt, should the court have found that the prohibition was overbroad. In its submissions to the Committee, the State may have tacitly indicated that there is potential for success of an argument regarding the legitimacy of the purpose purportedly served by the prohibition and whether such a purpose is even capable of being served in South African society.

The Committee responded to the State Party's averments in a manner which intimated that, should there be an objective basis for a challenge to the State Party's conduct in prohibiting cannabis use, the outcome may be different under the International Covenant. After considering the *Prince* judgment, and having regard to South Africa's section 36 limitations analysis, the Committee made the following statement:

⁶⁹ United Nations – International Covenant on Civil and Political Rights - Project CCPR/C/91/D/1474/2006 (ninety-first session; 15 October – 2 November 2007).

⁷⁰ Ibid at para 4.1.

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*'A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 ...The limitation therefore does not violate the right to equal treatment before the law.'*⁷¹

It seems therefore, that the results of the Committee's findings have another implication. If proof could be produced under the auspices of a challenge based on the equality provision (as one possibility), that there was no 'objective' reason to differentiate cannabis users from tobacco and alcohol users for example, then it is more likely that the legislative scheme would be held to offend the Constitution, and could also be held to infringe section 26 of the International Convention on Civil and Political Rights. This is one example of the greater possibility of success for a challenge based on rights including equality particularly.

Secondly, there would be no need for the court to concern itself with the problems incumbent on an exemption, if the desired outcome is legalisation or decriminalisation at a minimum. So much was suggested implicitly by the Constitutional Court in the *Prince* judgment, albeit in different words.⁷² The court, by suggesting that an exemption is too difficult to police and by suggesting further that exemption cannot achieve the State's purpose (which Trengove conceded as legitimate), effectively left the door ajar for the possibility that a different challenge might succeed. This is apparent because, by not arguing for an exemption, and by basing the entire challenge on the notion that the State's purpose is not legitimate, a litigant could avoid the trouble commensurate with exemption, and would ground an inquiry squarely on the legitimacy of the State's purpose in prohibiting cannabis. By directly attacking the legitimacy of the State's purpose in prohibiting cannabis, a litigant would therefore be better placed to discharge his onus of proving that rights in the Bill are violated, and would create a heavier burden for the State to argue that it in fact has a legitimate purpose.

Thirdly, by implicating a battery of rights including equality, instead of restricting the inquiry to one right to religion alone, the court likely has far less scope for holding that a right is not infringed.

⁷¹ Ibid at paras 4.9 and 4.10.

⁷² *Prince* supra note 2 at paras 114-120 and 128-133.

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An appraisal of all three rights to equality, dignity and privacy would be beyond the breadth and scope of this dissertation, particularly because each right would have to be separately considered under the application of the limitations analysis in section 36 of the Constitution. This chapter shall therefore focus on the right to equality in section 9 of the Constitution as one of the means to challenge the legislative scheme. That the challenge, if brought before a court, would require analysis of all three rights, is undeniable given the increased opportunities for a finding of constitutional invalidity – naturally the astute litigator would raise arguments on all three of the strongest rights in relation to this challenge.

The right to equality contains, in section 9(1), a rationality enquiry (as will become apparent later in this chapter), which requires the court to consider critically whether the purpose of the infringement of the right is legitimate, and which further requires the court to assess whether a rational connection exists between this purpose, and the means which the State has chosen to achieve it.⁷³ It is submitted that by striking a comparison between users of alcohol and tobacco, on the one hand, and the users of cannabis on the other, it will be possible to persuasively argue that the differentiation between these classes of people is irrational, and therefore cannot pass constitutional muster. Before proposing an argument based on the right to equality, it will be necessary to conduct a brief appraisal of other considerations which a court inevitably considers in matters of rights infringement, for they influence a court in the manner in which it approaches its determination regarding infringement of rights.

⁷³ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

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4.2 THE APPROACH OF THE CONSTITUTIONAL COURT IN ASSESSING INFRINGEMENT OF RIGHTS.

4.2.1 CONSIDERATIONS OF THE COURT.

When adjudicating any constitutional challenge which has the State as a party to the litigation, the court does not only have to dispose of the substantive issues raised by the challenge. The court finds itself in a position where one party to the dispute is designated under the Constitution as an arm of government with its own objectives, powers and functions, and therefore other considerations become pertinent in adjudicating the final outcome and in reasoning toward a decision. Section 8 clearly binds the State to the Bill of Rights, but the extent to which the State is bound often falls to be a matter of interpretation by the courts. When adjudicating rights infringements purportedly committed by the State, the court therefore cannot merely make findings on the substantive issue without recourse to other important considerations which are implicated when the State is a party to litigation. What follows is a brief consideration of some other considerations which are often brought to bear on rights adjudication. In turn, this section shall canvass briefly the considerations of Separation of Powers and the role of public opinion in rights adjudication.

4.2.2 SEPARATION OF POWERS

While the separation of powers may not be in issue when the court decides whether or not rights have been infringed, it is nonetheless a relevant consideration which will weigh heavily on the court's mind throughout the reasoning process. This is so, because despite the issue of whether a right has been infringed being one for the court to decide with impunity, once a right has been found to be infringed, the issue of remedy must be addressed. It is in the arena of remedy argument where the separation of powers becomes of particular consideration to the court, as the remedial powers of the courts are extensive once a right has been unjustifiably infringed.

Section 172(1) (a) and (b) of the Constitution provide the court with extensive remedial powers once the court has found law or conduct to be inconsistent with the Constitution.⁷⁴ Not only does section 172(1) deem it acceptable for the court to declare law

⁷⁴ Constitution, s172(1) (a) and (b) which read as follows:

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or conduct which is inconsistent with the Constitution invalid, it makes this peremptory. This means that even with considerations of separation of powers, a court has no choice concerning whether or not to declare the law or conduct invalid if it is in fact, unconstitutional. The choice vested in the court, however, regards which remedy the court will order once it has declared such law or conduct invalid. The court's extensive remedial powers cover any remedy which is 'just and equitable', and the decision of what constitutes a just and equitable remedy is left within the court's discretion. It is at this juncture, and not in deciding whether rights have been infringed, where the separation of powers is effectively pitted against the successful applicant's right to an equitable remedy which secures him justice, and it is this balancing act which the court finds itself employing that creates space for the pivotal role of the separation of powers doctrine.

There is no explicit separation of powers provision in the Constitution. Separate sections of the Constitution designate the powers and functions of the 'arms' of government.⁷⁵ Together, these separations of functions, and the powers the relevant arms have vested in them by the Constitution to perform such functions, make up South Africa's conception of the separation of powers. The doctrine, it is submitted, must be considered along with notions of judicial deference in today's political climate, because it is this notion which informs the court's articular construction of the separation of powers. In *Glenister*⁷⁶ the court stated the following regarding the separation of powers in the Constitution:

S172

1. When deciding a constitutional matter within its power, a court :
 - a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - b. may make any order that is just and equitable, including :
 - i. an order limiting the retrospective effect of the declaration of invalidity; and
 - ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

⁷⁵ The Constitution s43 deals with the allocation of legislative power to the National, Provincial and Local legislative bodies, S85 deals with executive power vesting in the hands of the President and Cabinet and the National Executive, and 165(1) vests the judicial power in the courts.

⁷⁶ *Glenister v President of the RSA* (1) 2009 (1) SA 287 (CC).

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'It is by now axiomatic that the doctrine of separation of powers is part of our constitutional design. Its inception in our constitutional jurisprudence can be traced back to Constitutional Principle VI, which is one of the principles which governed the drafting of our Constitution...In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.'⁷⁷

The court thus acknowledged that, where called to do so, the courts must sometimes interrogate the tricky question of whether or not to intervene in the functions of the other arms of government, and acknowledged further that the separation of powers doctrine may in fact require such intervention. The same court in *Doctors for Life*⁷⁸ has stressed that there may be limits on this intervention power of the courts, but that these limits should not render the court's duty to uphold the Constitution inoperable. This duty is vested in the courts specifically by Section 167(4)(e) of the Constitution, and echoes the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'.⁷⁹ The United States Supreme Court has also pronounced on the doctrine in its own jurisprudence. In *Obergefell v Hodges* the court split 5-4 about the decision to award marriage license to both same-sex and opposite sex couples.⁸⁰ The minority said that the decision of marriages should be one for the legislature not for the courts, while the majority

⁷⁷ *Supra* at paras 29 to 34.

⁷⁸ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 37-38.

⁷⁹ *Supra* at paras 37-38.

⁸⁰ *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.* US SC No. 14-556 June 26, 2015.

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found no impediment of this nature in their decision to award marriage licenses to same-sex couples.⁸¹

The minority opinion, penned by Justice Roberts, upheld a rigorous doctrine of the separation of powers in stating that ‘...this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.’⁸² The minority opinion therefore considered that even in the face of severe rights violations, to intervene would be to trespass too far on the territory of the legislature. The minority therefore evidenced a highly strict interpretation of the separation of powers doctrine, which is already more rigid than that envisioned by South Africa’s Constitution. The majority opinion, drafted by Justice Kennedy, acknowledged that there may be merit, in cases where the violation of fundamental rights is balanced against the need for democratic processes to regulate these issues, in allowing for the democratic processes to dictate change, however the court also acknowledged that:

‘Of course, the Constitution contemplates that democracy is the appropriate process for change, **so long as that process does not abridge fundamental rights** [emphasis added]...Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking...The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and **even if the legislature refuses to act** [emphasis added].’⁸³

The majority opinion thus evidences a more flexible and nuanced understanding of the doctrine where fundamental rights are at stake. It acknowledged the value in a cautious approach to the intervention power of the courts, but still decided to tip the balance in

⁸¹ *Supra*.

⁸² Justice Roberts Dissenting opinion *Supra* at 2.

⁸³ Justice Kennedy majority opinion *supra* at 24.

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favour of upholding fundamental rights, stressing that where the violation is severe, the separation of powers doctrine itself provides that the function of the courts is to uphold the Constitution. Returning to South Africa, the Constitutional court in *Allpay Consolidated Investment*⁸⁴ stressed the need for the court to acknowledge a construction of the doctrine which not only allows the court to intervene when needed, but makes the failure to do so (even for the purpose of judicial caution) a failure to carry out judicial responsibility under the Constitution:

‘There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights...Hence, the answer to the separation of powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency...’⁸⁵

Thus where there is a constitutional inconsistency, the court should not hesitate to correct the inconsistency. Judicial caution is necessary, but what these examples of jurisprudence show is that judicial caution should not be a dampener on the courts’ duty to declare unconstitutional conduct or law invalid, and the authority for this is none other than section 172(1) of the Constitutional text itself. Judicial caution and timidity in the face of the separation of powers doctrine, properly construed, does not mean that courts should be slow to stridently interrogate whether or not a right has been infringed, and does not mean that the court should not properly invalidate such infringement. It may indeed be said that judicial deference to the notion of separation of powers should not feature heavily in the interrogation at this stage, but should be more rigorously considered in the process of deciding what remedial action to take once having declared the law or conduct invalid. As will be shown in Chapter VI, the question of remedy is inextricably bound to considerations

⁸⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (6) BCLR 641 (CC)

⁸⁵ *Supra* at paras 42 and 45.

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of separation of powers and judicial deference, and this is arguably the correct approach. The same caution that is afforded remedial action (the stage of judicial decision-making which most affects the functioning of the legislative arm of government) does not, and should not feature at the stage where the court decides whether or not rights have been infringed.

4.2.3 PUBLIC OPINION

Public opinion is a consideration which gives regard to the moral climate of society, and has a bearing on the manner in which rights are interpreted and applied to issues in litigation. Public opinion has an uneasy status in adjudication internationally, because on the one hand, for the court's judgments to have institutional legitimacy, they must be accepted by the public at large. On the other hand, for a court to be influenced or strong-armed by the opinion of the public would undermine the court's duty to dispense justice without extrinsic influence, and would effectively mean that the citizens of a country, and not its judiciary, are responsible for the outcomes in human rights litigation especially. The role of public opinion in South Africa was addressed in the seminal case of *Makwanyane*.⁸⁶ This case involved a challenge to the constitutionality of the death penalty – an issue of sentencing in criminal law which at the time seemed as entrenched as the prohibition of cannabis seems to be today. During the court's hearing of argument and in the lead-up to penning of the judgment, there was mass public feeling for the retention of capital punishment in the criminal justice system, and the State relied heavily on the argument of favourable public opinion toward the death penalty to attempt to justify its retention in our law.⁸⁷ The State and public also based much of their argument on the deterrent purpose of the death penalty.

Chief Justice Chaskalson, for a unanimous court, gave a reverberating appraisal of the role of public opinion where fundamental rights are concerned:

'Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions

⁸⁶ *Supra* note 64.

⁸⁷ M Zlotnick '[The Death Penalty and Public Opinion](#)' (1995) Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 4, 28 June.

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without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution [emphasis added]...*The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected* [emphasis added].⁸⁸

He went on to use the words of the United States Supreme Court to reinforce the role of the court in adjudicating rights issues, and to bolster his conclusion that where fundamental rights are concerned, the courts rightly have the sole mandate on the interpretation to be given to these rights. In using the US Supreme Court's language, Chaskalson CJ made it clear that in some rare instances, the public majority and their duly elected representatives ought rightly to have no part in preventing certain decisions regarding fundamental human rights:

'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections [emphasis added].⁸⁹

The implication of this is that where fundamental rights are in issue, it sometimes becomes the court's mandate to go against countermajoritarian dilemma-style arguments which tout the separation of powers and pin their banner to the importance of public

⁸⁸ *Supra* note 64 at 431.

⁸⁹ Chaskalson CJ quoting US Supreme Court Justice Jackson in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 625, 638 (1943) *Supra* note 64 at 432.

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opinion. It in fact becomes the court's role to ignore the wishes of a duly elected Parliament and the desires of the public at large where the rights violated are so important that to allow continued violation would mean inescapable oversight by the court. The follow-on from this is none other than that despite the contentious position within the separation of powers of an argument for decriminalizing cannabis, the reality may well be that in heightened deference to the separation of powers and public opinion, the court may nonetheless find itself permitting continued human rights abuses in the name of a prohibition whose purpose may be as futile as the stated purpose was in *Makwanyane* regarding the death penalty. This argument will be balanced against the separation of powers doctrine as part of the weighting exercise the court performs in assessing what remedial action to take.

I now move on to consider whether the implicated right to equality has in fact been infringed by the legislative scheme.

4.3 THE RIGHT TO EQUALITY: SECTION 9 OF THE CONSTITUTION

4.3.1 OVERVIEW OF THE RIGHT TO EQUALITY: STRUCTURAL FRAMEWORK AND INTERPRETATION

The South African Constitution is based on the fundamental rights of equality, dignity and freedom.⁹⁰ Bearing in mind the historical and social context of South Africa, emanating from a system of apartheid, it is submitted that the value of dignity is pervasive throughout the Bill of Rights, but is pronouncedly more so regarding the right to equality in section 9 of the Constitution. The fundamental right to equality purports that the law will protect and benefit people equally, and there is an obligation on the State to ensure equal protection and benefit under the law, as explicitly stated in section 1(a) of the Constitution.

The framework of section 9 divides the right into three main constituent parts when it comes to challenging conduct or law or infringement of the section. These constituent parts are, briefly, section 9(1) which deals with differentiation, section 9(2) which relates to redistributive measures, and section 9(3) which deals specifically with discrimination on

⁹⁰ I Currie & J De Waal *'The Bill of Rights Handbook 5th Edition'* 2005 Juta&Co Ltd at p231.

