

Minor dissertation:**Criminalising cannabis in South Africa: a history and post-*Prince* discussion**

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## Table of Contents

I.	Introduction.....	3
II.	History of (criminalising) dagga in South Africa .....	5
	1. Before the white man came – pre-colonial conditions.....	6
	2. Van Riebeeck is here – has anything changed? .....	8
	3. The start of the period of prohibition – dagga as the ‘social evil’ .....	9
	4. What Prince had to face – the legal framework before September 2018.....	13
III.	Analysis of the punishments – dagga as the black sheep among drugs? .....	17
	1. Story of an inappropriate imbalance .....	18
	2. Medical reasons for justifying harsh punishments? .....	20
	3. The argument of youth protection.....	24
	4. Dagga as a non-white problem?.....	26
	5. Conclusion .....	31
IV.	Times are changing – the period of decriminalisation has begun.....	32
	1. <i>Prince I</i> .....	32
	2. <i>Prince II.1</i> – High Court .....	34
	3. <i>Prince II.2</i> – Constitutional Court.....	38
V.	From harsh punishments to decriminalisation – what’s in it for the criminal justice system? .....	42
	1. The possible impact of Sonke Gender Justice.....	47
	2. The newly introduced Cannabis Bill.....	49
VI.	Conclusion .....	52
VII.	Bibliography.....	56

## I. Introduction

In present times, dagga is found everywhere, be it in the form of news in the press or South African Police Service (SAPS) media statements, controversial expressions in private conversations, or only as a smell that wafts towards you as you walk down the street. The herb was criminalised around 100 years ago, and its use has been punished ever since. It was partially decriminalised nearly two years ago as a result of case law. However, it seems that rumours and misconceptions about its effects and harm, as well as the exact legal situation, are still widely spread. It is important to engage with the misunderstanding around dagga and its supposed decriminalisation – this will be done in this dissertation.

When I started my research on the topic, it was difficult to find literature focusing on current changes. Basically, all the information that I could find was at least some years – if not decades – old and, thus, outdated. My contribution is to give an overview of the current legal developments, including their origins, for a better understanding of how all of these different stages and developments are tied together. Thus, this thesis is limited to providing new angles and connections. It aims to introduce new lines of reasoning as to the recent developments in light of long-past occurrences. This is in order to show how the past still affects the present. In my view, the scholarly literature on dagga is full of very specific research and tackles discrete issues but lacks an overall connection between the different scholarly papers and their findings to date, something which this thesis aims to provide. Finally, this thesis supports and substantiates the decriminalisation of cannabis and its benefits in South Africa.

The decision to write about this topic is based primarily on personal curiosity. In my home country, Germany, the use of cannabis is still a punishable offence, despite recurring and long-lasting debates. When I came to South Africa, I noticed how freely people deal with the topic and what a big presence dagga consumption has in many of their lives. This is very different to what I have experienced in my home country. Using the exciting idea of the comparative perspective to Germany, I started to research the topic of the decriminalisation of cannabis and soon came across the inevitable history of its former criminalisation. I was fascinated by this story with its clearly racialised roots, which is why I decided to take a closer look and engage with the topic of the criminalisation of dagga in South Africa as a whole.

I will commence this thesis by engaging with the historical background, where I will examine the route of the use and cultivation of dagga in South Africa as well as the history of how it came to be criminalised. After dealing with the legal development around dagga, I will compare it to other drugs, arguing that the harsh dagga legislation is deeply rooted in the colonial past and driven by various factors, one of them being racism. In the following sections, this thesis will discuss in detail the two recent judgements which partially decriminalised dagga,<sup>1</sup> a long-overdue step. The last chapter looks at the status of the criminal justice system in relation to the decriminalisation of dagga.

For reasons of consistency and comprehensibility, it is important to clarify some terms and explain their usage. First of all, I use the terms ‘cannabis’ and ‘dagga’ – how it is commonly referred to in South Africa – interchangeably, just as the legislation does.<sup>2</sup> In this context, ‘cannabis’ stands for the whole plant, *cannabis sativa*, or any part or product thereof. This term is also used in accordance with legal provisions.<sup>3</sup> *Cannabis sativa*, however, means ‘cultivated cannabis’ and is the plant usually referred to when speaking about dagga intoxication in South Africa.<sup>4</sup>

Further, there is the need to distinguish between – or rather, to determine the distinct meanings of – legalising a certain substance and decriminalising it. Whereas there has been disagreement about the exact distinction of illegality and criminalisation for centuries, it is not only suitable but important to clearly define the use of the terms within this dissertation. While legalisation includes permitting the substance or its use, possession, cultivation, etc., decriminalisation does not go that far. When decriminalising a substance or a certain use, the status of illegality is maintained. At

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<sup>1</sup> *Prince v Minister of Justice and Constitutional Development and Others; Rubin v National Director of Public Prosecutions and Others; Acton and Others v National Director of Public Prosecutions and Others* (4153/2012) [2017] ZAWCHC 30; [2017] 2 All SA 864 (WCC); 2017 (4) SA 299 (WCC), referred to as *Prince II. 1*, available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2017/30.html&query=%20Prince>, accessed on 05 January 2020; *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30 para 25, referred to as *Prince II.2*, available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2018/30.html&query=prince>, accessed on 10 October 2019.

<sup>2</sup> Part III of the Drugs and Drug Trafficking Act 140 of 1992.

<sup>3</sup> *Ibid.*

<sup>4</sup> Craig Paterson *Prohibition & Resistance: A Socio-Political Exploration of the Changing Dynamics of the Southern African Cannabis Trade, c. 1850 – the present*. (published master thesis, Rhodes University, 2009) 17.

the same time, there will be no criminal charges for decriminalised behaviour.<sup>5</sup> In this special case of decriminalising dagga in South Africa, it was explicitly held that even if charges are pressed, the constitutional right to privacy will serve as a valid defence.<sup>6</sup> In other words, when decriminalised, the substance or its use is still prohibited, but if used anyway, there will not be any criminal consequences in terms of punishment such as fines or incarceration.

In short, this thesis will be about the long-lasting demonisation of cannabis and the final relief in the form of decriminalisation, as illustrated by two judgements. We are already experiencing short-term benefits rooted in the decriminalisation such as the decreasing number of arrests for dagga offences and are eagerly awaiting further benefits. The next chapter will look at the historical background, not only demonstrating how dagga was criminalised, but also examining other socio-political developments surrounding the criminalisation.

## II. History of (criminalising) dagga in South Africa

The history of dagga in South Africa is a history of its criminalisation. The use of dagga as a drug attracts one of the harshest punishments. Its use and diffusion, as well as other characteristics, are tightly connected to the legislation surrounding it at any point in time. And still, for one to understand the ‘whole story’ around this demonised herb becoming the social evil it is seen as by many, it is essential to research what happened before dagga was made illegal. It is thus important to navigate its history in order to understand the contradictions arising around dagga.

This chapter will firstly examine the pre-colonial times, long before dagga was first mentioned in writing by Jan van Riebeeck and other settlers.<sup>7</sup> The use and diffusion of dagga during the early colonial period will be another focus, asking what, if anything,

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<sup>5</sup> Sultan Khan ‘Legalize It, Don’t Criminalise It: The Cannabis Discourse in South Africa’ *Acta Criminologica: Southern African Journal of Criminology* (2015) 171.

<sup>6</sup> *Prince II.2* supra note 1 para 113-14; News 24 ‘How the Western Cape High Court dagga judgment applies to you’ Daily Maverick 31 March 2017, available at <https://www.dailymaverick.co.za/article/2017-03-31-how-the-western-cape-high-court-dagga-judgment-applies-to-you/#gsc.tab=0>, accessed on 27 June 2020; Emma Charlene Lubaale, Simangele Daisy Mavundla ‘Decriminalisation of cannabis for personal use in South Africa’ (2019) 19 *African Human Rights Law Journal* 841.