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listed and analogous grounds.⁹¹ Regarding structure and content, the equality provision has similarities to the Canadian equality provision⁹², however the Constitutional Court has stated that the right to equality in section 9 is worded differently than in other constitutions, these differences being reflective of differing historical contexts of the nations and their different jurisprudential and philosophical notions of equality.⁹³ Given these differences, 'Interpretations of the equality clause of the South African Constitution must therefore be based on the wording of the right within the constitutional context and cognisance must be taken of our history.'⁹⁴ As discussed in Chapter 1.2, South Africa's history of cannabis prohibition is one which was predicated mainly on racist and pseudo-psychological attitudes. Set against this contextual background, section 9 must be interrogated with this fact of our history firmly at the forefront of consideration.

The equality provision does not preclude classifications or differentiations by the State, as it is understood that legitimate reasons do sometimes exist for differentiations and

⁹¹ Constitution of the Republic of South Africa, 1996 ss9(1), 9(2) and 9(3):

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

⁹² Section 15 (1) of the Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 provides: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

⁹³ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at 216.

⁹⁴ K Govender 'Equality and Social Justice: Equality - the South African Perspective' Discussion document. Accessed from: <http://law.wustl.edu/Library/Guides/Equality/Gov-art4.html> accessed on: 02/11/15.

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classifications⁹⁵, however, 'whilst the government may legitimately make classifications, it can only classify people into different groups and afford different treatment to the different groups if the criteria upon which the classifications are based are permissible.'⁹⁶ Permissibility in turn depends upon the purpose of the differentiation and upon the existence of a satisfactory link between the criteria used to differentiate, and the State objectives which are purportedly served by the differentiation.⁹⁷ With respect to mere differentiation the State must act in a rational manner, and its laws must equally be rational. Regulation by the State ought not to be done in an arbitrary manner, and must not reveal 'naked preferences' that serve no legitimate governmental purpose.⁹⁸ 'Naked preference' which is arbitrary would be inconsistent with the rule of law and the fundamental values of a constitutional democracy. Section 9's purpose is thus to ensure that the State is bound by a standard of rationality, and therefore:

'...[b]efore it can be said that mere differentiation infringes [section 9] it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe [section 9].'⁹⁹

Further to this, the justification for reviewing state law or conduct against a standard of rationality is sourced elsewhere in the Constitution other than section 9. Section 1(c) of the Constitution, one of the founding provisions, has been utilised by the Constitutional Court to formulate reviews of legislative and executive action on the basis of rationality. One such case was that of *Pharmaceutical Manufacturers*.¹⁰⁰ The President had signed a bill into law without the requisite accompanying regulations, and the court invalidated this action on the grounds that, despite being executive action, such conduct could not be said

⁹⁵ P Hogg '*Constitutional Law of Canada*' 2010 Carswell at 52.6.

⁹⁶ Op cit note 94.

⁹⁷ *Prinsloo v Van Der Linde and Another* 1997 (6) BCLR 759 (CC).

⁹⁸ *Supra* note 73.

⁹⁹ Op cit note 94.

¹⁰⁰ *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

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to be rational. Another example was the case of *Democratic Alliance v President of South Africa and Others*¹⁰¹ where the court invalidated President Zuma's decision to appoint Menzi Simelane as National Director of Public Prosecutions on the grounds that the President, in ignoring evidence of dishonesty by Simelane, had failed to apply his mind to the question of whether Simelane was a 'fit and proper person' for appointment. Such a decision accordingly was held by the court to be irrational. The framework of section 9, and a test for its application have been canvassed in the Constitutional Court in great detail in the case of *Harksen v Lane*¹⁰² ('*Harksen*'), and the current challenge would require that the *Harksen* test be applied to the conduct and law of the State regarding the prohibition of cannabis.

4.3.2 ASSESSING INFRINGEMENT: THE *HARKSEN* TEST AND THE STANDARD OF RATIONALITY IN SECTION 9(1)

4.3.2.1 *HARKSEN V LANE* AND OTHER RELATED CASES ON EQUALITY

Harksen established the necessary stages of enquiry in order to establish whether section 9 has been infringed. The judgment was decided according to the Interim Constitution section 8, which was the formulation of the equality clause before the enactment of the Final Constitution, in which equality occupies section 9. The test, established for application of section 8 of the Interim Constitution, still finds application in the interpretation and analysis of section 9 of the Final Constitution. Mrs Harksen challenged the constitutional validity of relevant provisions of the Insolvency Act which caused her property to vest in the Master of the High Court.¹⁰³ The argument was that the Act placed excessively onerous burdens on the solvent spouse compared to the position of others in intimate relationships with the insolvent.¹⁰⁴ In reasoning toward the decision that the burdens were not too onerous, due to the necessary protection they afforded

¹⁰¹ *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC).

¹⁰² *Supra* note 73.

¹⁰³ R Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' based on a chapter of Kruger's PhD thesis 'Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts' (Rhodes University, 2009) *SALJ* Vol 128 (3) 479 at p480.

¹⁰⁴ *Ibid.*

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creditors¹⁰⁵, the court had to formulate a manner of testing conduct and law against section 9. This test has become known as the '*Harksen* test', and it is this test which will be applied to a challenge to the cannabis prohibition. Goldstone J for the court, formulated the test regarding the equality right as follows:

'(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination'¹⁰⁶

The test goes on to stipulate that, if the threshold test of rationality is satisfied, and there is a rational connection between a legitimate state purpose and the differentiation (the means used to achieve the purpose), the court will then proceed to the next stage of the enquiry into whether there has been discrimination under section 9(3).¹⁰⁷ The formulation of the *Harksen* test was 'the culmination of the Constitutional Court's evolving equality jurisprudence'¹⁰⁸ which had already been developed in a line of cases including *Prinsloo v Van der Linde*¹⁰⁹. In *Prinsloo*, under the Forest Act 122 of 1984 'a presumption of negligence arises when a claim for damages is instituted against a defendant for damages caused by a fire outside a fire control area as determined in terms of the Act. Prinsloo alleged that the statutory presumption discriminated unfairly against defendants in actions such as these when compared to other delictual matters where the burden of proof is on the plaintiff'.¹¹⁰ The court, during its reasoning, expressed the need for development of South Africa's equality jurisprudence, with careful consideration of international and foreign law in working this development.¹¹¹

¹⁰⁵ *Op cit* note 73.

¹⁰⁶ *Op cit* note 73 at para 54.

¹⁰⁷ *Op cit* note 73 at para 54.

¹⁰⁸ *Op cit* note 103 at p482.

¹⁰⁹ 1997 (3) SA 1012 (CC).

¹¹⁰ *Op cit* note 103 at p482 note 11.

¹¹¹ *Op cit* note 97 at paras 18-20.

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Differentiation was held by the majority to be 'at the heart of equality jurisprudence in general and... the section 8 right in particular'¹¹². As with the final Constitution section 9, the Interim Constitution section 8 distinguished between differentiation that amounts to unfair discrimination and differentiation that is not unfair discrimination.¹¹³ This distinction exists because some differentiation is necessary in any society, provided the differentiation is rational, non-arbitrary and does not manifest 'naked preferences'¹¹⁴. Rationality analysis is the foundation of the application of the equality provision precisely because it asks, with respect to an enquiry involving such 'mere differentiation'¹¹⁵, whether in fact a rational connection exists between the State purpose to be achieved through the differentiation, and the differentiation itself.¹¹⁶ Kruger, citing the court in *National Coalition*¹¹⁷ states that

'...[s] 9(1) ensures equal treatment of all persons in conferring benefits and imposing restraints on people...Where differential treatment is allowed, such treatment has to be rationally connected to a legitimate governmental purpose. With the formulation of the Harksen test, the rationality analysis became a standard threshold test in matters concerning equality... Rationally justifiable differentiation, termed 'mere differentiation', is acceptable in an open and democratic society.'¹¹⁸

The court explored the nature of the rationality enquiry in the case of *Jooste v Score Supermarket*¹¹⁹ and reasoned that the test is neutral in nature. It focuses purely on whether the differentiation is rationally grounded, rather than questioning whether it is fair, as is the enquiry under the discrimination enquiry in s 9(3):

'It is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is

¹¹² *Op cit note 97* at para 23.

¹¹³ *Op cit note 97* at para 23.

¹¹⁴ *Op cit note 97* at para 25.

¹¹⁵ *Op cit note 97* at para 25.

¹¹⁶ *Op cit note 97* at para 26.

¹¹⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 59.

¹¹⁸ *Op cit note 103* at pp485-486.

¹¹⁹ 1999 (2) SA 1 (CC).

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irrelevant to this enquiry whether the scheme chosen by the Legislature could be improved in one respect or another.¹²⁰

In this sense, the argument posited earlier in this Chapter, that the separation of powers should not weigh heavily at this stage of the enquiry, holds true if the court in *Jooste* was correct in its above stipulation. It also clearly shows that what is in issue, is not whether the differentiation *could* achieve the purpose if employed another way, rather the issue is whether the differentiation is arbitrary or indicative of 'naked preference' at the time the court hears the matter. The question is whether the court is obliged to traverse the entirety of the *Harksen* test on a finding of irrationality, or does it have a discretion to abandon the rest of the test, particularly where the litigant declines to supply argument on the matter?

Regarding the current challenge, it is clear that at least a large part of the differentiation is between classes of people who use cannabis, and those who use alcohol and tobacco. It is unclear however, whether there is any ground on which argument could be made on the basis of section 9(3), given that the listed grounds on which discrimination will be presumed unfair do not include choice of substance use or the equivalent ground.¹²¹ Additionally, the test for an analogous ground of discrimination which is unfair, requires that the differentiation be in respect of an immutable characteristic which severely impacts upon a person's dignity.¹²² The only listed ground under which the challenge could be made would be the ground of religion or belief. Given the lack of success in *Prince* of a similar argument, and given that the aim of this challenge would be to remove the prohibition on cannabis for the benefit of the entire population, an argument on the basis of religion would not be at all appropriate.

It is submitted that, this being the case, the court should not feel obliged to pursue the rest of the *Harksen* test per section 9(3), and that a litigant would have little success in

¹²⁰ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) at para 17.

¹²¹ Constitution s 9(3).

¹²² *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) para 40. The court does not explicitly mention the analogous ground enquiry, but assumes that HIV status naturally occupies the same status as listed grounds in s9(3). It does this because it did not wish to allow HIV to be regarded as a 'disability' which was the listed ground the challenge was brought under. The court decided in favour of unfairness because of the impact the discrimination had upon Hoffmann's dignity.

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arguing the matter on these grounds. Further, if a litigant is unsuccessful in proving the prohibition irrational under the first stage of the *Harksen* test, he ought not to pursue the matter under section 9(3), but should proceed to interrogating the other rights implicated (which are not the subject of this dissertation).

The *Harksen* rationality test forms the starting point and foundation for any enquiry involving the right to equality in section 9 of the Constitution. The State would likely claim that it has a legitimate purpose in prohibiting cannabis, and would further argue that there is a rational connection between that purpose, and the differentiation it exercises between users of cannabis and users of alcohol and tobacco. The focus of the application of the *Harksen* test in this instance is therefore to interrogate two things: firstly, it should interrogate whether the State's purpose is legitimate; secondly it should interrogate whether there is a rational connection between the State's purpose and the means it uses to achieve it (the differentiation between users of cannabis and users of alcohol and tobacco). In order to properly apply the *Harksen* test in this manner, an analysis must be conducted into the separate stages of this enquiry. It must be examined what exactly the court has meant by 'legitimate government purpose', in its jurisprudence, and what requirements (if any) the court has stipulated exist to ground a rational connection between government purpose and differentiation it employs.

4.3.2.2 THE INTERPRETATION OF A 'LEGITIMATE STATE PURPOSE'.

As discussed above, the enquiry under the *Harksen* test requires that there be a rational connection between a legitimate state purpose, and the differentiation which the State employs to give effect to that purpose. To reiterate the full question the enquiry examines, per *Harksen*:

- '(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination'¹²³

¹²³ *Supra* note 73 at para 54.

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The rationality test therefore examines two crucial aspects of the differentiation, once it has been established that differentiation exists. It is trite that the State's legislative scheme differentiates between people or categories of people. This is so because while the legislative scheme lists cannabis as a prohibited substance, thereby criminalising the conduct of cannabis users, it does not list alcohol or tobacco as prohibited substances, and therefore does not prohibit or criminalise the conduct of users of alcohol and tobacco. The first component of the rationality test is to examine whether the government's purpose in effecting the differentiation is legitimate. I submit that this component requires consideration not just with respect to whether the purpose is subjectively legitimate, but whether objectively, the purpose is legitimate. It is further submitted that objective legitimacy requires more than a surface-level examination of whether the State in fact has a purpose for the differentiation.

It arguably requires that the court interrogate several things: firstly, the court ought to interrogate whether the purpose *as expressed by the state* has as its basis some wrong or harm which it seeks to prevent – the reverse is true also, and the court should consider whether the basis of the purpose is genuinely the public good; secondly, the court should assess whether, objectively, there is some *unexpressed* possible purpose which underlies the differentiation, and whether these possibilities are also capable of being legitimate. A component of the enquiry into the State's expressed purpose ought to be whether the harm or wrong which the State seeks to prevent – through the differentiation – is in fact a 'harm' or 'wrong', objectively speaking. If there is no existing wrong or harm, or if, comparatively, the harm is no greater than that posed by other similar substances which have not been prohibited, then the government purpose arguably cannot be legitimate.

To interrogate the legitimacy of the purpose in the manner I have just outlined, is to go a step further than courts have gone in rationality analysis in contemporary Constitutional Court jurisprudence. It does not merely involve the court examining a list of reasons provided by the State to justify its purpose, and finding legitimacy based on the mere act of affording reasons.¹²⁴ The enquiry, which I submit as the correct one in this

¹²⁴ *Law Society of South Africa and Others v Minister of Transport and Others* 2010 Case no: CCT 38/10 First and Third to Eleventh Applicants' Heads of Argument p14 paras 26 and 27.

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instance, is in fact a specimen of rationality review which section 9 contemplates, even if the court has not effectively applied it up until now. The same question was examined in the Heads of Argument supplied for the case of *Law Society of South Africa and Others v Minister of Transport and Another*¹²⁵, and the judgment which followed therefrom. The first, and third to eleventh applicants, argued that the rationality test's proper construction originated from the work of Thayer¹²⁶, and merited consideration of more than whether the government could provide reasons for the purpose in order to ground a finding by the court that such purpose is legitimate. They argued that:

‘His test requires courts to determine whether there exists a rational connection between the means envisaged in an enactment and a legitimate purpose sought to be attained by that enactment. The requirement of rationality in turn holds that the legislative measure must not discriminate arbitrarily or unfairly deprive people of constitutional protection.’¹²⁷

They argued this aspect because typically, a court considering the legitimacy of a government purpose may find itself unsatisfied with the justifiability of the reasons the State affords to convince the court of the legislative purpose's legitimacy, but will still feel bound to pronounce the purpose legitimate (and the differentiation rational) due to the State having provided a list of reasons to this effect.¹²⁸ In this challenge, the same concern must be addressed. The proper way to achieve a finding of irrationality is to indeed argue that the State's reasons which purport to legitimise its purpose, in fact do not do so, either because they are not objectively good reasons, or are not supported by external evidence.¹²⁹ Taking this further, the applicants submitted that:

¹²⁵ 2011 (2) BCLR 150 (CC).

¹²⁶ Thayer in *The Origin and Scope of the American Doctrine of Constitutional Law* (1893) 7 Harvard Law Review 129. Cited in *Law Society of South Africa* op cit note 124 p14.

¹²⁷ *Op cit* note 124 paras 26 and 27.

¹²⁸ *Op cit* note 124 para 25.

¹²⁹ It was submitted that ‘...the factual basis on which the impugned legislation is sought to be rationalised should be interrogated judicially.’ *Op cit* note 124 p14 at para 26.

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‘...the rationality inquiry cannot properly be limited to inquiring whether there are “naked preferences”... Accordingly, the standard test as expressed by Thayer involves – in circumstances where a scheme categorically drops a guillotine on constitutional rights... that the court inquire into whether the measure “unfairly deprives people of constitutional protection”... Accordingly, the true rationality test does not lead to declarations of constitutional validity where the scheme is “substantively unjust”... **It involves an evaluation of the reasons, lest the principle of legality should suffer by putting form over substance or the quantity of reasons over the quality of the reasoning. While the test is not one of proportionality, of course, the approach cannot be reduced to a counting of straws...**¹³⁰ [Emphasis added]

The applicants further supplied an argument as to how the court ought to apply the test for a legitimate government purpose, arguing that, ‘...A court should deal with the evidence and in the light thereof evaluate the bases on which the impugned provision is sought to be justified. It cannot merely table them without evaluation.’¹³¹ Lenta has reflected on the duty of judges in South Africa to balance the conflicting needs of upholding individual rights while appropriately affording deference to policy decisions by other arms of government.¹³² He noted that placing emphasis on ‘one [need] at the expense of the other is to neglect an important aspect of the judicial function.’¹³³ Lenta acknowledged that the approach ought to be developed casuistically, and he considered that the conflict of needs envisioned in rationality review ‘can be reconciled at a certain level of abstraction and generality in the following principle: The judiciary should allow the legislature and the executive the maximum feasible room to develop policy **limited only by the requirement that it protect individual’s rights.**’¹³⁴ [Emphasis added].

¹³⁰ *Op cit note 124* pp15-16 paras 29-30.

¹³¹ *Op cit note 124* p17 para 32.

¹³² P Lenta ‘*Judicial Restraint and Overreach*’ (2004) SAJHR 544 at 575-576.

¹³³ *Ibid* at 575-576 discussing *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC) at para 156.

¹³⁴ *Ibid* at p576.

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To apply the construction of the rationality test in section 9, based on Thayer's work, as suggested in the Heads of Argument for the *Law Society* case, therefore should not be considered as an overreach by the court of its judicial function. Again, reiterating the argument regarding the separation of powers in this Chapter, this consideration ought not to deter the court at this stage of the rights violation enquiry, from concluding that a proper construction of the rationality test necessarily involves evaluating the reasons which the government supplies to legitimise its purpose, and testing these reasons against objective evidence.

Moseneke DCJ for the Constitutional Court, had to address these very arguments in the case of *Law Society and Others v Minister of Transport and Another*¹³⁵. His account of the above arguments was the following:

'...“the true rationality test”, applicants contend, does not lead to declarations of constitutional validity where the scheme is “substantively unjust”. And the scheme's substantive justness involves more than the “counting of straws” – more than merely listing, as the Minister has done in this case, reasons for adopting the scheme. Whilst the test is not one of proportionality, a court must evaluate the reasons, lest the principle of legality, as they put it, “should suffer by putting form over substance or the quantity of reasons over the quality of the reasoning”. Thus in evaluating the rationale for a chosen policy, goes the argument, the court must engage with the evidence as in all disputes; it must evaluate the bases on which the impugned provision is sought to be justified as rational.'¹³⁶

He went on to recount the formulation of the rationality test according to the jurisprudence of the Constitutional Court, and restated that the test concerns the existence of a rational nexus between a legitimate purpose and the means used to achieve it (differentiation in this challenge).¹³⁷ Regarding the argument that this should include the assessment of the government's reasons provided to legitimise its purpose for differentiation, Moseneke DCJ stated the following:

¹³⁵ *Law Society and Others v Minister of Transport and Another* 2011 (2) BCLR 150 (CC).

¹³⁶ *Supra* at para 30.

¹³⁷ *Supra* at para 32.

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‘A decision whether a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry...It is by now well settled that where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved...It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate...Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise.’¹³⁸

At this stage it is useful to note that Moseneke DCJ eventually finds against the applicants, but what is pertinent in the paragraphs quoted above, is that Moseneke DCJ confirms the objective nature of the rationality enquiry. In stating also that ‘...the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved’¹³⁹, Moseneke also confirms the submission that the legitimacy of the government purpose must depend on some public good which the State is attempting to achieve. Another aspect of interest to the submissions in this part, is that Moseneke does not completely invalidate the argument that the legitimacy of the government’s purpose ought to be tested with reference to objective evidence, rather he states that ‘...the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate...’¹⁴⁰. He goes on to decline to apply the applicants’ construction of the rationality test, stating that:

‘...It is accordingly unnecessary to deploy the rationality standard to provide constitutional protection which section 36 already provides... The applicants further urged us to incorporate fairness as an element of rationality. Again, the applicants conflate the rationality and proportionality standards of review. I have already remarked that fairness is not a requirement in the rationality enquiry. If the substance of the complaint is about the deprivation of fundamental rights, it would

¹³⁸ *Supra* at paras 33-35.

¹³⁹ *Supra* at paras 33-35.

¹⁴⁰ *Supra* at paras 33-35.

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be subject to the proportionality requirements of section 36 and not of mere rationality.¹⁴¹

What distinguishes the submissions in this part of the dissertation from the submissions the applicants made in this case (and which Moseneke declined to accept) is that the proposed submissions in this dissertation do not at all entail a conflation of the proportionality test in section 36 with the rationality standard in section 9. The submission is merely that, when afforded reasons which the State believes support the legitimacy of its purpose, the court ought to not merely ‘rubber stamp’ these reasons, but ought in fact to examine objective evidence, and on the basis of that examination, decide whether the reasons the State provides actually support legitimacy of purpose on a factual (not proportional) basis. The court ought to examine whether there is in fact an objective ‘public good’ sought to be achieved, and should then examine whether the purposes connected with that public good are legitimate when weighed against objective evidence. Moseneke remains silent regarding his view of the applicants’ contention that such an examination is really an aspect of the rationality test which governs all public conduct, policy and legislation, and therefore does not remove this possibility. This being so, the submission regarding this aspect of the rationality test is not disturbed by Moseneke’s reasoning in this case.

There is therefore no insurmountable jurisprudential bar to this suggested formulation of the ‘legitimate government’ purpose’ aspect of the rationality test. When the court considers the rationality of the legislative scheme which prohibits cannabis use, there should be no reason why an applicant could not succeed in arguing for this construction of this aspect of the rationality test. This being the case, the applicant could then move on to argue that, based on objective evidence, the reasons afforded by the government for its prohibition of cannabis do not in fact make its purpose legitimate. The next phase of argument would then naturally be to examine what the courts require in order to hold that there is a ‘rational connection’ between the purpose and the differentiation.

The following part of this Chapter will address the application of the ‘legitimate government purpose’ aspect of rationality, and will comprise an assessment of the purposes

¹⁴¹ *Supra* at paras 38-39.

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which the State advanced in *Prince* to justify its blanket prohibition under the limitations analysis. As will become apparent later in this Chapter, and in Chapter 5, it is acceptable to transplant the State's purposes for the prohibition from *Prince* into the rationality enquiry under section 9. This is because, should the court decide that the scheme is rational, the applicant's case would fail at the first hurdle, after which (as stated above) he would be well advised to proceed to argument on other rights. On the other hand, should the court decide that the scheme is irrational, there would in fact be no need to proceed to a limitations analysis. In support of this contention, I consider again the findings of Moseneke DCJ in *Law Society*, in which he held the following:

‘It is significant that one of the relevant factors listed in section 36 is the “relation between the limitation and its purpose”. This is so because the requirement of rationality is indeed a logical part of the proportionality test. **It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right...**’ [Emphasis added]¹⁴²

Given Moseneke's reasoning, if the applicant can prove that the State does not have a legitimate purpose in prohibiting cannabis use, while not prohibiting use of alcohol or tobacco, the rationality test will fail *ab initio* and there would accordingly be no need to even consider the rational connection test. For the purposes of this dissertation, I will still consider the rational connection test, despite my *prima facie* view that the State cannot, and does not, have a legitimate purpose for prohibiting cannabis use while not prohibiting alcohol or tobacco use. I will also not be considering the limitations analysis for the reasons supplied, namely, that I believe the proper construction of the rationality test would lead to a finding of irrationality. This being the case, as Moseneke himself stated ‘...a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right...’¹⁴³ Therefore, there could not be any need to proceed to a limitations analysis irrespective of the court's finding on rationality.

Further to this, it is submitted that the arguments advanced in Chapter 5, regarding the legitimacy of the government purpose behind prohibiting cannabis use, illustrate the

¹⁴² *Supra* at para 37.

¹⁴³ *Supra* at para 37.

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close link between the 'legitimate government purpose' inquiry and the 'rational connection' inquiry. Particularly regarding this challenge, the interrelatedness of these inquiries means that both may be addressed with reference to the same arguments. If the purposes behind the prohibition are not legitimate, there can be no rational connection inquiry. Even on the assumption that there would be a finding of legitimacy of purpose under the construction of the rationality test advanced in this Chapter, the evidence and facts which would be employed at this stage, would likely also prove a rational connection.

5. APPLICATION OF THE SECTION 9 (1) RATIONALITY ANALYSIS

5.1 THE LEGISLATIVE SCHEME REVISITED

Chapter 4 above has shown that an extended construction of the rationality test is appropriate when dealing with challenges to legislation under section 9(1). This extended construction is nothing novel in our law, but has already been expressly, alternatively tacitly approved, so I submit, by Mosoneke DCJ in *Minister of Transport*. Further, the construction of the rationality analysis I put forward does not conflate rationality and reasonableness (reasonableness in the sense of the section 36 limitations analysis), but merely requires more of the State when it claims that its purpose behind the challenged legislation is legitimate. It asks more than that the purposes be permissible at a base level. It asks whether there is in fact evidence to support the legitimacy of the purpose behind the legislation. Asking for evidence to support legitimacy is not the same as asking for a proportional outcome. Proportionality pertains to reasonableness, but evidence of legitimacy merely requires that the court not 'rubber stamp' the State's given purposes. It requires that the court do more than to merely ask whether the purpose could conceivably be legitimate. With this in mind, I now move on to apply the test for a legitimate State purpose, through reference to the legislative scheme, and to assess objective evidence against which the legitimacy of the State's assumed purposes ought to be tested.

The challenge would, in full, comprise an attack on the validity of section 40(h) of the Criminal Procedure Act¹⁴⁴ in so far as it relates to arrests for possession, consumption and

¹⁴⁴ 51 of 1977.

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transportation of cannabis for personal use. In addition, under attack for constitutional invalidity would be section 4, read with Part 3 of Schedule 2 of the Drug and Drug Trafficking Act¹⁴⁵, and section 22A read with Schedule 8 of the Medicines and Related Substances Act¹⁴⁶ with regards to possession and use of cannabis respectively. It is necessary to conduct a thorough examination of the relevant provisions, because they are the means through which the State differentiates between users of cannabis on the one hand, and users of alcohol and tobacco on the other.

Section 1 of the Drug and Drug Trafficking Act ('Drug Act'), supplies the following relevant definitions:

'(1) In this Act, unless the context indicates otherwise—

“dependence-producing substance” means any substance or any plant from which a substance can be manufactured included in Part I of Schedule 2;

...

“drug” means any dependence-producing substance, any dangerous dependence-producing substance or any undesirable dependence-producing substance;

...

“possess”, in relation to a drug, includes to keep or to store the drug, or to have it in custody or under control or supervision;

...

“drug offence”—

(a) in relation to a drug offence committed in the Republic, means an offence referred to in section 13 (a) - (f);

¹⁴⁵ 140 of 1992.

¹⁴⁶ 140 of 1992.

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(b) in relation to a drug offence committed outside the Republic, means any act or omission which, if it had occurred within the Republic, would have constituted an offence referred to in that section;

...

“undesirable dependence-producing substance” means any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2.

Cannabis is listed in Part III of Schedule 2 of the Drug Act, which classifies it as an ‘undesirable dependence-producing substance’. The definitions section of the act further classifies any undesirable dependence-producing substance as a ‘drug’ for the purposes of the act. This classification is the first component of the prohibition contained in the legislative scheme. The second component, which actually creates the offence, is the definition of ‘drug offence’, which, read with section 4¹⁴⁷ and section 13¹⁴⁸ of that Act, effectively criminalises possession of cannabis (see above for the definition of ‘possession’). Section 17 of the Drug Act creates the penalties which follow from convictions on the basis

¹⁴⁷ Drug and Drug Trafficking Act 140 of 1992 s 4 reads as follows:

Use and possession of drugs.—No person shall use or have in his possession—

- (a) any dependence-producing substance; or
- (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,

¹⁴⁸ Drug and Drug Trafficking Act 140 of 1992 s 13 (f) reads as follows:

Offences relating to scheduled substances and drugs—Any person who—

- (a) places any drug in the possession, or in or on the premises, vehicle, vessel or aircraft, of any other person with intent that the latter person be charged with an offence under this Act;
- (b) contravenes a provision of section 3;
- (c) contravenes a provision of section 4 (a);
- (d) contravenes a provision of section 4 (b);
- (e) contravenes a provision of section 5 (a); or
- (f) contravenes a provision of section 5 (b),

shall be guilty of an offence.

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of this act.¹⁴⁹ Section 40(h) of the Criminal Procedure Act ('CPA') provides for the arrest of any person, without a warrant, who is suspected of having committed an offence relating to the possession of drugs.¹⁵⁰ The Medicines Act reinforces the prohibition as it relates to the Medical profession.

This is the legislative scheme which, through these various provisions, prohibits the use of cannabis. The substances alcohol and tobacco have not been listed in any manner which would cause their possession to be a criminal offence, as these substances are permitted for use, and are consequently regulated by the legislature through their own respective Acts of Parliament.¹⁵¹ This is the heart of the differentiation. Cannabis is listed as a drug whose possession is an offence – the legislative scheme expressly makes it so. Alcohol and tobacco are regulated through legislation. The only offence committed for possession and use of those substances beyond the scope of the respective acts, would thus be a regulatory one as opposed to one which carries a greater sentence, and greater criminal sanction. The issue that must now be examined is whether the State's assumed

¹⁴⁹ Drug and Drug Trafficking Act 140 of 1992 s 17:

Penalties.—Any person who is convicted of an offence under this Act shall be liable—

(b) in the case of an offence referred to in section 13 (a) or (c), to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment;

(c) in the case of an offence referred to in section 13 (e), to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment;

(d) in the case of an offence referred to in section 13 (b) or (d), 14 or 15, to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment; and

(e) in the case of an offence referred to in section 13 (f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.

¹⁵⁰ Criminal procedure Act, 51 of 1977 s 40:

Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;

¹⁵¹ Liquor Act 59 of 2003; Tobacco Products Control Act 83 of 1993 respectively.

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purposes for prohibiting cannabis use and possession in the manner it chose to do so, are legitimate. This will involve an exploration of the State's assumed purposes and accompanying reasons or evidence, and the testing of the assumed purposes against this evidence in order to come to a conclusion as to the legitimacy of these purposes.

Moseneke DCJ's linking of the rationality enquiry to the enquiry regarding the importance of the purpose in the section 36 limitations analysis in *Law Society v Minister of Transport*¹⁵² allows room for an assumption regarding the State's purposes, based on the arguments in *Prince* as well as the Committee hearing which followed his case. This is because Moseneke reasoned that rationality is a pertinent factor in the leg of the limitations test which considers the relation between the limitation and its purpose, and that accordingly, there are similarities between the rationality enquiry as to legitimacy of purpose, and this leg of the limitations analysis.¹⁵³ This being so, I have drawn three implied purposes from the arguments in *Prince* and the committee meetings which the State used to justify its limitation of Prince's right to religion. It is, I submit, appropriate to imply these purposes and to make use of them in application within this context of the rationality enquiry, due to the reasoning of Mosoneke DCJ in *Law Society v Minister of Transport*¹⁵⁴.