<sup>7</sup> Hazel Crampton *Dagga: A Short History* (2015) 1; François Theron *The Dagga Problem: A Sociological Perspective with Special Reference To The Question Of Social Policy* (published master thesis, University of Cape Town, 1974) 97.

changed around the status of dagga due to the long-lasting occupation with its emerging economy. Finally, this chapter will evaluate the early legal regulations around dagga at the beginning of the 20<sup>th</sup> century as well as the further development of the legal framework up until 2018. With this, there will be a shift away from rather strictly historical matters and facts towards a more legal analysis.

### 1. Before the white man came – pre-colonial conditions

In 1658, Jan van Riebeeck made notes about a certain plant in his diary. These observations were to become famous for the first-ever written reference to cannabis in a South African context.<sup>8</sup> What this documentation does not reveal at first sight is that the herb commonly named dagga, had been cultivated and used long before this moment. When van Riebeeck arrived at the Cape, the history of dagga already went back hundreds of years.<sup>9</sup>

Bearing this in mind, one could get the idea that dagga is native to southern Africa. But this is wrong, as the plant is originally from Central Asia.<sup>10</sup> The exact diffusion and lines of how it spread are not agreed upon by scholars, especially when it comes to an exact ‘centre of origin’ as well as narrowing down the date of its first introduction.<sup>11</sup> There is some consensus, however, that by about 4200-4000 BC it had reached China, where records exist about the use of the plant as fibre.<sup>12</sup> Further evidence of its ancient use<sup>13</sup> as well as religious Hindu texts describing its creation<sup>14</sup> were found in India which leads to the assumption that the plant also reached India at an early point in time, if not being native to this area of Asia.

Growing and having been used in Asia for several centuries, the plant was only brought to the subcontinent by Arabs somewhere between the 12<sup>th</sup> and the 16<sup>th</sup> century<sup>15</sup> due to the spread of the Arab trading routes.<sup>16</sup> The early trading routes in southern Africa

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<sup>8</sup> Crampton op cit note 7 at 1; Theron op cit note 7 at 97.

<sup>9</sup> Theron op cit note 7 at 97.

<sup>10</sup> Paterson op cit note 4 at 17; Crampton op cit note 7 at 11.

<sup>11</sup> Compare, e.g., Crampton op cit note 7 at 11 and Paterson op cit note 4 at 17-8 for a detailed evaluation.

<sup>12</sup> Robert Connell Clarke as cited in Paterson op cit note 4 at 17-8; Crampton op cit note 7 at 11.

<sup>13</sup> Robert Connell Clarke as cited in Paterson op cit note 4 at 17-8.

<sup>14</sup> Crampton op cit note 7 at 11.

<sup>15</sup> Compare different opinions such as Crampton op cit note 7 at 14, Paterson op cit note 4 at 20, and Theron op cit note 7 at 97.

<sup>16</sup> Theron op cit note 7 at 97; also see Paterson op cit note 4 at 20.

brought the plant from the shores of the Indian Ocean,<sup>17</sup> especially today's Zanzibar and Mozambique,<sup>18</sup> into the heart of the African continent.

As competing as the opinions about the actual origin of the plant are, so too are the views regarding the origin of the name 'dagga'. One of the more plausible explanations is the one Theron picks up on in his thesis, being that 'dagga', as the Afrikaans people used to write it, comes from the Khoikhoi<sup>19</sup> (or Khoi) word 'dachah'.<sup>20</sup>

It seems certain, however, that nearly all the inhabitants of indigenous Southern Africa used the herb dagga, and used it for different reasons, such as recreational or medical ones.<sup>21</sup> It can rightfully be seen as an ancient custom.<sup>22</sup> This custom has been followed by, amongst others, the Khoi, the San, the Sotoh-Twana and Nguni.<sup>23</sup> The Khoikhoi and their use of dagga are also explicitly named by van Riebeeck in his journal. He seemed to be particularly interested in this unknown plant.<sup>24</sup> Whether it is, as Kowalski names it incorrectly, to believe that the Khoikhoi were the main cultivators of dagga in southern Africa<sup>25</sup> or that the Hancumqua actually cultivated the herb and only sold it to the Khoikhoi,<sup>26</sup> dagga, in any case, constituted a valuable trading commodity among various indigenous groups.

The exact use, as well as the social norms concerning dagga, differed from one ethnic groups to another.<sup>27</sup> Although it is difficult to access reliable details due to a lack of substantial written evidence, Peterson shows in his thesis that dagga managed to establish a certain cultural significance for indigenous communities, as it formed part of their regular customs.<sup>28</sup> The Zulu tribes, for example, encouraged their warriors to smoke dagga in order to increase their abilities and decrease their fear.<sup>29</sup> Other groups

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<sup>17</sup> Crampton op cit note 7 at 15.

<sup>18</sup> Theron op cit note 7 at 97.

<sup>19</sup> Due to its derogatory meaning, the term 'Hottentot', which was originally used by Theron, was replaced by the less compromising term 'Khokhoi' which stands for the same group of indigenous people.

<sup>20</sup> Theron op cit note 7 at 97; For more detailed discussions about the origin of the word 'dagga', see: Paterson op cit note 4 ch. 1.

<sup>21</sup> Jonathan Burchell *Principles of Criminal Law* 5 ed (2016) 821; Kelly Maxine Kowalski *Decriminalization of Cannabis – High Time to Revisit Prince* (published LLM thesis, University of Cape Town, 2016) 7.

<sup>22</sup> Theron op cit note 7 at 97.

<sup>23</sup> Crampton op cit note 7 at 10.

<sup>24</sup> Theron op cit note 7 at 97.

<sup>25</sup> Kowalski op cit note 21 at 7.

<sup>26</sup> Crampton op cit note 7 at 2.

<sup>27</sup> Theron op cit note 7 at 97.

<sup>28</sup> For more detail see Paterson op cit note 4 at 26-31.

<sup>29</sup> Theron op cit note 7 at 98.

such as the Nguni smoked dagga as a purely social custom and their members never used it while on their own.<sup>30</sup> In general, smoking dagga appears to have been a form of drug use which was often tightly linked to social situations<sup>31</sup> and, as this shows, was perceived to be a positive action. Although usually there were certain rules such as the prohibition of dagga for women or youths,<sup>32</sup> when smoked in moderation, dagga was not linked to any kind of reprehensible behaviour nor did it carry any stigma. It was used among the different ranks of a group and was not reserved for those in high office.<sup>33</sup>

The findings of this subchapter show how widely spread and ‘normal’ the use of dagga was in pre-colonial times. The herb was highly appreciated by people from different kinds of groups, as it was of great value both in terms of trading and personal use. During this time, there is no indication of the ‘evil’ that dagga would be viewed as in the future. And it is not that this different view could be attributed to a lack of understanding of the dangers or negative effects of its use amongst the indigenous people. On the contrary, there are records showing that some people abused the drug. When doing this in violation of the rights of others, these people were ostracised.<sup>34</sup>

## 2. Van Riebeeck is here – has anything changed?

One question is whether the widely spread use of and trade in dagga changed during the colonial era. To put it very briefly, the answer is no.

During the centuries following colonial settlement up until the early 20<sup>th</sup> century, the frequency of use did not decrease. Dagga also continued to be, as Crampton puts it, a ‘perfectly legal substance’.<sup>35</sup> Trading continued as freely as before, and there was no difference compared to the trade of other goods.<sup>36</sup>

Although the use among white settlers was at best of minor significance, there are historical reports about the old *Trekboers* sometimes even smoking dagga themselves

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<sup>30</sup> Ibid.