Mosoneke DCJ drew attention to the similarity between 'legitimate purpose' leg of the rationality enquiry, and the leg of the limitations analysis test which examines the link between the limitation and its purpose. This similarity then permits the application of the extended form of the legitimate purpose leg of the rationality enquiry, through the use of the implied purposes which the State used to justify the limitation in *Prince* (in application of the 'limitation and the relation to its purpose' leg of the limitations analysis). These assumed purposes may be stated as follows: Prevention of the 'Harm' or 'Wrong' which cannabis introduces to society; and the need to fulfil obligations in terms of international law.¹⁵⁵

¹⁵² *Supra* note 135 at para 37.

¹⁵³ *Supra* note 135 at para 37.

¹⁵⁴ *Supra* note 135 at para 37.

¹⁵⁵ *Prince* supra note 2 at paras 52-53; para 114; para 72 (international law obligations).

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5.2 IS THERE A LEGITIMATE GOVERNMENT PURPOSE?

5.2.1 THE NEED FOR THE EXISTENCE OF A GREATER HARM ASSOCIATED WITH CANNABIS TO SUPPORT A LEGITIMATE PURPOSE FOR DIFFERENTIATION.

As stated immediately above, one purpose which the State claims is achieved through its differentiation, is the prevention of the greater comparative harm which cannabis poses, as opposed to the harm caused by alcohol and tobacco. Evidently, by choosing to prohibit cannabis, and merely to regulate the sale and use of alcohol and tobacco, the State is unequivocally supporting the notion that cannabis causes more harm than alcohol or tobacco. This is so, because the only thing which can objectively differentiate these substances regarding the State's chosen control methods, is the level of sanction which the State attaches to each respective substance. Indeed, by classifying cannabis as an 'undesirable dependence-producing substance', but omitting to similarly classify alcohol and tobacco, the State in its own law declares that cannabis is considered by it to be the more harmful substance, worthy of prohibiting in order to prevent that greater harm from affecting the population.

By comparing cannabis with alcohol and tobacco, the similarities and differences in levels of relative harm can be assessed, in order to establish whether the differences warrant the differentiation which is achieved through prohibition, and ultimately, whether the harm prevention is a legitimate government purpose. It is undeniable that all recreational substances (for example, alcohol, tobacco and cannabis alike) cause harm of some kind. Therefore, if the government purpose is to combat harm in the public interest, it is not difficult to imagine that this purpose could pass as legitimate when viewed in isolation.

The issue arises when there are, for example, three substances which all objectively cause harm, yet the State chooses to only prohibit one of them. The government purpose of preventing harm in the public interest thus loses legitimacy where it chooses to prohibit one of the harm-causing substances, but fails to do so in respect of the others. Viewed differently, the purpose loses legitimacy where the State allows certain harmful substances

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to be freely consumed (subject to regulation), but prohibits one which, objectively, is no more of a menace to society than those which are not prohibited. It is unnecessary to prove that cannabis is harmless. The condonation of tobacco and alcohol consumption by the State indicates that a boundary has already been demarcated, indicating the level of harm which the State considers to be acceptable. If the purpose is to protect society from a greater social 'wrong' or 'harm', where the actual harm is no greater than that of permitted substances, the purpose cannot be considered legitimate.

At this point, the history of the cannabis prohibition in South Africa and other former British Colonies must be recalled, as this history (discussed in Chapter I) entirely defined the stigma which has attached to cannabis, and has created the adverse perception which led to its ultimate prohibition. I submitted in Chapter I, the following conclusion regarding the ignominious history of cannabis prohibition as it relates to the current legislative prohibition:

'This violation is exacerbated by the very history of racialized politics, psychology and criminology which led to the current prohibition... cannabis is prohibited, while other substances (like alcohol and tobacco) which also had a flourishing early trade and culture of consumption, are permissible... cannabis was likely only treated differently owing to early inaccurate pseudo-psychological and criminological attitudes...'¹⁵⁶

This conclusion regarding the original purpose of the cannabis prohibition in South Africa, is supported by Paterson's work (also discussed in Chapter I) in which he states, regarding the origins of the strict prohibition of cannabis:

'...cannabis use was not a political issue until such a time as the 'non-white' population came into great enough contact with the politically dominant 'white' population to make this contact seem like a threat that needed to be reduced. Cannabis use was not a problem unless there was great enough contact between the 'white' colonists and the cannabis-using 'non-white' population, and, in this sense, cannabis laws may be located in the greater schema of the so-called 'grand

¹⁵⁶ Chapter 1.2 – The History of the Prohibition.

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*apartheid' design. At the very least, both cannabis law and apartheid law rest on the same ideological foundation.*¹⁵⁷

It becomes obvious then, that the origin of the so-called greater 'harm' or 'wrong' which the State insists cannabis poses to society, may amount to nothing more than incorrect perception which has become ingrained over decades of prohibition. This ingrained perception is also predicated upon the same thinking which made acceptable the death penalty, the criminalisation of non-heterosexual relationships, harsh immigration law and many other such issues.

In the past, the protection against illicit drugs which are 'severe and addictive', was considered by this Court to be a legitimate purpose.¹⁵⁸ In the present case, however, the use of cannabis must be treated differently than it has been in the past due to the following comprehensive scientific research, which clearly indicates that cannabis is no more 'severe' and 'addictive' than alcohol and tobacco, and which reveals that the State's purpose may actually be to uphold antiquated reasoning which was originally based upon pseudo-scientific research with racist motivations. It is acknowledged that any investigation into the health hazards of recreational drugs is unavoidably affected by social approval or disapproval, and conflicting views as to its potential legal status.¹⁵⁹ Any court considering this issue would thus be urged to be wary of this. A court would also be asked to avoid treating cannabis as a "special" drug in its own category,¹⁶⁰ but rather to evaluate it in the same manner as other recreational substances, namely alcohol and tobacco. The adverse effects of cannabis as compared to alcohol and tobacco will be (briefly) dealt with in terms of mental health, physical health and prevalence of risk in South Africa.

¹⁵⁷ Op cit note 10 at pp117-118.

¹⁵⁸ *S v Bhulwana* 1996 (1) SA 388 (CC); *Prince* supra note 2; *S v Makwanyane* supra note 64.

¹⁵⁹ W Hall, *The Health and Psychological Effects of Cannabis Use*, 6 Current Issues Criminal Justice 208 (1994-1995) accessed via Heinonline.

¹⁶⁰ *Ibid.*

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5.2.2 THE ADVERSE EFFECTS OF CANNABIS ON MENTAL HEALTH COMPARED TO TOBACCO AND ALCOHOL

Some of the possible adverse mental effects of cannabis include psychological responses (for example, panic, anxiety, depression or psychosis),¹⁶¹ effects on pre-existing mental illness,¹⁶² the chance of the development of mental illness (sometimes referred to as ‘cannabis psychosis’),¹⁶³ and the possibility of dependency and/or withdrawal effects.¹⁶⁴ Adverse mental effects of alcohol consumption include psychological responses (changes in emotions and personality), as well as impaired perception, learning and memory.¹⁶⁵ There is a strong link between the use of alcohol and interpersonal aggression,¹⁶⁶ and consumption may lead to dependency and/or withdrawal effects.¹⁶⁷ Finally, although tobacco is not a psychoactive substance, it is undeniably dependence-producing and has been shown to affect the smoker’s mood patterns.¹⁶⁸ It is therefore evident that all three substances lead to dependence and/or withdrawal, and therefore the ‘harm’ or ‘wrong’ which the State associates with cannabis due to its ‘addictive’ nature, is not associated with cannabis alone, but concerns alcohol and tobacco also. Furthermore, both alcohol and cannabis are considered ‘psychoactive’¹⁶⁹ or ‘mind-altering’ substances, in that they lead to altered psychological behaviour.

¹⁶¹ Johns, *Psychiatric Effects of Cannabis*, *The British Journal of Psychiatry*, 2001 vol 178 pp116-122.

¹⁶² *Ibid* at pp116-122.

¹⁶³ *Ibid* at pp116-122.

¹⁶⁴ *Ibid* at pp116-122.

¹⁶⁵ Oscar-Berman, M, Shagrin, B, *Impairments of Brain and Behaviour*, Alcohol Health and Research World, vol 21, 1997 (accessed via Academic Search Premier).

¹⁶⁶ Giancola, Zeichner, *The Biphasic Effects of Alcohol on Human Physical Aggression*, *Journal of Abnormal Psychology*, vol 106, 1997.

¹⁶⁷ Gudjonsson et al. *The Effects of Alcohol Withdrawal on Mental State, Interrogative Suggestibility and Compliance: An Experimental Study*, *The Journal of Forensic Psychiatry*, vol 13, 2002.

¹⁶⁸ Adan, Sanchez-Turet, *Effects of Smoking on Diurnal Variations of Subjective Activation and Mood*, *Human Psychopharmacology: Clinical and Experimental*, vol 15, 2000.

¹⁶⁹ Global Status Report on Alcohol and Health, World Health Organization, 2014 p13; Hall, Solowij, *Adverse Effects of Cannabis*, *The Lancet*, vol 352, 1998 pp 1611-1616.

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The term 'cannabis psychosis' is often cited as an adverse and severe effect of cannabis, but there is evidence to support the contention that this term is often misused, misunderstood and falls foul of the common conflation in psychological studies, between the concepts of 'correlation' and 'cause'¹⁷⁰. The latter notion is important to understand in this context, because the mere fact that some psychological study subjects who suffer from psychosis happened to consume cannabis at some stage, does not *per se* mean that the psychosis was in fact caused by cannabis consumption. Effectively the submission is that there is insufficient, or lack of proof to support the argument for a causal effect.

People in South Africa have consumed, and do consume, alcohol to the extent that they lack the criminal capacity to act.¹⁷¹ As far as psychological behaviour is concerned, it can be argued that alcohol is more intoxicating than cannabis,¹⁷² yet alcohol is not prohibited by the Drugs Act. The comparative 'wrongs' or 'harms' of alcohol intoxication are controlled and regulated through state interventions such as prohibition of driving under the influence of alcohol¹⁷³. This being so, the State arguably does not have a legitimate purpose in preventing a social 'harm' or 'wrong' regarding the potential mental and psychological effects of cannabis, whilst it fails to prevent the same harm regarding alcohol and tobacco. Legitimacy would require one of two things: either the State should prohibit the use of alcohol and tobacco, or it should not be permitted to prohibit cannabis. Evident from this part, is that the purpose of harm prevention regarding the mental effects of cannabis, cannot be legitimate whilst medical evidence proves that alcohol causes as much, if not more harm than cannabis does.

¹⁷⁰ Op cit note 161 at pp116-122.

¹⁷¹ *S v Chretien* 1981 (1) SA 1097 (A). Add reference to the GLAA.

¹⁷² Bloomquist, ER '*Marijuana, The Second Trip*' (1971) Glencoe Press at p80.

¹⁷³ National Road Traffic Act 93 of 1996 S65(1).

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5.2.3 ADVERSE PHYSICAL EFFECTS OF CANNABIS COMPARED TO TOBACCO AND ALCOHOL

Cannabis affects the brain receptors, and this potentially can cause dose-related impairments of psychomotor performance.¹⁷⁴ When consumed through smoking long-term, cannabis is associated with increased symptoms of respiratory and cardiovascular diseases, similar to those associated with tobacco smoking.¹⁷⁵ Finally, the abuse of cannabis can also have an adverse effect on foetal growth when a pregnant mother consumes it.¹⁷⁶ Regarding alcohol consumption, chronic heavy drinking can have serious repercussions for the functioning of the entire nervous system, particularly the brain.¹⁷⁷ These include, non-exhaustively, atrophy of nerve cells and brain shrinkage, as well as Korsakoff's Syndrome, described as: 'a devastating memory disorder in which a person appears to forget incidents of his or her daily life as soon as they occur.'¹⁷⁸

Alcohol misuse contributes to chronic health problems such as liver failure and cirrhosis, and can contribute to a compromised immune system, increasing susceptibility to opportunistic diseases.¹⁷⁹ Alcohol misuse during pregnancy has been linked to foetal alcohol syndrome in infants.¹⁸⁰ Tobacco smoking causes tuberculosis, lower respiratory infections and various forms of cancer.¹⁸¹ Tobacco smoking also contributes to cardio-vascular

¹⁷⁴ Ashton, *Pharmacology and Effects of Cannabis: A Brief Review*, The British Journal of Psychiatry vol 178, 2001.

¹⁷⁵ Hall, Solowij, *Adverse Effects of Cannabis*, The Lancet, vol 352, 1998 pp 1611-1616. See also Ashton *ibid*.

¹⁷⁶ B Zuckerman et al. [Effects of Maternal Marijuana and Cocaine Use on Fetal Growth](#) New England Journal of Medicine, 1989 320, pp762-768.

¹⁷⁷ Op cit note 165.

¹⁷⁸ Op cit note 165.

¹⁷⁹ Medical Research Council, *Effects of Acute Alcohol Intoxications in South Africa*, Fact Sheet: Alcohol Use in South Africa, 2008, <http://www.sahealthinfo.co.za/admodule/alcohol.htm> (accessed September, 2015).

¹⁸⁰ *Ibid*.

¹⁸¹ World Health Organization Global Report: Mortality Attributable to Tobacco, 2004.

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diseases.¹⁸² Morgan and Zimmer have stated the following regarding the myth of the link between lung disease and cannabis smoking:

‘...marijuana and tobacco smoke are nearly identical. Because most marijuana smokers inhale more deeply and hold the smoke in their lungs, more dangerous material may be consumed per cigarette. However, it is the total volume of irritant inhalation -- not the amount in each cigarette -- that matters. Most tobacco smokers consume more than 10 cigarettes per day and some consume 40 or more. Regular marijuana smokers seldom consume more than 3 -5 cigarettes per day and most consume far fewer. Thus, the amount of irritant material inhaled almost never approaches that of tobacco users. Frequent marijuana smokers experience adverse respiratory symptoms from smoking, including chronic cough, chronic phlegm, and wheezing. However, the only prospective clinical study shows no increased risk of crippling pulmonary disease (chronic bronchitis and emphysema).’¹⁸³

It is therefore evident that, regarding physical effects, the harmful effects of cannabis are again closely comparable to those of alcohol and tobacco in terms of foetal development, as well as the prevalence of respiratory and cardiovascular diseases (regarding tobacco use). While it is nearly impossible to rank the levels of harm caused by each substance in order of ‘seriousness’, it is submitted that a brief consideration of the prevalence of use of each of these substances provides a starting point. Based on empirical data, alcohol remains the most frequently reported primary substance of abuse across South Africa.¹⁸⁴ This is illustrated by trauma and psychiatric data.¹⁸⁵ Regarding mortality rates, the national figure of all non-natural deaths relating to blood-alcohol concentrations was a staggering 46% in 2002.¹⁸⁶ Tobacco smoking is also highly prevalent, ranking third in

¹⁸² Ibid.

¹⁸³ Morgan J, Zimmer L ‘*Exposing Marijuana Myths: A Review of the Scientific Evidence*’ 2005 originally published as monograph by The Lindesmith Center in New York City at pp 5-6.

¹⁸⁴ Central Drug Authority, 2006; United Nations Office on Drugs and Crime, 2004.

¹⁸⁵ Parry et al, *The South African Community Epidemiology Network on Drug Use (SACENDU): Description, Findings (1997-99) and Policy Implications*, Addiction Vol 97, 2002.

¹⁸⁶ Op cit note 179.

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terms of mortality rates in South Africa.¹⁸⁷ Cannabis, on the other hand has a very low acute toxicity, and as of 1998, there were no confirmed published cases worldwide of human deaths from cannabis poisoning.¹⁸⁸ Regarding the addictive properties of cannabis, Morgan and Zimmer state that:

‘It is now frequently stated that marijuana is profoundly addicting and that any increase in prevalence of use will lead inevitably to increases in addiction...for any drug to be identified as highly addictive, there should be evidence that substantial numbers of users repeatedly fail in their attempts to discontinue use and develop use patterns that interfere with other life activities... epidemiological surveys show that the large majority of people who have had experience with marijuana do not become regular users.’¹⁸⁹

I submit that the harm-causing properties of cannabis fall directly within the categories of self-harm tolerated by the State. This is so, because despite clear medical evidence which suggests that alcohol and tobacco are more prevalent causes of mortality and physical health problems, the State continues to permit the consumption of alcohol and tobacco. To continue to treat cannabis as a separate category of potential harm-causing substances, is arbitrary and is not predicated on a legitimate purpose. The only reasonable inference to be drawn from the State’s refusal to include cannabis in the same category as alcohol and tobacco, is that the State is attempting to protect the personal morality of a sector of society – something which has effectively never been stated as a purpose which the State itself considers to be legitimate in the *Prince* case.

Drawing again on the part earlier in this chapter, dealing with the role of public opinion and contemporary ‘moralising’ in the court’s adjudicative function, it is evident that even if public opinion echoed this potential ‘morality’ argument, the court should be slow to afford any particular weight to this in its determination of the *Harksen* rationality test. Further to this, again reiterating the conclusions drawn from the earlier appraisal of the

¹⁸⁷ Groenewald et al. ‘*Estimating the burden of disease attributable to smoking in South Africa in 2000: original article.*’ South African Medical Journal vol 97 (2007) 674-681.

¹⁸⁸ Op cit note 175.

¹⁸⁹ Op cit note 183 at p10.

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history of cannabis prohibition, to prohibit cannabis use on moral grounds, or as a choice of public morality which the State makes, is merely to entrench a bias which itself stems from a past history of highly racialized and blatantly incorrect psychological analysis. Regarding the ‘harm’ or ‘wrong’ which cannabis constitutes – prevention of which the State claims is a legitimate purpose – compared with the comparative harms of alcohol and tobacco, it is thus evident that if the State’s purpose in such harm prevention were to be truly legitimate, its prohibition would have to properly take cognisance of the equal harm caused by use of alcohol and tobacco. Simply put, the State cannot continue to deem cannabis a menace to physical and psychological health which warrants the extreme of a prohibition, while it allows consumption of equally harmful substances. Such ‘naked preference’ shown to users of alcohol and tobacco cannot and does not, exhibit a legitimate government purpose.

5.2.4 THE NEED TO FULFIL THE OBLIGATIONS UNDER INTERNATIONAL LAW

The Constitution enshrines the need for South African courts to consider international law in their adjudications.¹⁹⁰ In addition, the Constitution also provides that international treaty laws only become binding internally on the Republic when they are transformed into statute through the processes of the National Assembly.¹⁹¹ The

¹⁹⁰ Constitution s39(1).

¹⁹¹ Constitution s231:

International agreements

231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

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government purpose to fulfil international obligations would only be legitimate if these obligations in fact extend to cannabis prohibition in contemporary international relations, if there would be repercussions for failing to prohibit cannabis, and if the international opinions on cannabis have in fact remained as they were when such obligations came into existence. It is submitted that the recent shift in international public opinion, means that while previously South Africa's commitment to the international 'War on Drugs,' may have been considered a legitimate purpose, as of today it appears to be a hopeless attachment to the past.

The government purpose of fulfilling international law obligations, is likely to be the stated objective which is most capable of being seen as legitimate – providing that to fail to adhere to these obligations would create serious repercussions for the government, should cannabis not be prohibited under South African law. It is therefore necessary to examine whether there is any manner in which the international instruments which purport to create an obligation on signatory states, may be construed such that states are not considered to be in violation of international law obligations, should they forgo their prohibitions of cannabis. I submit that, if there would be no repercussions, and if accordingly the international community would not construe cannabis decriminalisation as a violation of international law obligations, then there would be no legitimacy in the government claiming such obligations as a purpose for cannabis prohibition.

Leinwand states the following regarding the international obligations to prohibit drugs generally, and cannabis specifically, as they stood in the 1970s:

'The international legal norms that do exist are embodied in international agreements and treaties. The sole obstacle to...legalization of marijuana is...the 1961 Single Convention on Narcotic Drugs, a multilateral treaty under the sponsorship of the United Nations...This Convention imposes rather strict obligations on the parties in reference to cannabis and presents a clear barrier to domestic legalization of the drug...under international law, the domestic legality of an action does not excuse the violation of a treaty obligation, and the action thus remains illegal under international law. The Single Convention on Narcotic Drugs was intended to embody in one treaty and under one central administration the vast array of international

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agreements regarding narcotic drugs; Article 44 of the Convention specifies that as between the parties, the Convention specifies that as between the parties, the Convention supersedes all pre-existing drug treaties.¹⁹²

He wrote his paper to examine how international obligations to prohibit drug use may be circumvented such that international law obligations would no longer be an obstacle to the United States legalising cannabis use, however for the purposes of this dissertation, his work will be useful in providing an overview of the provisions of the Single Convention which create the international law obligations to prohibit cannabis. It will then be necessary to examine how other states have decriminalised or legalised cannabis use, despite the purported international law obligations created by this treaty, in order to justify the position that these so-called international obligations do not in fact bind the signatory states in perpetuity regarding the status of cannabis. Even if states are bound, the position is still justified that, despite these obligations, other states have in fact chosen their own paths in this regard, and this and other such treaties can therefore not be used as an excuse as to why cannabis must still be prohibited in South Africa.

Regarding the specific prohibition contained in the treaty, Leinwand states the following:

'The preamble to the treaty states that its purpose is to prevent "addiction to narcotic drugs"... It was generally assumed by the delegates that cannabis was a narcotic substance which was at least habit-forming, if not as addicting as morphine and heroin, and that it was a "stepping stone" to those other drugs...In short, cannabis was included in the treaty because it was thought to be a narcotic drug, the addiction to which the treaty was designed to prevent. There is no definition of "narcotic" in the treaty; drugs were assigned to one or more of four schedules, each with a different degree of control, depending upon how harmful each substance was considered to be. Article 4 of the Convention provides that the parties must take the

¹⁹² M Leinwand *'The International Law of Treaties and United States Legalization of Marijuana'* 1971 10 Columbia Journal of Transnational Law 413 at pp414-417.

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legislative and administrative action necessary to carry out the provisions of the treaty.’¹⁹³

At this stage it is useful to highlight the fact that the treaty places cannabis in a category separate from alcohol and tobacco, which are not classified as substances which states ought to prohibit. At the outset therefore, the treaty makes the very mistake which the previous part of this dissertation has already examined. The treaty itself displays an arbitrary preference in that it classes cannabis in the same position as drugs such as opium and other highly dangerous substances, and in this regard, Leinwand states that:

‘Section (c) of this Article is perhaps the most important clause in the treaty. It specifies that the parties may not permit the production, export, import, distribution, or possession of the listed drugs, including cannabis, except for medical purposes...**It is also relevant that cannabis is included in Schedule IV, the most serious class**, because under Article 2 (5) a party may then take the action of prohibiting its use.’¹⁹⁴ [Emphasis added]

The treaty was established in 1961, far before the current medical and other empirical evidence (mentioned in the previous part of this dissertation) debunked the theory that cannabis is a drug of a similar class to more harmful ones like opium for instance.

South Africa is a sovereign state, subject first and foremost to the Constitution, which is the supreme law of the Republic.¹⁹⁵ Notwithstanding our international obligations, we thus have a primary duty to justify and debate prohibition, particularly given the fact that such international obligations were established long before current medical and other empirical evidence was available to refute the need for such obligations regarding cannabis. Simply put, international obligations change with the progress of opinions and behaviours of the states which adhere to them. To claim obligations, which are asynchronous with current empirical research and contemporary international states’ behaviours, as the purpose for

¹⁹³ Ibid at pp417-418.

¹⁹⁴ Ibid at p418.

¹⁹⁵ Constitution s2.

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continuing prohibition of cannabis, is to indeed display 'naked preference' with unwarranted adherence to fixed principles. Such conduct is not rational, whether or not a treaty from 1961 purports to justify this. Nevertheless, Leinwand proposed some interesting and valid arguments as to why, despite the existence of this and other relevant treaties, there may not be irreversibly binding obligations placed on states to prohibit cannabis. It is submitted that if these were plausible arguments in the 1970s, they would be even more so today, after the effluxion of time and the change of international opinions on the cannabis issue (to be briefly canvassed later in this chapter).

The first point Leinwand makes, is that there is little cohesion regarding the rules of the law of treaties and how they are to be applied:

'Whether [a state] is able to achieve its goal under the terms of the Single Convention itself or by resort to the general international law of treaties makes little difference in terms of legal effect; both methods are equally valid...The problem that arises in looking to general treaty law is the same as that faced in nearly every other branch of international law: **the lack of a final, binding authority as to what the rules actually are. In the absence of such an authority, a consensus of respected opinion must serve as a substitute.**' [Emphasis added]

This implies that when considering what the current obligations under international law are, recourse may be had to the current international opinion is on the relevant issue – in this case, cannabis prohibition. Similarly, Lauterpacht in 1955 stipulated, regarding the law of treaties: 'Apart from that general and unavoidable acceptance of the basic principle, *Pacta sunt servanda*, there is little agreement and there is much discord at almost every point.'¹⁹⁶ Leinwand, regarding methods by which states could divest themselves of international law obligations, stated the following:

'To relieve itself of the obligations of the Single Convention regarding marijuana, it is submitted that [a state] could selectively denounce the treaty - i.e., denounce only the terms of the Convention relating to cannabis. The Convention contains a Denunciation Clause (Article 46), but that clause does not provide for selective

¹⁹⁶ Lauterpacht, 'Codification and Development of International Law', 49 American Journal of International Law 17 (1955).

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denunciation. To see if this is possible, therefore, the rules of general international treaty law in regard to the separability of treaty clauses must be examined... The modern trend of opinion regarding separability of treaty clauses with respect to actions taken to alter the treaty in some way, is that separability should be increasingly permitted.¹⁹⁷

Thus Leinwand shows that there are mechanisms through which a state could relieve itself of such obligations with impunity. This in turn means that the only obligation which the State has, is a continually, and irrationally self-imposed one. Further to this, Leinwand suggests that these tests for denunciation and separability imply something, which by itself means that, should a state fail to prohibit cannabis, it would in fact not fail to fulfil its international law obligations under this treaty:

‘Cannabis is just one drug covered by the Convention, and as such is a "particular subject matter" upon which the rest of the treaty does not depend for support. As each drug is a separate entity, the enforcement of the terms of the Convention concerning cannabis is not necessary for the performance of the other provisions of the treaty. **Since the purpose of the Convention is the prevention of addiction to narcotic drugs, and cannabis is neither addictive nor a narcotic, the cannabis clauses are not essential to the stated purpose of the treaty.**¹⁹⁸ [Emphasis added]

If this is indeed the case, South Africa’s government cannot use international obligations as a legitimate purpose which justifies prohibiting cannabis. There would effectively be no breach of international law obligations, were cannabis to be permitted. This is because, by separating the requirements for fulfilment of the essential purpose of the treaty, from the requirement for fulfilment of what can be viewed as merely incidental aspects, a state can remain compliant. It can also take for itself the necessary self-determinative powers to regulate substances which are not essential to fulfilling the treaty’s purpose, while still remaining within an adherent boundary. Despite this, there remains another obvious indicator of the fact that to decriminalise cannabis, would not amount to any material breach of international law obligations which could cause repercussions for

¹⁹⁷ Op cit note 192 at p426.

¹⁹⁸ Op cit note 192 at p429.

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South Africa on the international front. This is the role of international custom, or customary international law, in determining international obligations, even notwithstanding treaties.

‘Customary international law (“CIL”) is one of two primary forms of international law, the other being the treaty. CIL is typically defined as a “customary practice of states followed from a sense of legal obligation”...Governments take care to comply with CIL, and often incorporate its norms into domestic statutes.’¹⁹⁹

International custom, when it is adopted by either a majority of states, or by those states with the larger balances of power on the international stage, in turn changes the obligations which states have.²⁰⁰ International custom, or customary international law, consists broadly of two components which must be satisfied before a change in state behaviour may be regarded as a change in customary international law: state practice and *opinio juris*.²⁰¹ As provided in the *Asylum Case (Colombia v Peru)*²⁰², state practice and *opinio juris* form the substance of customary international rules. It was further stipulated in the *Right of Passage*²⁰³ case that state practice, while it certainly refers to ‘general practice’, also allows for localised or regional practice ‘amongst a group of states or just two states in their relations *inter se* as well as for general customs binding upon the international community as a whole’.²⁰⁴ Basing my submission on this logic, there are key international states which have, de facto, abandoned their international law obligations to criminalise cannabis, and have not faced repercussions internationally.²⁰⁵ This being the case, it is arguable that the decriminalisation or legalisation of cannabis amongst the group of states which have adopted these policy changes regarding cannabis, has created a new rule of customary international law. This new rule (if it exists, as I submit it does), while perhaps not mandating other states to decriminalise cannabis, can definitely be said to remove the prohibition on states regarding decriminalisation or legalisation.

¹⁹⁹ J L Goldsmith, E A Posner ‘A Theory of Customary International Law’ (1998) John M. Olin Law & Economics Working Paper No. 63 (2d Series) at pp1-2.

²⁰⁰ Ibid at pp1-2.

²⁰¹ D Harris ‘Cases and Materials on International Law 4th Edition’ (2010) Sweet and Maxwell at p19.

²⁰² *Asylum Case (Colombia v Peru)* ICJ Rep. 1950, p266.

²⁰³ *Right of Passage Case (Merits)* ICJ Rep. 1960 p6 at p220.

²⁰⁴ *Supra*.

²⁰⁵ Op cit note 1. Table of countries which have either decriminalised or legalised cannabis to various extents is reproduced at the end of this chapter.

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This being so, if South Africa were to remove the prohibition on cannabis, the change in international custom would be reason enough to expect that South Africa would also face no negative repercussions. It is submitted, based on the above argument, that several key states internationally have decriminalised or legalised cannabis use, and have benefitted from this change.²⁰⁶ Pacula says the following regarding the relative cost-benefit analysis of the impact of decriminalisation/legalisation of cannabis on the healthcare system in California:

[The following concerns the] ...evidence of the potential budgetary effect to the state of California of an increase in marijuana use associated with legalization for marijuana on health care costs. Estimates are focused on scientifically established health harms for which data is readily available, including the number of dependent users, treatment costs, emergency room visits, and hospitalizations. The exercise shows that the rise in health care expenditures associated with scientifically established health harms known to be associated with use are likely to be small relative to the expected revenue and cost-savings associated with reductions in criminal justice...²⁰⁷

Her working paper demonstrates that while there have been cost implications for the healthcare system in California, these have been outweighed by the revenue available to the State following the regulation of cannabis rather than its prohibition.²⁰⁸ Comparatively, the costs of the criminal justice system have also been positively affected.²⁰⁹ This section has therefore illustrated that the two assumed state purposes behind cannabis prohibition, cannot be viewed as legitimate when examined under the construction of the rationality analysis as tacitly accepted by Mosoneke in *Law Society v Minister of Transport*.²¹⁰

²⁰⁶ Op cit note 1.

²⁰⁷ Pacula R.L 'Examining the Impact of Marijuana Legalization on Harms Associated with Marijuana Use' 2010 RAND Working Paper WR-769-RC.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ *Supra* note 135.

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5.3 THE RELATION BETWEEN THE MEANS USED TO ACHIEVE THE PURPOSES OF DIFFERENTIATION, AND THE PURPOSE— IS THERE A RATIONAL CONNECTION?