<sup>31</sup> See also Paterson’s descriptions in Paterson op cit note 4 at 29.

<sup>32</sup> Theron op cit note 7 at 98.

<sup>33</sup> Ibid.

<sup>34</sup> Theron op cit note 7 at 98-9.

<sup>35</sup> See Crampton op cit note 7 ch. 1, especially at 5.

<sup>36</sup> Kowalski op cit note 21 at 7-8.

for recreational purposes.<sup>37</sup> And even for those settlers not smoking it, they found ways to still profit from this entrenched economy. There is evidence, for example, that the white missionaries at former Klaarwater traded self-grown dagga from their church gardens with indigenous tribes such as the San or the Bushmen.<sup>38</sup> Others also cultivated it on their farms since it was very common and rather easy to grow and instead of using it themselves, they traded it or gave it to their labourers for whom it had personal value.<sup>39</sup>

During the colonial period, there was more data recorded<sup>40</sup> which makes research easier. Thus, assumptions about cultivation and trade are more reliable. Further, there are writings about all kinds of medicinal applications and effects,<sup>41</sup> published by highly valued academies such as *Die Suid-Afrikaanse Akademie vir Wetenskap en Kuns* as well as other advertisements in the press.<sup>42</sup>

All of this shows that up until this time, the perception of dagga by the white settlers was not negative at all; they used it as much as they could to their own advantage, and thus, in line with these values, did not criticise anything that strengthened their economy.<sup>43</sup>

### 3. The start of the period of prohibition – dagga as the ‘social evil’

The dominating attitude of the time can be described as justifying immoral behaviour for the sake of the colonialists’ own purposes. These particularly included the aim of maximising their own profits. At the beginning of the 19<sup>th</sup> century, this attitude started to change. Paterson claims that it is during this period that ‘one begins to find references to the settler’s cultivation of dagga being rendered with disdain’.<sup>44</sup>

Still, even a hundred years later, in the early 20<sup>th</sup> century, this increasing reprehension did not find its way into law. Even most magistrates’ reports from this time did not often engage with dagga. More emphasis was on the abuse of alcohol and issues

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<sup>37</sup> Kahn as cited in Crampton op cit note 7 at 6.

<sup>38</sup> Crampton op cit note 7 at 5-6.

<sup>39</sup> Paterson op cit note 4 at 34.

<sup>40</sup> Crampton op cit note 7 at 2.

<sup>41</sup> For more detail on these findings see Crampton op cit note 7 at 6.

<sup>42</sup> Kahn as cited in Crampton op cit note 7 at 6.

<sup>43</sup> Paterson op cit note 4 at 32-3.

<sup>44</sup> Ibid at 34.

following from that. Even though some magistrates called smoking dagga an ‘evil habit’, in general, there was not much attention raised around it.<sup>45</sup> Especially compared to other issues such as alcohol, the use of dagga was not seen as a major problem.

The first legal regulations concerning dagga were passed in 1903 by the Orange Free State and the Orange River Colony, both only prohibiting the action of dealing in dagga.<sup>46</sup> Apart from these, there was no legislation passed until the nationwide Customs and Excise Duties Amendment Act 35 of 1922<sup>47</sup> which, for the first time, prohibited the use and possession of ‘habit-forming drugs’ including dagga.<sup>48</sup> The bill also regulated the import, transport, and sale of these kinds of drugs, including cocaine, heroin, morphine, opium and other synthetic substances.<sup>49</sup> According to Chanock, the development of national legislation can be ascribed to moral panic arising out of public debates about links that were made between people being under the influence of dagga and the crimes they committed.<sup>50</sup> Taking it further, smoking dagga was now openly linked to the decreasing efficiency of labourers, especially those working on farms.<sup>51</sup> The plant, and all its derivatives were, therefore, and for explicit recommendation by the police, fully criminalised.<sup>52</sup> Interestingly, in advance of passing the Act, the intention of the legislature seemed to be that ‘moderate dagga smoking is of little importance from the point of view of public order and welfare’, and thus, the Act would not be enforced where this kind of moderate smoking was to be found.<sup>53</sup>

The cultivation of the drug, however, was not made illegal until six years later when regulations were legislated in the form of the Medical, Dental and Pharmacy Act 13 of 1928<sup>54</sup> to reinforce the prohibition of using or dealing in the so-called ‘habit-forming drugs’. This Act extended the powers of the magistrates’ courts, particularly in terms

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<sup>45</sup> Martin Chanock *The Making of South African Legal Culture 1902-1936* (2001) 92.

<sup>46</sup> Crampton op cit note 7 at 6-7; Burchell op cit note 21 at 822; The relevant Acts were the Prohibition Ordinance Act 43 in the Orange River Colony and the Dagga Prohibition Ordinance 48 of 1903 (O) in the Orange Free State.

<sup>47</sup> The Customs and Excise Duties Amendment Act 35 of 1922.

<sup>48</sup> Crampton op cit note 7 at 6-7; Burchell op cit note 21 at 822.

<sup>49</sup> Gerhard Kemp (ed), Shelly Walker, Robin Palmer et al. *Criminal Law in South Africa* 3 ed (2018) 488.

<sup>50</sup> Chanock op cit note 45 at 93.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* at 94.

<sup>53</sup> Union Archives MM 2372/22: 22/11/21; 12/12/22 as cited in Chanock op cit note 45 at 94.

<sup>54</sup> The Medical, Dental and Pharmacy Act 13 of 1928; Crampton op cit note 7 at 7; Kemp (ed), Walker, Palmer et al. op cit note 49 at 48; Burchell op cit note 21 at 822.

of possible punishment.<sup>55</sup> Surprisingly, the term ‘habit-forming drugs’ came up only once during the Parliamentary debate and the example mentioned was not even dagga, but cocaine.<sup>56</sup> It seems, however, as if legislators automatically included dagga among these drugs and no one raised an objection to its inclusion.

The need for the justification to include dagga became obsolete when it was included on the international list of ‘habit-forming drugs’.<sup>57</sup> The official inclusion had the effect that several newspaper articles claiming the harmlessness of the drug were being unheard. The issue seemed to be settled, although it actually was not at all.<sup>58</sup>

In 1937, the Weeds Act was passed, the process of which again, did not include any Parliamentary debate about the term ‘habit-forming drugs’.<sup>59</sup> What it did, however, was to significantly enhance the power of the police. It also emphasised newly added offences to illustrate the drastic nature of this regulation, and according to Paterson, ‘placed the onus on the occupier or owner of a property to prevent land being used to produce dagga, 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.’<sup>60</sup>

And still, the harshest piece of legislation was yet to come. In 1971, the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 was passed.<sup>61</sup> The bill was passed very quickly<sup>62</sup> and without significant debate, which again suggests consensus and a lack of coherent views or ideas. Burchell supports this view, naming growing concern among the population about the increasing use of and dealing in dagga as an impetus, particularly seeking stricter legislation.<sup>63</sup> But this public perception was misled because contrary opinions kept being unheard. The General Council of the Bar of South Africa, for example, expressed deep concern, especially regarding the fact that there was no consultation of any kind with the legal profession before the Act was passed. He further worried about the legal implications

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<sup>55</sup> Kahn as cited in Crampton op cit note 7 at 7.

<sup>56</sup> Paterson op cit note 4 at 53.

<sup>57</sup> Ibid at 54.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> The Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971.

<sup>62</sup> Crampton op cit note 7 at 37.