As discussed at the beginning of this chapter, the legislative scheme which prohibits cannabis is the means the State uses to differentiate between users of cannabis, and users of alcohol and tobacco. Should a court find that the State's assumed purposes discussed in this chapter are legitimate, the next step would be to test whether there is a logical relation between the purposes of the differentiation, and the means the State uses to differentiate. The means used to differentiate include at a minimum, the parts of the legislative scheme which prohibit cannabis, and the parts of the legislative scheme which attach criminal sanctions to the users of cannabis.²¹¹

In this chapter, I have already discussed whether the purpose of the differentiation between cannabis users, and users of alcohol and tobacco, is legitimate. I proceeded to make my submissions in relation hereto. I submit further, that given the use of legislative prohibition to achieve the State's assumed purposes, submissions regarding the legitimacy of these purposes would make reference to highly similar, if not the same, evidentiary analysis which must be used to evaluate whether the means used to achieve the purposes are rationally connected to achieving the purposes.

The reason for this, is that when assessing whether the legislative prohibition is a means which connects rationally to the purpose, consideration must be given to the same jurisprudential theme that underlies whether the purpose itself is legitimate. The means used must logically relate to the purpose behind differentiating between use of cannabis, and use of alcohol and tobacco. Cannabis must be proved to cause greater harm to society than is caused by alcohol and tobacco, in order for the prohibition to rationally be connected to the purpose.²¹² The consideration which I shall discuss now is whether the other means used by the State to differentiate (harsher criminal sanctions imposed upon users of cannabis) is rationally connected to the purposes behind the differentiation.

²¹¹ Chapter 5 of this dissertation at 5.1 The Legislative Scheme Revisited.

²¹² My submission on this subject is reflected above at 5.2 and 5.3.

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The sanctions imposed by the Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment Act 105 of 1997, for the use of cannabis, are undoubtedly harsher than those imposed by the legislation which regulates the use of alcohol and tobacco.²¹³ The Criminal Law Amendment Act effectively prescribes minimum sentences of between 15 years and life imprisonment for any offence listed in Parts I and II of Schedule 2 to the Criminal Procedure Act (which includes cannabis). Effectively, the user of cannabis who is caught by law enforcement officers with more than a certain amount of cannabis in his possession, is subject to the sanctions mentioned directly above. This may be contrasted to the Liquor Act and Tobacco Products Control Act, which Acts prescribe lesser sentences for persons contravening the regulatory framework regarding alcohol and tobacco.²¹⁴

Notwithstanding the court's discretion to impose lesser sentences, the very fact of the harsher minimum sentences for users of cannabis makes the legislative scheme, in its

²¹³ Schedule 2, Parts I and II of the Criminal Procedure Act 51 of 1977 read with the Criminal Law Amendment Act 105 of 1997 s 51:

51. (1) Notwithstanding any other law but subject to subsections (3) and (6) a High Court shall if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6) a regional court or a High Court shall—

(a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of—

(i) a first offender. to imprisonment for a period not less than 15 years:

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

...

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

...

²¹⁴ Liquor Act 59 of 2003; Tobacco Products Control Amendment Act 12 of 1999. Both Acts prescribe fines for the contravention of their provisions, and only prison sentences in the most extreme offence cases.

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current form, an exceptionally harsh means to achieve the purposes behind the prohibition. Despite the harshness of the means used, the only question is whether the means are rationally connected to the purpose, or put differently, whether the means are capable of achieving the purpose.²¹⁵ Under this analysis, it is not appropriate or acceptable for a court to enquire as to whether other means would be better suited.²¹⁶ This would be a conflation of the rational connection test and the test in the section 36 limitations analysis which asks whether less restrictive means could be used to achieve the State's purpose.

In the present instance therefore, this part of the rationality test is restricted to assessing whether the State's assumed purposes (of preventing greater harm to society and fulfilling international obligations) are capable of being achieved through the legislative prohibition and the commensurate sanctions imposed on users of cannabis. If the measures are not capable of achieving the State's purposes, then there cannot be a rational connection between the prohibition and the purposes of the State.²¹⁷

The issue of whether the State's purpose of preventing greater harm to society is capable of being achieved through prohibition, is one which can be addressed through reference to the current cannabis use statistics, but it is doubtful whether this is sufficient to prove that the means are not capable of achieving the State's purpose. The mere evidence of cannabis use prevalence (despite the existence of harsh criminal sanctions) cannot, by itself, dismiss the legislative scheme as not being rationally connected to the purpose behind it. Indeed, it is not enough to suggest that the legislative scheme is not effective, what must be proved is that the legislative scheme, by design or in effect, is not at all capable of achieving the State's purpose.²¹⁸ Since this is not the case, whatever the statistical evidence may be, it would therefore be a fruitless exercise to conduct a thorough analysis of statistical data on cannabis use prevalence. The simple truth is that prohibition does have some success at preventing, or at least ceasing (however temporarily) use of cannabis. While it is true that there are definitely less restrictive means which could be used

²¹⁵ *Supra note 120* at paras 14-16.

²¹⁶ *Supra note 120* at para 16.

²¹⁷ *Supra note 120* at paras 14-16.

²¹⁸ *Supra note 120* at paras 14-16.

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(such as those used to regulate the use of alcohol and tobacco), this is not a matter which may be assessed under the rationality analysis.

It is for this very reason that I stated earlier in this dissertation, in Chapter 4, that the best hope for success of the rationality argument under section 9 (1), would be to attempt to employ an extended version of the legitimate government purpose leg of the rationality test, and through this, to argue that the State has no legitimate purpose for differentiating between the use of cannabis, and the use of alcohol and tobacco. Because the scope of the rational connection leg of the test is so narrow and does not permit comparison between measures that would be less invasive, and the measures employed, this significantly limits the ability to succeed on the ground of the rational connection test, should the legitimate purpose leg of the challenge be unsuccessful. In short, failure at the legitimate purpose leg of the test (which is in itself equally as possible as success at that stage) would in all probability preclude success under the rationality enquiry altogether, at which point the litigant would be advised to proceed under the other rights not covered in the breadth of this dissertation, and under those rights, to address the proportionality aspects of this case under the section 36 limitations analysis.

The next issue to be addressed, in Chapter 6, will be a consideration of the types of remedial action available to the court, should it decide in favour of the litigant who brings this challenge. Chapter 6 has been written under the assumption of a successful challenge under the section 9 (1) rationality analysis and it must be emphatically reiterated that the outcome of either success or failure of this challenge rests finally with the court assessing the matter. The section 9 (1) rationality analysis has, I submit, the best prospect of success before a court, provided the court is persuaded to apply the extended construction of the legitimate government purpose aspect of the test (which was, I submit, impliedly accepted by Mosoneke DCJ in *Law Society v Minister of Transport*). This notwithstanding, there is a still a good chance that a court would decline to apply this extended construction of the rationality test and that the rationality analysis would fail at this stage. With this in mind I elected to write the Chapter 6 analysis of potential remedial action, as it would be written were success of the rationality analysis guaranteed.

5.4 TABLE SHOWING STATES WHICH HAVE DECRIMINALISED OR LEGALISED CANNABIS

USE: Accessed from New Health Guide 'Where is Marijuana Legal?' 2014 accessed from: <http://www.newhealthguide.org/Where-Is-Marijuana-Legal.html> accessed on: 2015-12-14.

Country	Possession	Sale	Transportation	Cultivation	Notes
Argentina	Illegal but decriminalized	Illegal	Illegal	Illegal	Cannabis is legal for personal use and that too in small quantities and to be consumed in private locations. Consuming publically is usually accepted in young adults. Similarly consumption for medical reasons is accepted in private locations but it is not legislated. All other aspects are illegal and punishable by law.
Australia	Illegal but decriminalized in certain states				Personal use is decriminalized in small quantities in some states such as South Australia, Australian Capital Territory, Western Australia and the Northern Territory.
Belgium	Illegal but decriminalized	Illegal	Illegal	Illegal but decriminalized for one female plant only	In Belgium, consumption in home and possessing quantities up to 3 g or a certain female plant is tolerated though not legal in adults.
Brazil	Illegal; however mostly tolerated	Illegal	Illegal	Illegal	The possession for personal use entails given a warning, community education. Selling and transportation of larger amounts is considered as drug trafficking.
Canada	Illegal but legal for use in medicine and industries after obtaining a governed issued license.	Illegal	Illegal	Illegal unless the plants are grown for medical purposes with a government issued license	

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Colombia	Illegal but decriminalized				Since the year 1994, possession of small quantities of cannabis up to 22 g has been decriminalized for personal use.
Costa Rica	Illegal but decriminalized				Though cannabis use is illegal, the tolerance of smoking marijuana is high in the entire country. Possession of small quantities for personal use has been decriminalized though no minimum amount has been specified.
Czech Republic	Illegal but decriminalized	Illegal	Illegal but decriminalized	Illegal but decriminalized	Since April 1 st 2013, medical use or prescription is legal.
Ecuador	Illegal but decriminalized	Illegal	Illegal	Illegal	Possession of less than 10 g is considered as possessing for personal use and is legal but not punished.
France	Illegal but legal for medical use				Cultivating, selling, owning or consuming cannabis is prohibited.
India	Illegal/Legal(under the regulation of government)	Illegal/Legal (It is legal to sold in shops authorized by government)	Illegal	Illegal(Though with government permission it is legal)	It is utilized during the observance of some Hindu rituals. Though it is illegal to possess by law but the law is treated with low priority. Many states such as Tripura, West Bengal and North East has their own separate laws that allow cannabis which is locally known as ganja. Large tracts of marijuana grow unchecked in the wild parts of many states such as Tripura, West Bengal, Kerala etc.
Iran		Regulated use is legal while unregulated use is illegal	Regulated use is legal while unregulated use is illegal	Legal	It is legal to grow cannabis as the seeds of the plant are eaten by the locals. Moreover, companies draw oil from the seed, which is then sold legally.
Mexico	Illegal but decriminalized				Since August 2009, personal use and possession of up to 5 g of cannabis is

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					decriminalized
North Korea	Legal	Legal	Legal	Legal	The sale, growth and consumption of marijuana is legal and not regulated by the government of North Korea.
Pakistan	Illegal/Legal				Though laws exist inhibiting the sale and misuse of marijuana, still they are very rarely used. The use in community gatherings is tolerated considering it to be a centuries old custom. Moreover, in the wild, large tracts of marijuana grow unchecked.
Switzerland	Illegal but decriminalized	Illegal	Illegal but decriminalized	Legal in certain Cantons	Since January 2012, growing of cannabis of up to 4 plants is allowed in some cantons.
United States	Illegal at federal level but it is legal at state level in states such as Washington and Colorado.	Illegal	Illegal	Illegal	Laws concerning marijuana vary by state.
Spain	Illegal but decriminalized	Illegal	Illegal	Legal	Growing of plant for personal use is legal.
Uruguay	Legal for personal use	Illegal	Illegal	Illegal	It is legal for personal use so personal possession is not penalized

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6. A 'JUST AND EQUITABLE' REMEDY

6.1 DEFINING 'JUST AND EQUITABLE' REMEDIES THROUGH THE LENS OF THE CONSTITUTIONAL COURT

Section 172(1) of the Constitution²¹⁹ grants the court wide remedial powers. Remedial action and the possibility of the court granting any at all, only arises as an issue following a declaration of invalidity by the court. Section 172(1) instructs the court to declare any law or conduct invalid, if it infringes any provision, or unjustifiably limits rights in the Constitution. This declaration of invalidity is not optional upon a finding of constitutional invalidity or infringement – the language of s 172(1) is peremptory, using the word 'must', not 'may' or 'should'.²²⁰ While the court has no discretion in declaring law or conduct invalid where it is unconstitutional, the remedy it grants thereafter is within the court's discretion. The proviso to which the court must adhere, is merely that the remedial action it orders, should be 'just and equitable'.²²¹ A 'just and equitable' remedy should, at first blush, be capable of facilitating or triggering redress to those asking for a remedy, but should also

²¹⁹ Of the Republic of South Africa, 1996:

S 172

(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) ...

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

...

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

²²⁰ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

²²¹ Constitution s 172(1).

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preserve the carefully prescribed boundaries of the functions of the different arms of government. How this is achieved, depends largely on the court's construction of the doctrine of the separation of powers, and the court's adoption of an appropriate construction of judicial deference.

6.1.1 SEPARATION OF POWERS REVISITED

As previously discussed in Chapter 4, the separation of powers doctrine rightly comes into prominent focus when discussing potential remedial action by the court, particularly upon a finding of unconstitutionality. The issue, as argued in Chapter 4, only becomes contentious upon contemplation by the court of how to cure the unconstitutional law or conduct of its inconsistency with the Constitution. Until this point, the court, in deciding issues of rationality, and in declaring such irrational law or conduct invalid (which it is mandated to do by s 172(1)), is performing no role or function which is not explicitly reserved to it by the constitutional text. Per the reasoning in *Obergefell*²²², *Glenister*²²³ and *Doctors for Life*²²⁴, when a court decides upon validity of law or conduct, it is performing exactly the role envisaged by the constitutional order, in that to do so is to uphold rights and perform an oversight function over the other arms of government. Deciding which remedial action is appropriate, is a different albeit connected matter, and one which requires a more nuanced appreciation of the role which the separation of powers plays at this juncture in a court's deliberation.

Having submitted that the government's prohibition of cannabis is not rational, and is not predicated upon a legitimate government objective (when compared to the government's position on alcohol and tobacco), it is trite that a finding of this nature would therefore warrant a declaration of constitutional invalidity by the court, per section 172(1). What remains unclear however, is what remedial action would be most appropriate, having due regard to the nuanced effect of the separation of powers on this decision.

²²² Supra note 80.

²²³ Supra note 76.

²²⁴ Supra note 78.

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The most effective manner of addressing this question, is to delve into the discussion about judicial deference. Given that the court's role is to devise remedial action for a successful litigant, the way the separation of powers manifests in judicial contemplation of remedial action, is through the court's deliberation of how much it should defer to the legislative arm of government in the remedy it constructs. A remedy which substitutes the decision of a court for the legislature's decision, will likely be too invasive, as it would not defer appropriately to the expertise and role of the law-making institution of a nation. On the other hand, a remedy which cannot offer proper vindication of rights for the successful litigant, would be a neglect of the court's duty to provide satisfaction through its eventual decision regarding remedy.²²⁵ Where the court draws its line between these two extremes will depend on the culture of judicial deference which the court adopts in its deliberations. Only through the adoption of a proper and coherent theory of judicial deference, can the court ensure that the separation of powers is properly and sufficiently preserved.