<sup>63</sup> Burchell op cit note 21 at 822.

and stressed ‘the necessity of retaining the fundamental principles of South African jurisprudence’.<sup>64</sup> The Prime Minister, whom the council turned to, decided, however, to ignore this. This, as well as the addition, ‘[...] even in this type of legislation’<sup>65</sup>, shows that the Act, indeed, was seen as significant and even though Parliament passed it quickly, there were grounds for further discussion and issues. Engaging more closely, it seems possible that the reason for this behaviour was driven by the idea of sparing public debate with possible loss of control regarding the outcome. This, however, does not appear in the discussion.

The reasons for the council’s concern, however, are easily comprehensible. The bill created three main categories of ‘potentially dangerous dependence-producing drugs’, like barbiturates, ‘dangerous dependence-producing drugs’, including cocaine, morphine and opium, and ‘prohibited dependence-producing drugs’, which included dagga and heroin. The third category was characterised as having no medical value.<sup>66</sup> The punitive jurisdiction was increased in general and the powers of investigation and interrogation were expanded.<sup>67</sup> Mandatory and extremely lengthy periods of minimum imprisonment without any option of a fine came into operation.<sup>68</sup> In addition, presumptions were made that clearly favoured the state.<sup>69</sup> First and foremost, the burden of proof was greatly eased for the state, putting it upon the accused, who now, contrary to the usual requirements in South African criminal law, had to prove their innocence instead of being proven guilty.<sup>70</sup> The Act furthermore included new regulations, expanding possible offences significantly, such as making it an offence to fail to report to the police any suspicion of contraventions of the Act in places of entertainment.<sup>71</sup>

As a consequence, there was virtually no more debate nor research avenues possible.<sup>72</sup> Particularly concerning was this development in comparison to other countries which seemed to be much further in their liberalisation concerning dagga and who continued developing towards that opposite direction of South Africa, further relaxing their

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<sup>64</sup> Kahn as cited in Crampton op cit note 7 at 38.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid at 39.

<sup>67</sup> Crampton op cit note 7 at 7; Kemp (ed), Walker, Palmer et al. op cit note 49 at 488.

<sup>68</sup> Crampton op cit note 7 at 39-40; Compare also Burchell op cit note 21 at 822.

<sup>69</sup> Kemp (ed), Walker, Palmer et al op cit note 49 at 488; Crampton op cit note 7 at 40; Burchell op cit note 21 at 822-23.

<sup>70</sup> Crampton op cit note 7 at 40; Burchell op cit note 21 at 822-23.

<sup>71</sup> Kemp (ed), Walker, Palmer et al op cit note 49 at 488.

<sup>72</sup> Crampton op cit note 7 at 44.

regulations.<sup>73</sup> A report released by the World Health Organization (WHO) around the same time that the Drugs Act was passed, indeed ‘indicated an association between dagga use and minor crimes/anti-social behaviour, but could not find no link between dagga use and major crime’.<sup>74</sup> At this time, international studies were the only possible source for such information. In South Africa, such scientific research was unimaginable.

Finally, in 1992, the 1972 Abuse of Dependence-producing Substances and Rehabilitation Centres Act was replaced by the Drugs and Drug Trafficking Act 140 of 1992,<sup>75</sup> due to the readmission of South Africa to the United Nations after the apartheid era ended. The Drugs and Drug Trafficking Act implemented the United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances.<sup>76</sup> Apart from some newly introduced regulations regarding trafficking and money laundering, however, nothing much changed compared to the legal framework which the 1972 Act had established.<sup>77</sup>

#### 4. What Prince had to face – the legal framework before September 2018

To cover the years in between, it is best to cite Crampton who claims in her book that ‘it is no exaggeration then to say that in 2015 South Africa’s drug laws remain virtually as draconian as they had been in 1971. And dagga remains the main target against which South African drug legislation is directed.’<sup>78</sup> Thus, cannabis is still seen as the social evil it has been seen as for so long.<sup>79</sup>

It is important to engage with the legal framework in more detail. Therefore, it is necessary to take a closer look at the specific rules which have been challenged. Within this, the relevant Acts of law are the Drugs and Drug Trafficking Act 140 of 1992 (the

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<sup>73</sup> Compare how Crampton describes contrary development all over the world in Crampton op cit note 7 at 41-3.

<sup>74</sup> Kahn as cited in Crampton op cit note 7 at 43-4.

<sup>75</sup> The Drugs and Drug Trafficking Act 140 of 1992.

<sup>76</sup> Burchell op cit note 21 at 823; Kemp (ed), Walker, Palmer et al. op cit note 49 at 489.

<sup>77</sup> Burchell op cit note 21 at 823; Kemp (ed), Walker, Palmer et al. op cit note 49 at 489; Crampton op cit note 7 at 45.

<sup>78</sup> Crampton op cit note 7 at 46.

<sup>79</sup> Ibid.

Drugs Act) and the Medicines and Related Substances Control Act 101 of 1965<sup>80</sup> (the Medicines Act).<sup>81</sup>

In 2002, Prince challenged section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act.

Section 4(b) of the Drugs Act reads as follows<sup>82</sup>:

‘No person shall use or have in his possession—

(a) [...]

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless—

(i) he is a patient who has acquired or bought any such substance—

(aa) [...]; or

(bb) [...],

and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner;

(ii) he has acquired or bought any such substance for medicinal purposes—

(aa) [...];

(bb) [...]; or

(cc) [...];

(iii) he is the Director-General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;

(v) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course

<sup>80</sup> The Medicines and Related Substances Control Act 101 of 1965.

<sup>81</sup> The following parts of this chapter are mainly borrowed from a previous research paper written during the course ‘Law & Society in Africa’, conducted during the first term of 2019.

<sup>82</sup> Section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992.

of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation; or

(vi) he has otherwise come into possession of any such substance in a lawful manner.’

To summarise section 4(b), one can say that it prohibits the use as well as the possession of cannabis (and any of the other dangerous dependence-producing substances) if none of the exceptions apply.

(The former) Section 22A(10) of the Medicines Act reads as follows<sup>83</sup>:

‘No person shall—

(a) acquire, use, have in his possession, manufacture or import any Schedule 8 substance except for analytical or research purposes and unless a permit for such acquisition, use, possession, manufacture or importation has been issued to him by the Director-General on the recommendation of the council; or

(b) acquire, import, collect, cultivate, keep or export any plant or any portion thereof from which any such substance can be extracted, derived, produced or manufactured, unless a permit to acquire, import, collect, cultivate, keep or export such plant or any portion thereof, has been issued to him by the Director-General on the recommendation of the council.’

Cannabis is one of the substances listed in Schedule 8 which is why these prohibitions include it as well.

The more recent High Court and Constitutional Court judgements, which will be evaluated in detail below, challenged section 4(b) and 5(b) of the Drugs Act as well as section 22A(9)(a)(i) or (10) of the Medicines Act.

Section 5(b) focuses on the prohibition of dealing in any of these dependence-producing substances, unless any of the exceptions apply and reads as follows<sup>84</sup>:

‘No person shall deal in ...

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

(i) he has acquired or bought any such substance for medicinal purposes-

(aa) [...];

(bb) [...]; or

(cc) [...],

<sup>83</sup> (The former) Section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965.

<sup>84</sup> Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992.

and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, transships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; or

(iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, transships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or Regulation.’

Thus, this section explicitly prohibits the dealing in dagga unless it includes one of the narrowly listed exceptions.

Section 22A(9)(a)(i) of the Medicines Act reads as follows<sup>85</sup>:

‘No person shall—

(i) acquire, use, possess, manufacture or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance unless he or she has been issued with a permit by the Director-General for such acquisition, use, possession, manufacture, or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7 or Schedule 8 substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research.’

Whereas (nowadays) Section 22A(10) of the Medicines Act reads as follows<sup>86</sup>:

<sup>85</sup> Section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965.

<sup>86</sup> Section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965.

‘Notwithstanding anything to the contrary contained in this section, no person shall sell or administer any Scheduled substance or medicine for [any purpose] other than medicinal purposes: Provided that the Minister may, subject to the conditions or requirements stated in such authority, authorise the administration outside any hospital of any Scheduled substance or medicine for the satisfaction or relief of a habit or craving to the person referred to in such authority.’

As Zondo ACJ puts it in the Constitutional Court judgement, ‘when read with Schedule 7 of GN 509 of 2003 published in terms of section 22A(2) of the Medicines Act, section 22A(9)(a)(i) is a prohibition of the acquisition, use, possession, manufacture or supply of, among others, cannabis.’<sup>87</sup>

Summarising, this subchapter shows how harsh the legal framework still is when it comes to dagga. Possible reasons for these draconian regulations shall be discussed and evaluated further in the next chapter.

### III. Analysis of the punishments – dagga as the black sheep among drugs?

As briefly shown in the previous chapter, punishments for the use and possession of dagga are harsh. This chapter will have a closer look at the punishments themselves that were implemented by the Drugs Act of 1992<sup>88</sup> and its predecessor – the Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971.<sup>89</sup> It is also important to compare the punishments to the sentences in relation to other drugs. This chapter will not only show the imbalance of treatment between different drugs but also ask for the *why*, the official as well as the unofficial reasoning, behind these strict punishments.

Various possible reasons as well as their particular impact on forming these rigorous laws, will be evaluated. After outlining the prevailing imbalance of punishments, the focus will be on the possible reasons which, over time, have repeatedly been mentioned in diverse (scientific) publications and have thus become more or less

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<sup>87</sup> *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30 para 25 available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2018/30.html&query=prince>, accessed on 10 October 2019.

<sup>88</sup> The Drugs and Drug Trafficking Act 140 of 1992.

<sup>89</sup> The Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971.

common arguments. These reasons to be evaluated are youth protection, medical reasons, and racism.

### 1. Story of an inappropriate imbalance

To summarise the findings made above, currently the legal basis to punish a person for using dagga or dealing in it is regulated in the Drugs Act of 1992 and the Medicines Act of 1965.<sup>90</sup> But in order to understand the punishments in light of their development and changes that were made (or not made), it is useful to briefly engage with the 1971 Act.

The 1971 Act, whose penalties were ‘intended to be severe’,<sup>91</sup> was already heavily criticised before it came into force.<sup>92</sup> The introduction of harsh punishments is assumed to be connected to previously rapidly increasing numbers of dagga offences.<sup>93</sup> Still, even an authority in the form of the Department of Social Welfare raised the question of whether increasing fines and imprisonment periods would be the most effective way to fight the numerous offences.<sup>94</sup> The Department suggested investigating the real causes of the issue through an exhaustive study.<sup>95</sup> Theron picks up on this thought in his thesis, saying that the increased offences were fundamentally a social problem to which authorities have responded with draconian measures. He sees severe punishments, especially if implemented for first offenders, as a danger due to them being stigmatising and (unfair) labelling.<sup>96</sup>

The Drugs Act of 1992 forms new categories of ‘dependence-producing substances’, ‘dangerous dependence-producing substances’ and ‘undesirable dependence-producing substances’. Dagga is listed in Part III, and thus, is part of the undesirable dependence-producing substances. The range of possible punishments includes imposing a fine, imprisonment, and both a fine and imprisonment. The amount of the possible fine is to be determined by the presiding officer. Concerning the imprisonment periods, up to 15 years are possible for the use of dagga and up to 25

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<sup>90</sup> The Medicines and Related Substances Control Act 101 of 1965.

<sup>91</sup> Dr Mulder as cited in Theron op cit note 7 at 125.

<sup>92</sup> Theron op cit note 7 at 129.

<sup>93</sup> Ibid at 111.

<sup>94</sup> Ibid at 116.

<sup>95</sup> Department of Social Welfare and Pensions *Drug Dependence and Some of its Concomitant Aspects in the Republic of South Africa* (1970) 24.

<sup>96</sup> Theron op cit note 7 at 146.

years for dealing in the drug. Particularly bearing in mind that the sale of dagga often constitutes the only source of income for many dealers, imprisonment of up to 25 years seems to be unbearably harsh. And it is part of the reality that even small-time dealers go to jail for their offences, many of them leaving as hardened criminals.<sup>97</sup>

At first, supporters of legalising or decriminalising dagga might regard the classification of dagga as being an 'undesirable dependence-producing substance' and not a 'dangerous dependence-producing substance' as a good thing. In former classifications, as shown above, it was indeed categorised as part of the more dangerous substances. This change of classification therefore could be seen as an achievement in terms of softening its status within the legal framework. However, it becomes clear that in fact, it does not make any difference. Admittedly, being classified as 'undesirable' sounds better and less harmful than being officially labelled as 'dangerous'. Still, both categories fall within the same range of punishments. The Act effectively only distinguishes between 'dependence-producing substances' on the one hand and 'dangerous dependence-producing substances' as well as 'undesirable dependence-producing substances' on the other hand. Further, dagga still finds itself to be in the same group of substances as Methamphetamine and Heroin, which was also one of the main critiques of the Act of 1971.<sup>98</sup> Alcohol, however, to which Minnaar compares dagga in order to explain what is meant by 'undesirable', is not listed at all, and thus is not considered as being part of any of those groups.<sup>99</sup>

At the same time, the development of the legal framework to become stricter not only bears various absurdities within itself and in relation to the number of criminal offences, but also with regard to the general global trend. In 2015, Minnaar raised the issue that many countries in the world are moving towards the decriminalisation of certain drugs which are perceived as less harmful, such as dagga, while they are inflexibly strict with harder drugs such as heroin. This is a trend that has been completely ignored by the South African authorities where these substances are still treated as equally dangerous and harmful.<sup>100</sup>

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<sup>97</sup> Anthony Minnaar, 'The Legalisation and Decriminalisation of Marijuana (Dagga): A Review of American and South African Experiences' (2015) *Acta Criminologica: Southern African Journal of Criminology* 147.

<sup>98</sup> Theron op cit note 7 at 129.

<sup>99</sup> Minnaar op cit note 97 at 142.

<sup>100</sup> *Ibid.*

To conclude this section, the legal development proves itself to be inconsistent and inappropriate. This leaves us with the assumption that there must have been other reasons for the legislature to allow for such harsh punishments. Some reasons that possibly had an impact will be evaluated in the following subchapters.

## 2. Medical reasons for justifying harsh punishments?

One possibility in terms of these other reasons seems to be that there are medical reasons justifying the harsh punishments. It is important to evaluate the different sources according to the time they were written in and with respect to the standard of scientific knowledge at the time of publication. What was once a scientific fact may by now have been proven to be wrong.

At this time, the use of dagga and its medical effects have not been fully explored, regarding both the mental and the physical effects.<sup>101</sup> What seems to be certain, however, is that the effects differ significantly from one person to another and even for the same person on different occasions. These differences can also, but not exclusively, depend on variables such as the method and amount of consumption.<sup>102</sup>

Yet, medical reasons are frequently discussed when it comes to the question of if, and how, to punish the use, possession, and cultivation of dagga. For that reason alone, we need to further explore them as a possible reasoning behind the severity of the penalties.