6.1.2 AN APPROPRIATE CONSTRUCTION OF JUDICIAL DEFERENCE: A DIALOGIC APPROACH.

Judge Dennis Davis penned an article ('To defer and then when? Administrative law and constitutional democracy') in which he addressed the issue of judicial deference with focus on the operation of deference within an administrative law context. It is submitted that his article contains an appropriate construction of judicial deference even in a rights litigation context, as the issues facing the court in administrative law contexts are highly similar to those experienced in a case like the one currently under consideration. Both contexts involve the need to remedy injustice caused by other branches of government, both involve (in some instances) considerations of remedy following a finding of irrationality and invalidity, and both involve the weighing up of the same concerns in devising 'just and equitable' remedies. Davis approvingly cites Hoexter's definition of deference: 'A willingness to appreciate the legitimate and constitutionally-ordained province of [government] agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect and to be

²²⁵ *Supra note 220.*

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sensitive in general to the interests legitimately pursued by [governmental] bodies and the practical and financial constraints under which they operate.²²⁶

A proper account of judicial deference is arguably one which is capable of constructing a dialogic relationship between the judiciary and the legislature, particularly in rights litigation cases. Our Constitution envisages interaction between the branches of government, and this interaction is described by Justice Ngcobo, as a constitutional dialogue between the arms of government.²²⁷ Courts are given the central role to uphold the Constitution and give life to its foundational values.²²⁸ It has the final word on whether an act of parliament is invalid or whether any exercise of public power was invalidly taken.²²⁹ All branches of government must effectively work together to uphold and enforce the Constitution and its values, and constitutional dialogue is a firm response to criticism that the courts usurp the functions of democratically elected government, when they pronounce on otherwise 'political' issues.²³⁰ The dialogic theory appreciates that judicial findings of invalidity are only the beginning of the process.²³¹ The proper application of the idea of a constitutional dialogue is that there is dynamic interaction between the branches of government: when the court declares something invalid, this ought to be followed by amendment or other action by parliament or the executive.²³²

The practical operation of this dialogic approach is found in the Constitution itself. As stated above, sections 8(3) and 172(1) provide that a court has the mandate to strike down or declare invalid any conduct or law which is inconsistent with the Constitution, and may also make any order that is just and equitable. These powers mean that the branches of government are drawn into a conversation whenever litigants believe the government has

²²⁶ DM Davis 'To defer and then when? Administrative law and constitutional democracy' (2006) *Acta Juridica* 23-40 at pp25-27.

²²⁷ S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) *Stellenbosch Law Review* 1.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid.*

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acted contrary to the Constitution, and this conversation affords the court an appropriate lighter touch through the discretion it has to devise a 'just and equitable' remedy. An example of this is found in section 172(1)(b), which permits a court, upon a finding of invalidity, to make an order suspending the order of invalidity such that the offending branch of government may remedy the defect – the court may also grant the government extensions of these time periods if reasonable to do so.²³³

Judicial deference, and the notion of constitutional dialogue, guard against the counter-majoritarian dilemma, particularly where the court is required to give a remedy to correct an unconstitutional *law*.²³⁴ This task runs the greatest risk of usurping the legislature's law-making function, in light of counter-majoritarian arguments. The counter-majoritarian argument holds that it is unacceptable for an unelected judicial bench to overrule the democratically elected legislature on governance matters.²³⁵ Governance matters would include how the legislature elects to regulate the affairs of society. The role of the court in declaring law or conduct invalid is unassailable, but this role does not extend to instructing the legislature on the best manner of correcting this defect where an entire legislative scheme is involved.

The court has the right and duty to declare the legislative scheme unconstitutional, insofar as it applies to cannabis consumption. Cannabis prohibition is not rational when compared to the treatment of alcohol and tobacco, therefore it is necessary for the court to declare that this is so, and invalidate the legislative scheme for this reason. What is impermissible, is for the court to proceed to dictate to the legislature exactly the finer terms of how this is to be corrected. This is not a constitutional dialogue, as it leaves little room for the legislature to respond in a constructive manner. In this circumstance it would either have to comply, or be seen to ignore the court's decision – both of which are equally unpalatable options.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

6.1.3 'JUST AND EQUITABLE' – EFFECTIVENESS AND PRESERVATION.

Arguably, a proper account of judicial deference will be one which best balances the need to vindicate fundamental rights (through recourse to an effective remedy) against the need to preserve the distinction between correcting unconstitutional law or conduct, and overstepping the boundary between arms of government. Just as the meaning of 'just and equitable', in the context of remedies, depends on a proper construction of judicial deference, so too does a proper account of judicial deference depend on the proper interpretation of 'just and equitable' in section 172(1). The Rule of Law requires that justice be delivered effectively to those who seek recourse to its structures and institutions, and accordingly, where there is infringement of rights by the conduct or decisions of relevant persons or bodies, effective remedies must be considered and dispensed by the court which finds that such infringements have occurred. The law acknowledges that where there is a right there is a remedy, and without an effective remedy that is of practical effect for the litigants, justice does not avail them in their cause and is for all intents and purposes, withheld.²³⁶

The approach required to grant an effective, 'just and equitable' remedy can be illustrated with reference to the approach to remedies of the Constitutional Court in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC):

' An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape new remedies, if needs be, to achieve this goal'.²³⁷ [Emphasis added].

²³⁶ *Supra* note 220.

²³⁷ *Supra* note 220 at para 69.

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Fose illustrates that a ‘just and equitable’ remedy must be robust enough to successfully, and sufficiently, vindicate the infringed right. The need to ‘forge new tools’ and ‘shape new remedies’ illustrates further that the discretion vested in the court is intended to serve a particular purpose.²³⁸ This purpose must be to restore the litigant, as much as is reasonably possible, to the position he or she was in before the right was infringed.²³⁹ By way of example, if a person was a criminal before the court’s pronouncement, he or she must, at the very least, cease to be considered one in the eyes of the law, after the court has deemed that law unconstitutional. In this context, the equality provision would require that cannabis consumers not be treated as criminals where consumers of alcohol and tobacco are not. For this to be satisfied, the court’s remedy must be robust enough to ensure that this can indeed be so.

On the other hand, a proper construction of judicial deference in the context of remedies must also consider that section 172(1) does not mean that the remedy can amount to a substitution of the court’s vision of governance for the legislature’s (the court cannot replace the legislature’s vision for its own where there are other ways of curing the defect). The legislature, and democracy, per *Obergefell*, are the primary engines for reform in the law, as it is the legislature which is democratically elected, and therefore carries a higher law-making pedigree. The implications of this for the interpretation of section 172(1), and for a proper account of judicial deference, include that highly invasive remedies (which amount to a usurpation of the legislature’s law-making power), ought not to be contemplated by the court. What constitutes ‘highly invasive’ will, it is submitted, depend on the circumstances of each case, and stands to be determined casuistically. The following parts of this dissertation will be dedicated, by way of a conclusion, to exploring several remedial options available to the court, and assessing exactly where to draw the line between a sufficiently robust remedy, and one which is too invasive.

²³⁸ *Supra* note 220.

²³⁹ *Supra* note 220.

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6.2 INAPPROPRIATE REMEDIAL ACTION.

6.2.1 'READING DOWN': PREVENTION RATHER THAN CURE

As stated previously in this dissertation, 'reading down' is not so much a constitutional remedy as it is a preventative measure. Reading down the language of a statute so as to bring about compliance with the Constitution prevents any declaration of invalidity, in accordance with the principle of avoidance.²⁴⁰ This principle aims to prevent a statute from being declared unconstitutional, by reading the language of the statute in a manner which saves it from invalidity, but still accords with the legislature's purpose behind the enactment of the offending legislation. Per Justice O'Regan:

'What may be the ordinary meaning of the statutory provision is restricted to avoid an unconstitutional consequence. Reading down a statute does not require any order or remedy; it is something that is done in the text of the judgment itself with no consequential relief to follow.'²⁴¹

It is submitted that in the present case, reading down is wholly inappropriate. As stated earlier in this chapter, the unavoidable outcome would certainly need to be a declaration of invalidity of the legislative framework insofar as it concerns cannabis. This is so for reasons which are evident from the principles involved in reading down a statute, outlined equably by Justice O'Regan:

'One of the questions that arises is how far a court should go to find a meaning consistent with the Constitution in the face of the express language in the provision itself. In South Africa, two principles are in tension here: the desirability of avoiding a declaration of invalidity which, is at least at one level, an affront to the legislature who enacted it and therefore a result that courts, for reasons of institutional comity and respect, prefer to avoid; the other is the rule of law principle that legislation should be clear and intelligible upon its face. Attaching a meaning to the words in a

²⁴⁰ Op cit note 54.

²⁴¹ K O'Regan '*Fashioning constitutional remedies in South Africa: some reflections*' 2011 Middle Temple and SA Conference: Remedies in *Advocate* April 2011 issue at pp41-42.

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legislative provision that is different to the ordinary import of the words may well impair this principle.²⁴²

In the present instance, reading down the language of the Schedules of the Drugs and Drug Trafficking Act so as to interpret the legislative scheme as non-inclusive of cannabis, would be in flagrant contradiction of the legislature's obvious intention in this regard. By including cannabis in the schedules to this Act, and other component Acts of the legislative scheme, the legislature's clear intention is to prohibit cannabis. Any attempt to read the schedules as a non-prohibition of cannabis would, therefore, constitute a higher affront to the legislature than would a declaration of invalidity, properly suspended (to be discussed in further detail later in this chapter).

As stated above, it is simply not possible to preserve the intention behind the statutes whilst attempting to construe a prohibition as anything other than a prohibition. Any attempt to read down the schedules to this and other component Acts within the legislative scheme as excluding cannabis, would be such an attempt, and would overstep the clear boundaries set for the court when performing such an interpretative exercise. Whilst a declaration of invalidity is an 'affront to the legislature',²⁴³ it is at least one which the court is directed to make by the Constitution section 172(1), one which is contemplated by the Constitutional framework, and one which the court may make, without stretching to the very limits the bounds of statutory interpretation.

6.2.2 SEVERANCE: A SEVERE ENCROACHMENT

Severance is one example of a remedy employed by the court once it has granted a declaration of invalidity. It is necessary at this point to recall the principles and procedures incumbent upon such a declaration. Per Justice O'Regan:

'Once a court has concluded that a statutory provision is inconsistent with the Constitution, section 172 states that it must declare the provision inconsistent. The court does, however, have a range of choices as to the precise terms of the declaration of constitutional invalidity and any ancillary relief. The two obvious

²⁴² Ibid.

²⁴³ Op cit note 241.

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decisions for a court are: the scope of the order of invalidity; and the effective date of the order of invalidity: should it come into operation immediately with prospective effect only, should it have retrospective effect, or should it be suspended for a period to give the relevant authorities time to correct the constitutional problem.’²⁴⁴

As will be submitted later in this chapter, a suspension of the order of invalidity would be the most appropriate remedy in the present case, as it is through this remedy that the court may vindicate the rights infringed by the legislative scheme (by declaring it unconstitutional) whilst still preserving an appropriate level of judicial deference to the legislative arm of government. This being so, severance as a remedy is not one which is capable of preserving appropriate judicial deference, given the test that is used to determine whether severance can be employed as a remedy. On this issue, O’Regan states the following:

‘Severance involves either excising words or provisions from a statute so as to remove the cause of constitutional complaint (actual severance); or notional severance that provides that a particular meaning or effect of a legislative provision is deemed to be ‘notionally severed’ from the ambit of the provision. Actual severance is a useful jurisprudential technique that allows courts to target the offending words in a provision and sever them and has been used on numerous occasions by the Constitutional Court to eradicate unconstitutional provisions (or parts of them) from statutes. Severance can sometimes be quite extensive. The test for severance is the simple test whether the ‘bad can be severed from the good’ in such a manner that what remains is still consistent with the legislative purpose.’²⁴⁵

The legislative purpose behind cannabis prohibition has already been discussed at length in Chapters 4 and 5. It is evident that the purpose of the legislative scheme, regarding cannabis, is to prohibit. The government itself claims that such a purpose is legitimate in defence of the legislative scheme in *Prince*, and would likely do so again in a future

²⁴⁴ Op cit note 241 at p42.

²⁴⁵ Op cit note 241 at p42. See also *Coetzee v Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (3) SA 631 (CC) at para 16.

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challenge. The question which arises then, per the test for severance employed by the court, is this: can cannabis be severed from the relevant schedules whilst still upholding the purpose of the legislation? I would submit that the answer is one of two things: either this is not possible without eroding the State's purpose behind including cannabis in the schedules, or it is possible, but not without a severe incursion into the territory of the legislature and an insufficiently deferential approach toward the separation of powers. The government has a prerogative to regulate substances as it wishes, this much is true. The government does not however, have the right to prohibit substances when such prohibition is not rationally connected to a legitimate government purpose, and this is the justification for a declaration of invalidity.

This notwithstanding, I submit that the court does not have the right to trespass so far into the territory of the legislature as to employ severance in a case of this nature when it comes to remedy. The court upholds rights in such cases by declaring the unconstitutional law or conduct invalid, but I submit that it ought not to go further and decide how this defect is to be corrected, particularly when to sever the defect would lead to an unmanageable state of affairs for the government. To simply excise cannabis from the schedules would create a legal vacuum of sorts, whereby there would be no regulation of cannabis whatsoever – this in turn would simply exacerbate the problems which would be better curbed through regulation (such as law enforcement, budget and regulatory logistics). The choice of how to cure the defect – through regulation rather than prohibition – ought rightly to lie with the legislature, and for a court to employ the remedy of severance would remove this choice from the realm of the legislature in an undesirably undemocratic manner. As Van Staden stipulates, regarding typical remedies employed by the court:

‘A declaration of invalidity to the extent of the inconsistency is the default remedy following a finding of inconsistency and will only be departed from if a more limited order (such as reading in, notional or actual severance, suspending or limiting the retrospective effect of the order, or a combination of these) will provide a better outcome.’²⁴⁶

²⁴⁶ M Van Staden, *The Role of the Judiciary in Balancing Flexibility and Security* 2013 *De Jure* 471 at p484.

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Where a court issues a declaration of invalidity to protect rights, but ought to tread lightly on the terrain of the legislature, it is possible to suspend the order of invalidity subject to notional or temporary severance of the offending parts of that legislation in order to cure the worst rights violations resulting therefrom, while the legislature is afforded an opportunity to correct the defect.²⁴⁷ On this subject, Van Staden notes that Bishop posits the following:

‘...When a court awards this hybrid remedy it has already concluded that reading in, notional or actual severance is an inappropriate permanent measure but requires a “stop-gap measure” until the legislature gets around to deciding how to cure the defect.’²⁴⁸

In this regard severance could be usefully employed to cure the defect created by including cannabis in the legislative scheme’s prohibition of dangerous dependence producing substances. I submit however, that this would open the door to the same problem posed by severance as the sole remedy, and not just as a ‘stop-gap’ measure. The problem is that to simply sever a substance which has been prohibited, from the legislative scheme, and it being a substance around which there is absolutely no regulatory framework, without further qualification or structural oversight, would be to create a lacuna in the law enforcement sector. This would be impossible to regulate at a later stage without serious budgetary and logistical implications.

6.3 STRIKING AN APPROPRIATE BALANCE: SUSPENSION OF THE ORDER OF INVALIDITY AND THE NEED FOR A STRUCTURAL INTERDICT

This chapter has briefly discussed certain preventative and remedial action open to the court when faced with a challenge to conduct or law under the Bill of Rights, and when declaring the law or conduct unconstitutional and invalid to the extent of the inconsistency. In this chapter, a discussion was conducted briefly regarding the reasons for the unsuitability of these actions referred to. Reference was made to the possible effective use of a declaration of invalidity, coupled with suspension of the order of invalidity, and use of

²⁴⁷ Ibid at p484 footnote 71 citing Bishop in ‘Remedies’ in *Constitutional law of South Africa* (Woolman et al eds) (2008) 9-125.

²⁴⁸ Ibid.

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supervisory relief, also known as a structural interdict, to cure the defect in the legislation. Reference was also made to the need to preserve the Separation of Powers, through employment of an appropriate level of judicial deference. Section 172(1) of the Constitution instructs the Court, when it determines that law or conduct is inconsistent with the Constitution, to declare such law or conduct invalid to extent of the inconsistency.²⁴⁹ The one remedy which cannot be used at the Court's discretion, is the declaration of invalidity. A court must declare unconstitutional law or conduct invalid. The manner of curing the defect is at the discretion of court.

I submit that the way in which a court can best preserve an appropriate level of judicial deference in cases such as this one, is to declare the offending legislation invalid and to suspend the order of invalidity to allow Parliament to correct the invalid law through means of its own choosing, subject to supervision by the Court. This is because the task of rectifying the legislation which prohibits cannabis is not one which will be imposed on the Court, but will be imposed on the Legislature. As such, the Court cannot correct the defect of its own will and in the manner it prescribes, without placing an onerous burden on the legislature.

The court may dictate what law is unacceptable in an egalitarian society based on the values of dignity, equality and freedom²⁵⁰, and may dictate that such law may no longer be upheld. The court however, may not always stipulate the manner of achieving legislative conformity with the Bill of Rights, without Court placing itself firmly in the terrain of the Legislature, which has the power and function under the Constitution to make law and to regulate the conduct of South African society. This is not permissible under the Separation of Powers, and as such, the correct remedy ought to include the deferral to the Legislature, of the manner in which the constitutional inconsistency is to be cured.

This is only truly capable of achievement through a suspension of the order of invalidity by the Court, because the legislature is best placed to make polycentric decisions which involve considerations of both a logistic and budgetary nature, and which require further information than may be provided on the papers of such an application before the

²⁴⁹ Constitution S 172(1).

²⁵⁰ Constitution S 1 founding values.

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court.²⁵¹ This being so, a Court may nevertheless impose conditions on such a suspension, and may even order suspension either in part or in full depending on the circumstances of each case.²⁵² The manner of imposing conditions may include supervisory orders and mandatory relief.²⁵³ The degree and content of these orders in turn also depends upon the overriding consideration when ordering remedial action: the need for the remedy to be just and equitable in the circumstances.

Roach and Budlender have examined this species of relief in detail. At the opening of their paper, they state the following regarding this kind of remedial action:

*'In Minister of Health v Treatment Action Campaign [(2002) (5) SA 721 (CC)]... the Constitutional Court indicated that 'a mandamus and the exercise of supervisory jurisdiction' may be necessary to ensure an effective remedy for a breach of any constitutional right, including a socio-economic right. A year later, the Supreme Court of Canada held in Doucet-Boudreau v Nova Scotia (Minister of Education) that a trial judge could, after ordering that a government build minority-language schools, retain jurisdiction over the case and require the government to report back to the judge with affidavits on its progress in complying with the order.'*²⁵⁴

In both South Africa and Canada therefore, Courts have demonstrated that supervisory relief is sometimes necessary when curing invalid law or conduct. What this also illustrates, is that this type of relief is most effective in the arena of complex, polycentric decision-making, such as the regulation of the conduct of society in regard to education and in this case, substance consumption. It has also been used most effectively in the arena of socio-economic rights disputes.²⁵⁵ Most recently, the court has made use of the supervisory order in the case of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief*

²⁵¹ *Supra note 84*. The Court ordered that separate argument be given on remedy at a later stage, given the complexity and seriousness of the decision, and the pursuant need for further information. At paras 96-98.

²⁵² Constitution S 172(1).

²⁵³ Roach, Budlender *'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?'* (2005) 122 SALJ 325.

²⁵⁴ *Ibid.*

²⁵⁵ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

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Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (6) BCLR 641 (CC). After hearing argument on appropriate remedial action, the court said the following:

*'Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.'*²⁵⁶

The Court continued:

*'Once a finding of invalidity . . . is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered.'*²⁵⁷

Although the Court in these excerpts discussed remedy in the context of invalid administrative action, the same principles hold true for any polycentric issue. It holds true for socio-economic rights decisions, as evidenced by the decisions in *TAC* and *Grootboom*, and it similarly holds true in cases where social and political rights are at issue. This is evidenced by the approach of the court in the case of *Minister of Home Affairs and Another v Fourie and Another* 2006 (3) BCLR 355 (CC). The judgment of Sachs J gives insight into how the court has injected advisory paragraphs into its remedial orders, even when suspending the order of invalidity to give the legislature complete independence its decisions of how to cure the defect:

'... in exercising its legislative discretion Parliament will have to bear in mind that the objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms... The second guiding consideration is that Parliament be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner

²⁵⁶ *Supra* note 84 at para 30.

²⁵⁷ *Supra* note 84 at para 31.

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that in its context and application would be calculated to reproduce new forms of marginalisation...'²⁵⁸

Despite the fact that Sachs J concludes that supervisory relief would not be appropriate in the context of same-sex marriages²⁵⁹, I submit that in the context of the current issue, the Court would be faced with a markedly different context. The prohibition of cannabis use does not merely impact on the dignity and status in law of cannabis users, in the manner that the lack of marriage equality impacted on same-sex couples. Same-sex couples were not in a position where their choices, although unjustly not provided for and protected by law, resulted in deprivation of their liberty and freedom of movement. Cannabis users, under the prohibition, are liable to be sentenced to heavy fines and imprisonment.²⁶⁰ The remedy which the court constructs, ought therefore to take into consideration the harsh nature of the consequences of a lack of supervisory relief. Should the court merely suspend the order of invalidity with no recourse to supervisory or structural relief, the worst of the right's violations resulting from the unconstitutional prohibition would not cease, and the relief granted would be ineffective.

To illustrate the need for supervisory relief in instances where there is an urgent need to prevent further violations of rights, Roach and Budlender discuss the Constitutional Court's decision in *TAC*, and note the Court's reasoning at para 129 that:

*'... a structural interdict should be granted where 'it is necessary to secure compliance with a court order'*²⁶¹

The Constitutional Court has also stipulated that:

*'A supervisory order will also be appropriate where the facts indicate that it is 'inadvisable for the court to assume' that the order will be carried out promptly.'*²⁶²

²⁵⁸ *Minister of Home Affairs and Another v Fourie and Another* 2006 (3) BCLR 355 (CC) at paras 149-150.

²⁵⁹ *Supra* at paras 154-155.

²⁶⁰ S40(1)(h) of the Criminal Procedure Act 51 of 1977.

²⁶¹ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 129.

²⁶² *Sibiya v Director of Public Prosecutions (Johannesburg High Court)* (Constitutional Court) Case CCT 45/04, judgment delivered 25 May 2005 cited in Roach and Budlender *op cit note 253* at pp332-333.

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In the present case it is not difficult to imagine that an order declaring the prohibition of cannabis invalid would be slow in being rectified by the legislature, and not unjustifiably so. There would be a plethora of considerations of logistic and budgetary nature, to which Parliament would need to apply its mind, before a final correction to the offending legislative regime could be effected. This notwithstanding, it could not be justifiable to permit the continuation of criminal sanctions being imposed on users of cannabis. The only manner in which the court could effectively account for these realities would be to suspend the order of invalidity, but to order structural relief at least insofar as the imposition of criminal sanctions is concerned. This is illustrated by Roach and Budlender:

‘A second circumstance in which a structural interdict is warranted is where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance... The consequences of non-compliance are irremediable, and so serious that it is necessary to go beyond the mandatory order and do whatever is reasonably possible to ensure effective compliance.’²⁶³

The imposition of prison time and heavy fines are arguably ‘irremediable’, and therefore the court’s remedy should be supervisory to the extent that it precludes the further imposition of such sentences and fines from the date of the court’s order. The Court’s order in fact need do no more than to ensure the freedom of cannabis users until and including such time as the government devises its own plan to cure the offending legislative regime. This is actually more beneficial to both cannabis users and the State, as it prevents the worst of the violations of the rights of cannabis users, and allows the State the time and space it requires to formulate a permanent plan:

‘The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution... there are interesting parallels between the ability to suspend declarations of invalidity (which is recognized in s 172 of the South African

²⁶³ Op cit note 253 at pp333-334.

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*Constitution) and the use of structural interdicts. In both cases courts are concerned about providing government some flexibility in order to select the precise means to achieve compliance with the Constitution, while also ensuring that compliance is indeed achieved within a finite and reasonable period of time.*²⁶⁴

Roach and Budlender pay particular attention to the manner in which the Constitutional Court cured the defect of an Ordinance in the case of *Zondi v MEC for Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC):

‘... [t]he court found that neither reading-in nor severance would be an appropriate remedy. The only appropriate remedy was to strike down the offending provisions, which were an integral part of the scheme of the Ordinance. The question was what should happen in the interim, while the legislature was attending to the matter. On the one hand, the infringement of constitutional rights could not be allowed to continue... On the other hand, there was a need to protect landowners against trespassing animals. The solution arrived at by the court was to declare the relevant sections of the Ordinance invalid, to suspend the order of invalidity for a period of twelve months, and to provide that pending the enactment of remedial legislation the Ordinance was to be applied in a specified manner...’²⁶⁵

The upshot of this chapter therefore, is that it has been shown through reference to academic works as well as the jurisprudence of the Constitutional Court, that the most effective relief a court could grant in the present case would be a suspension of the order of invalidity coupled with supervisory or structural relief. This structural relief would only need to prevent continuation of the worst aspects of the prohibition of cannabis use, namely the imposition of criminal sanctions on cannabis users. The legislature would retain the discretion, subject to court supervision, regarding the manner of curing the defect in the legislative scheme. This would fulfil the requirement in section 172(1) of the Constitution – that the court grant a ‘just and equitable’ remedy. It would be ‘just’, because the court would effectively provide justice to the victims of the legislative scheme, by ceasing the worst of the right’s violations through necessary supervisory relief. It would also be

²⁶⁴ Op cit note 253 at p334.

²⁶⁵ Op cit note 253 at p335.

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‘equitable’ because in suspending the order of invalidity for an appropriate period (dependent upon the circumstances), the court would leave the polycentric aspect of curing the legislative scheme to the legislature – the institution constitutionally mandated to create and modify the law.

7. CONCLUSION:

The case of *Prince*²⁶⁶ was the first in South Africa to bring before the court the question of the status of cannabis use and consumption. As has been shown, this case demonstrated the court’s unwillingness to consider the decriminalization of cannabis for a small section of the population, and the failure of the litigants to successfully challenge the applicable legislative scheme under the auspices of the right to freedom of religion. This dissertation’s title (*Decriminalisation of Cannabis: High Time to Revisit Prince*) equably described the focus of this study. This dissertation canvassed a challenge to the legislative scheme which prohibits cannabis in South Africa.

The dissertation addressed some of the necessary component parts of an argument which could be brought before a court in an attempt to achieve a declaration of invalidity of the legislative scheme insofar as it refers to cannabis, with the ultimate goal being decriminalization of cannabis for personal use and consumption. This dissertation, rather than being a study on the policies of, and comparative benefits to, nations which have already taken steps to decriminalize or legalize cannabis, has comprised a snapshot of the minimum necessary contents of an argument which would have a reasonable prospect of success were it to be brought before a court with the necessary jurisdiction to pronounce on such a constitutional issue.

In Chapter 1, the introductory chapter, I set out the differences between decriminalization and legalization of cannabis, and briefly outlined the reasoning behind the need to first achieve decriminalization before any attempt at full legalization may be made. I also canvassed the history of cannabis prohibition in South Africa, in order to lay a contextual foundation for the ultimate challenge to the legislative scheme, based on certain rights in the Bill of Rights. It became evident from this chapter that the government purpose

²⁶⁶ Supra note 2.

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behind prohibition of cannabis, stems from a bad history of racist influences amongst other tainted legal, psychological and anthropological research. It further became evident, that the success of the potential challenge will depend largely on the incorporation of this contextual study into the matrix of Constitutional argument based largely on contemporary studies of the comparative effects of cannabis, alcohol and tobacco, measured against the constitutional standards provided by the Bill of Rights.

In Chapter 2, I conducted analysis of the original *Prince* case. This analysis included a consideration of the challenge mounted by Prince and others against the legislative scheme which prohibits cannabis. In this analysis, I assessed the merits and failures of Prince's case, based on the reasoning of majority and minority judgments of the Constitutional Court in the matter. Further to this, I attempted to distinguish the original challenge from the one under discussion in this dissertation, and it is now clear that the challenge envisaged in this dissertation has a greater prospect of success before a court than did the challenge mounted by Prince.

In Chapter 3, I have address several underlying concepts which are brought to bear in the judicial mind when any human rights challenge is contemplated by a court. At a minimum these include: the necessary distinction between a challenge under s 8 of the Constitution (dealing with the direct application of the Bill of Rights), and one brought under s 39 of the Constitution (which involves an indirect application of the Bill of Rights); The role of international law in rights adjudication and the corollary need to consider international law; The role of foreign law in rights adjudication, and the accompanying danger of reliance on foreign law where the jurisdictions are vastly different; Considerations of public opinion and the separation of powers (with its ancillary consideration of judicial deference).

These concerns must be addressed in order to better frame any challenge of this nature, for in any number of judgments given by South African courts in rights litigation, these concerns pervade the language of judgments and often sway the course of a judgment when properly considered and applied. This chapter also served to elucidate the reasons why, for the purposes of this dissertation, it was unnecessary and beyond its scope to consider all the rights under which a challenge to the legislative scheme may be mounted. This chapter outlined the reasoning behind the decision to focus exclusively on

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the right to equality, and specifically on the requirement of rationality contained in s 9 (1) of the Constitution.

In Chapter 4, the right to equality was examined in close detail. More particularly, this chapter addressed an argument based on a broader account of the requirement of rationality in section 9(1) of the Constitution, and attempted to show two things in this regard: Firstly, under a broader account of rationality, a court must not only consider the *stated* purposes provided by the State (in an attempt to prove that a purpose behind differentiation between classes of persons is legitimate), but must consider the objective evidence which relates to these purposes, and make its evaluation of legitimacy accordingly;

Secondly, a consideration of recent case law proved that this broader construction of the rationality analysis under section 9(1), is in fact already contemplated by the Constitutional Court, or even if it is not, it nonetheless has not been ousted by the same court in its reasoning. This chapter also set up the necessary comparators required to apply this construction of the rationality analysis, namely alcohol and tobacco. The State differentiates between cannabis users, and users of tobacco and alcohol, and it is therefore impossible to judge rationality of the differentiation without due recourse to a comparative framework between these three substances, which is evident from this chapter.

In Chapter 5, the rationality analysis was applied. This was done by addressing the government's stated purposes behind the differentiation between cannabis on the one hand, and alcohol and tobacco on the other hand. These purposes were then tested against objective contemporary evidence, legal argument and research, based on modern data and international law discussion. The conclusions reached in Chapter 1 were reconsidered and interwoven with the other evidence which militates against the legitimacy of the government's stated objectives.

In Chapter 6, a brief consideration of possible remedial action was put forward. This was necessary, as it has been demonstrated that, owing to considerations of judicial deference associated with the separation of powers, a litigant may well succeed on the merits of his case, yet still fail at the stage of remedial action. A fine line is required to be drawn between vindicating rights, and affording sufficient respect to the boundaries of the

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judicial function. To this end, a number of select and most-of-often employed remedies were examined briefly. A determination was reached that the remedy most capable of maintaining the delicate balance between the court's role as the arbiter and guardian of the Constitution, and the need to afford due deference to the legislative arm of government, would be one of a declaration of constitutional invalidity of the legislative scheme insofar as it relates to cannabis, coupled with the necessary restrictions and qualifications. Such restrictions involve a suspension of the order of invalidity for a designated period, coupled with the necessary interim relief. This interim relief would ideally consist of a structural interdict by the court, which would also be subject to amendment on application where reasonably necessary.

Ultimately, the matter of whether a potential challenge to the prohibition of cannabis would be a success or a failure, is one which lies solely at the discretion of the court which eventually hears the matter. Whilst the outcome may be uncertain, this dissertation has at least proposed some arguments which may persuade a court of the need to re-address the cannabis prohibition, and I submit further that a challenge to the prohibitive legislative scheme cannot be far away. My argument may not be one which is guaranteed success, but very few arguments of this nature ever can truly be guaranteed to secure a victory for a litigant. What I hope this dissertation has proved however, is that there is at least one plausible argument to be made for the decriminalization of cannabis, and that whatever the eventual outcome, this has proved that it is indeed high time to revisit the case of *Prince*, and so many thousands of other South Africans who share his predicament.

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