Starting in the late 19<sup>th</sup> century, the idea of cannabis causing insanity was spread and adopted by the British colonies.<sup>103</sup> The first publications were written by the government in South Africa, raising the concern that dagga caused insanity, particularly amongst the ‘natives’ in India; these concerns were claimed to be well-researched.<sup>104</sup> Further, there were other very detailed descriptions of how indentured Indian workers’ abilities markedly decreased due to the use of dagga.<sup>105</sup> Concerning these descriptions, however, it is not clear which can really be proven and which are fabricated and altered and passed on from one person to another.<sup>106</sup> It seems that a lot

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<sup>101</sup> Crampton op cit note 7 at 32; Khan op cit note 5 at 168.

<sup>102</sup> Crampton op cit note 7 at 26.

<sup>103</sup> Paterson op cit note 4 at 43.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid at 43-4.

<sup>106</sup> Ibid at 44.

of those ‘findings’ were based on the interpretation of other stories and concocted, depending on how they fitted into the bigger picture. Conclusions were drawn from circumstantial evidence at best. And then, they were spread under the umbrella of scientific research. Similar descriptions, however, can be found regarding labourers in the Cape in the early 20<sup>th</sup> century.<sup>107</sup>

But the most shocking aspect was that the Natal Indian Immigrants Commission, responsible for most of the publications at this time, was not even concerned about the people or dagga causing insanity. Their main concern was how dagga had a negative impact on their workers’ work performance and was a trigger for violence.<sup>108</sup> This shows that those quasi-scientific reasons for the upcoming concern regarding dagga did not even circle around the health of their labourers but only on the employers’ own economic well-being.

In the early 20<sup>th</sup> century, the first systematic investigation regarding the effects of dagga was published by C.J.G. Bourhill in the form of a thesis he submitted to the University of Edinburgh.<sup>109</sup> It concentrated on the use of dagga among the natives of South Africa and claimed to evaluate the findings in a scientific manner. His findings showed that dagga played a crucial role in producing ‘dagga insanity’<sup>110</sup> as well as other types of insanity such as schizophrenia, dementias and manic depressive and delusional psychoses. Continuing, he clarifies that dagga is not likely to be the only cause for these insanities but is only one important factor adding to the ‘causal trinity – environment, nidus and vice’.<sup>111</sup>

In his thesis, Paterson’s extensive engagement with Bourhill’s study shows that those medical findings, at least from today’s perspective, are nothing but ostensible.<sup>112</sup> They bare profound racist ideologies hiding under the cover of quasi biological reasoning. And yet, Bourhill’s views were widely spread and highly esteemed. They represented the state of both the scientific and official debate at that time.<sup>113</sup> Thus, they were assumed to be accurate scientific data that is dangerous for both the individual and

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<sup>107</sup> Chanock op cit note 45 at 93.

<sup>108</sup> Paterson op cit note 4 at 45.

<sup>109</sup> Paterson op cit note 4 at 36; Charles John George Bourhill *The Smoking of Dagga (Indian Hemp) among the Native Races of South Africa and the Resultant Evils* (published thesis, University of Edinburgh, 1913).

<sup>110</sup> Bourhill op cit note 109 at 3, part II ch 3.

<sup>111</sup> Bourhill as cited in Chanock op cit note 45 at 93.

<sup>112</sup> Paterson op cit note 4 ch 2.

<sup>113</sup> Chanock op cit note 45 at 92; Paterson op cit note 4 at 37.

society due to causing insanity. Contrary views and lines of argumentation, which also already existed during this time, were ignored. Adopting this perspective, Bourhill's findings, which raised medical concerns, could be an explanation, or at least part of it, of why harsh laws were introduced, even though it took nearly 60 more years until the Dependence-producing Substances Act of 1971 was introduced.

Theodore James, publishing many of his articles regarding cannabis around 1970, had already discussed that the lack of first-hand clinical assessments were a barrier to a profound critical evaluation.<sup>114</sup> He also emphasises the disagreement amongst scholars regarding the question of dagga being harmful or not.<sup>115</sup> In his thesis, written in 1974, Theron further raises the issue of the lack of investigation into dagga. He quotes the Department stating that 'it is generally accepted that the use of dagga causes psychological dependence'.<sup>116</sup> At the same time, he criticises the lack of investigation into dagga smoking, and thus, brings up the question of why dagga was characterised as a prohibited dependence-producing substance in terms of the Dependence-producing Substances Act of 1971. In his view, the inclusion was not based on enough evidence.<sup>117</sup> This shows that there were indeed other, highly educated, voices challenging the official view. However, there is no evidence that these voices were heard, or that they were included in any debates.

Today, dagga and its effects are, at least, better known than in the 1970s. What we know now, however, nearly exclusively focuses on chronic heavy dagga use by habitual users, meaning those who smoke on a daily basis.<sup>118</sup> Within this group of users, dagga is believed to increase the symptoms of chronic bronchitis, cause impaired respiratory function, cancer, and cardio-vascular disease, decrease resistance to infection, lower testosterone secretion, and sperm production as well as disrupt the ovulatory cycle in females.<sup>119</sup> In terms of behaviour, smoking cannabis very heavily can lead to more distinct cognitive impairment, confusion, amnesia, delusions, hallucinations, anxiety, and agitation as well as schizophrenia.<sup>120</sup> But again, these consequences only concern habitual users smoking every day over a long period of

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<sup>114</sup> Theodore James 'Dagga: A Review of Fact and Fancy' (1970) *S.A. Medical Journal* 578.

<sup>115</sup> *Ibid* at 576-8.

<sup>116</sup> The Department of Social Welfare and Pensions as cited in Theron *op cit* note 7 at 115-6.

<sup>117</sup> Theron *op cit* note 7 at 116.

<sup>118</sup> See Khan *op cit* note 5 at 168.

<sup>119</sup> Hall & Solowij, Parry & Myers as cited in Khan *op cit* note 5 at 168.

<sup>120</sup> Ashton as cited in Khan *op cit* note 5 at 168.

time. This type of smoking increases various risks but does not definitely lead to any of the above-mentioned diseases and impairments. Recreational, and thus occasional, use, on the other hand, does not cause these particular risks if not for those smoking during adolescence and young adulthood.<sup>121</sup>

Modern studies do not show a connection between the recreational use of dagga and violent or aggressive behaviour.<sup>122</sup> Therefore, this connection, as declared in past studies, is to be refuted. Even the World Health Organization report of 1971 supports the finding that drinking alcohol, which is widely accepted in society, is more likely to lead to violence than smoking dagga.<sup>123</sup>

Nowadays, supporters of a change of categorisation of dagga and moderation of the laws or even decriminalisation of the herb base their arguments in particular on comparisons to legal drugs such as alcohol, caffeine, and tobacco. They do this to put dagga into the same context as legal substances which, in some circumstances, have a more lethal effect. Thus, it seems that they try to demonstrate how dagga is relatively harmless for adult users, unless smoked excessively.

One of the biggest fears surrounding dagga still seems to be the issue of dagga probably being a gate-way drug.<sup>124</sup> This means that people, especially of a rather young age, start with smoking dagga and end up being addicted to more harmful and dangerous drugs such as heroin or morphine. Although there is no proof in the form of a direct connection between dagga and dangerous drugs to be found for this theory yet, it is a common part of anti-decriminalisation argumentation.<sup>125</sup>

What will not be evaluated in any detail here is the wide-ranging medicinal use of dagga which also bares uncountable advantages. This would go beyond the scope of this thesis and has already been exhaustively assessed by various scholars.<sup>126</sup>

Concluding, one can say that the discussion regarding the effects and medical risks of dagga lacks research. In 1974, Theron already suggested the ambiguity regarding dagga's medical effects to be crucial for the hesitation in terms of a possible

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<sup>121</sup> Taylor, Iversen as cited in Khan op cit note 5 at 169.

<sup>122</sup> Crampton op cit note 7 at 30.

<sup>123</sup> Ibid at 28.

<sup>124</sup> Paterson op cit note 4 at 1; Khan op cit note 5 at 177.

<sup>125</sup> Paterson op cit note 4 at 1.

<sup>126</sup> For more detail on this see e.g. Crampton op cit note 7 ch 7 and Khan op cit note 5 at 169.

legalisation of dagga.<sup>127</sup> This thought ignores the official position on dagga during that time, namely that it is very harmful to an individual's health. The scientific findings constituting the official view, however, were probably mostly driven by a profoundly racist ideology and it seems that contrary opinions were not heard. Thus, medical fears and ambiguity could indeed have been a reason for the harsh laws that came into force, although the line of argument would have lacked stringency, even at that time. At least today, we have enough scientific foundation to certainly say that dagga is by far not as dangerous as was estimated in the 20<sup>th</sup> century. With all that we know, medical reasons cannot justify such harsh punishment, at least not standing by themselves. They indeed could form part of a whole consistent line of argument based on different reasons. But at the end of the day, I have to say that they do not seem to be enough to still uphold such draconian laws.

### 3. The argument of youth protection

Having drawn the conclusion that medical reasons might be part of the argumentation providing the basis for harsh laws, but that they are not likely to justify them on their own, it is necessary to consider further possible reasons. Another one could lie in the argument of youth protection.

Paterson engages with The Report of the Inter-Departmental Committee on the Abuse of Dagga (RICAD) from 1952. He claims that dagga abuse by youths used to be tightly connected with lack of occupancy and supervision.<sup>128</sup> Nearly twenty years later, just prior to the implementation of the Dependence-producing Substances Act of 1971, Dr Mulder stated at Stellenbosch University that '[w]e dare not let hundreds of young lives be sacrificed on this modern altar of self-destruction'.<sup>129</sup> He referred to the Hippie-movement of the 1960s and 70s, when many young people were seen as especially vulnerable in terms of dagga abuse. For the first time, the discussion focused on white youths too, who were rebelling against their parents and smoking dagga heavily.<sup>130</sup> This development might have justified the call for more youth protection

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<sup>127</sup> Theron op cit note 7 ch 3.

<sup>128</sup> The Report of the Inter-Departmental Committee on the Abuse of Dagga (RICAD) as cited in Paterson op cit note 4 at 57.

<sup>129</sup> Cape Times as cited in Theron op cit note 7 at 123.

<sup>130</sup> For more detail see e.g. Theron op cit note 7 at 123, Crampton op cit note 7 at 31, Paterson op cit note 4 ch 3.

with stricter laws in order to gain more control. Still, the laws were not only directed at the youth but also at every mature person, being part of the target group. Because of this, it seems questionable whether youth protection had the most significant impact. In addition, the argument used to implement such draconian laws for the protection of young people is not very convincing.

More recent studies show that dagga use ranks second to alcohol and that this use is particularly alarming among young people between the age of 13 and 19. Within this age group, the use is five to ten percent higher than amongst adults.<sup>131</sup> Further, when smoking dagga heavily at a relatively young age, the risk of not finishing high school and experiencing instability in later jobs increases.<sup>132</sup> Also, the medical risks, as already mentioned above, are much higher when abusing dagga in adolescence. Particularly concerning psychological disorders, connections can be drawn to cannabis abuse at a relatively young age.<sup>133</sup> Taking these findings seriously, they might provide a sufficient basis to uphold the strict laws we have. In other words, if the argument of youth protection was not enough to introduce the laws, it might be enough to maintain them at the present time.

Countering this thought, it is important to note that even today youth protection occurs more as a supporting argument. It cannot be founded as the leading reasoning in justifying the harsh dagga laws, as there does not seem to be any focus on it. Additionally, it would make more sense to actually target the youth if protecting them was the primary purpose. But the laws are written and executed for everyone, of all ages. This argument clearly shows that youth protection cannot be the main goal behind them.

Concluding, youth protection has the potential of being the main reasoning behind the strict laws as medical and social findings show. But considering how the laws are designed today, this argumentation does, by no means, seem to have priority.

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<sup>131</sup> Peltzer and Ramlagan as cited in Khan op cit note 5 at 172; Iversen as cited in Khan op cit note 5 at 169.

<sup>132</sup> Hall & Solowij as cited in Khan op cit note 5 at 168.

<sup>133</sup> Semple, McIntosh & Lawrie as cited in Khan op cit note 5 at 169; Iversen as cited in Khan op cit note 5 at 169.

#### 4. Dagga as a non-white problem?

With the unsatisfactory findings made in the previous subchapters, it is obvious that there must be at least one other (main) reason why the government has had to impose and maintain such harsh laws. Another thesis, which will be proven to be overwhelmingly significant and correct, is that the main reasoning behind the laws concerning dagga is racism. Dagga has been demonised by white governments for a long time. It was seen as a non-white problem and experienced racialised prohibition. It is safe to say that colonialism was founded on a hierarchy of colour.<sup>134</sup> The colonialists expected other 'racial' groups to be useful to them; their doing was oriented for their own protection, at the expense of others.<sup>135</sup> At the same time, the interaction between the different 'races' was kept to a minimum. The fears of the colonialists regarding dagga were wide-ranging. And yet, during these times, up until the 20<sup>th</sup> century, they can be broadly categorised into the fear of insanity, labourer indolence, violence, and degeneration.<sup>136</sup> The white community connected the indolence of their labourers to smoking dagga instead of looking for other reasons such as poor nutrition, poor medical care or poor living conditions.<sup>137</sup> Blacks and Coloureds were considered to be more 'primitive' than the white ruling class, and thus, more 'savage'.<sup>138</sup> Paterson describes the general idea as follows: 'if criminals were like savages, then all savages were potential criminals'.<sup>139</sup> This view, as well as the idea that dagga would enforce inner, bad character traits, was heavily loaded with racial prejudice, although it was not seen like this at the time. Or even if it was, such prejudice was deemed acceptable. The colonists' ideology of a natural hierarchy was supported by the quasi-scientific research at this time, as already described above. Especially Charles Darwin, who today is best known for his contribution to the science of evolution, planted and watered this ideology with the studies he published at the end of the 19<sup>th</sup> century.<sup>140</sup> All of this led to the recommendation that dagga be prohibited.<sup>141</sup>

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<sup>134</sup> Crampton op cit note 7 at 27; Paterson op cit note 4 at 39-40, 49.

<sup>135</sup> Paterson op cit note 4 at 49-50.

<sup>136</sup> Ibid at 50.

<sup>137</sup> Crampton op cit note 7 at 28.

<sup>138</sup> Paterson op cit note 4 at 38-9; Crampton op cit note 7 at 27.

<sup>139</sup> Chanock as cited in Paterson op cit note 4 at 39.

<sup>140</sup> Paterson op cit note 4 at 38-9, 46, 118; Crampton op cit note 7 at 27.

<sup>141</sup> Paterson op cit note 4 at 43; Crampton op cit note 7 at 28.

Presumably, above all stood the fear of contact between the different racial groups, leading to moral degeneration and a break of the cultural norms of the white community.<sup>142</sup> Non-whites such as the Khoikhoi, Xhosa, and San were seen as inferior to the white colonialists. Since dagga was presumed to lower self-control, the ruling-class was afraid that (non-white) dagga users would breach the barriers they constructed between the groups.<sup>143</sup> Hence, this might have a negative impact on the members of such presumed higher order, so the fear that this would lead to their moral degeneration.

These descriptions show the increasing racialisation in various sectors of society. Already at the end of the 19<sup>th</sup> century, these racist views had climbed to new heights. Dagga, admittedly rarely smoked by the white population, was widely seen as a non-white problem only. The white population mostly associated it with those racial groups they considered to be inferior. Therefore, it was important to them to create and keep a clear distance between these groups of different backgrounds, especially between themselves as a supposedly superior group, and the inferior groups comprised of other races. Hence, the motivation for prohibiting dagga was to be found in the colonists' benefit from exploiting other racial groups, while maintaining a presumably safe distance, and thus, minimising the threat originating from these. In other words, the colonists did not want to renounce the advantages which exploiting other racial groups gave them but wanted to preserve a certain distance between them so as not to degenerate themselves. The threat they saw in the dagga usage of other groups was to be kept at a distance.

Then, by 1921, a real panic arose concerning the use of dagga and the threat it constituted to the white ruling class.<sup>144</sup> Since this needed to be controlled, it is interesting to see how the demonisation of dagga correlated with increasing systematic racial discrimination and new upcoming laws within the next decades, building the foundation for the latter apartheid era.<sup>145</sup> Criminalising dagga was, therefore, an important step in maintaining and even expanding the divide between the different groups populating South Africa.

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<sup>142</sup> Crampton op cit note 7 at 28-9; Paterson op cit note 4 at 39-40, 46, 48, 50.

<sup>143</sup> Crampton op cit note 7 at 28-9.

<sup>144</sup> Paterson op cit note 4 at 52.

<sup>145</sup> Crampton op cit note 7 at 26-7; Paterson op cit note 4 at 119-20.

These fears were also heavily influenced by the criminological thinking at that time and its pseudo-scientific basis.<sup>146</sup> The targets of criminal investigation were generally found amongst blacks, coloureds, and poor whites, in other words, marginalised groups according to the understanding of the white upper class.<sup>147</sup> Criminality, not only regarding dagga, was assumed to be ‘infectious’ and ‘spread from lower races to higher’.<sup>148</sup> Comments such as ‘[t]he Native view that there is nothing reprehensible about dagga-smoking in itself, as distinct from smoking to excess which is frowned upon, has not been changed by the fact that the law of the white man now forbids the practice’<sup>149</sup> demonstrate vividly how racial tensions and feelings of being superior to other groups defined the tone. Publications with chapters headed ‘Crime in Relation to Race and Nativity’<sup>150</sup> or ‘The Negro and Crime’<sup>151</sup> are more examples of the pervading atmosphere. It also shows that the general idea in terms of criminology was a question of race, and not only concerning cannabis.

When Apartheid became consolidated, these developments were also further entrenched. Dagga was still firmly linked to the underclass.<sup>152</sup> But since Apartheid officially introduced a hierarchy between different racial groups and separated these wherever possible, the direct connection between dagga and the separation of those groups established a certain fear as well. The government was afraid dagga could encourage political discontent and protest.<sup>153</sup> In a similar development earlier that century, the white ruling class feared a breach of the separation of racial groups. They were worried that breaking dagga laws could easily lead to also breaking Apartheid laws.<sup>154</sup> Thus, dagga became more and more of a threat to the all-white government and its establishment. This was supported by the fact that dagga was still very suitable for the masses and its use was widely spread. It, therefore, needed to be even more controlled.

In 1952, the Report of the Inter-Departmental Committee on the Abuse of Dagga (RICAD) was published.<sup>155</sup> It set the tone and initiated discussions for several decades

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<sup>146</sup> Chanock op cit note 45 at 69; Paterson op cit note 4 at 118-9.

<sup>147</sup> Chanock op cit note 45 at 69, 76, 77.

<sup>148</sup> Chanock as cited in Paterson op cit note 4 at 46.

<sup>149</sup> Van Schalkwijk as cited in Theron op cit note 7 at 103.

<sup>150</sup> Sutherland, E. H., and Cressey, D. R. as cited in Paterson op cit note 4 at 39.

<sup>151</sup> Taft as cited in Paterson op cit note 4 at 39.

<sup>152</sup> Crampton op cit note 7 at 31.

<sup>153</sup> Ibid at 30.

<sup>154</sup> Ibid.

<sup>155</sup> The Report of the Inter-Departmental Committee on the Abuse of Dagga (RICAD) of 1952.

from that year onwards.<sup>156</sup> Already in the preamble to the first chapter of the report, it was basically stated that dagga was assumed to be a non-white problem.<sup>157</sup> This reflected the view and ideology of the apartheid establishment, while contrary studies or ideas did not find their way into the report.<sup>158</sup> Thus, the commission which published the report was supposed to work in a certain way, as it had a racialised mandate.<sup>159</sup> As Paterson puts it, the report seemed ‘to reflect an attempt to reconcile the deracialised social sciences of the post-war years with the increasingly racialised politics of the newly established apartheid state’.<sup>160</sup> In terms of dagga, the commission found that it was presumed to be the least dangerous of habit-forming drugs and that when it was smoked in moderation, the effects were not serious.<sup>161</sup> They even concluded that it might be no more harmful than smoking tobacco.<sup>162</sup> And yet, the commission did an about-face on the very same page of its report, returning to previously stated arguments concerning the great dangers of overindulgence, as if to refute its own initial conclusions.<sup>163</sup> It also emphasised that dagga indeed would produce moral degeneration.<sup>164</sup> Since this reasoning does not seem very conclusive and there seems no plausible reason for it, the actual motive behind it might be racism. Dagga was referred to as ‘the evil’<sup>165</sup> in an attempt to maintain the fear of it. A new term introduced in the report was ‘respectability’ which was also linked to the use of dagga in a way that the use of dagga was thought to lead to decreasing respectability.<sup>166</sup> This, however, was again solely connected to non-whites. Hence, the thinking of racial hierarchies was further entrenched with new figures. In general, this ideology was covered but not openly stated.<sup>167</sup> But still, these views are the only ones that were included in the report. Another argument supporting this is that Bourhill’s thesis, which has been evaluated above, was not only used by the commission but exclusively

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<sup>156</sup> Paterson op cit note 4 at 55.

<sup>157</sup> Theron op cit note 7 at 101.

<sup>158</sup> Paterson op cit note 4 at 58.

<sup>159</sup> Ibid at 55.

<sup>160</sup> Ibid.

<sup>161</sup> RICAD (1952) as cited in Paterson op cit note 4 at 56.

<sup>162</sup> Ibid.

<sup>163</sup> RICAD op cit note 154 at 42.

<sup>164</sup> RICAD (1952) as cited in Paterson op cit note 4 at 56.

<sup>165</sup> Paterson op cit note 4 at 56.

<sup>166</sup> Ibid at 57.

<sup>167</sup> Ibid at 58.

reprinted for it.<sup>168</sup> The outcome of the report was the recommendation of almost draconian laws.<sup>169</sup>

In the 1960s and 1970s, dagga politics experienced significant changes due to the hippie movement arising. Suddenly, white middle-class youth started using dagga.<sup>170</sup> It seems possible that now that their own children were smoking dagga, the establishment focused on protecting them instead of solely oppressing other racial groups. This could even be seen as a reason behind the harsh Act introduced in 1971. And in a way it was true, namely that whites wanted to protect their youth. But instead of fearing negative medical effects, this wish had other causes. The real reasoning behind presumably necessary protection was based on the old fear of cannabis usage leading to degeneration. In other words, white people wanted to protect themselves from losing control and degenerating, as, in their opinion, were non-white dagga users.<sup>171</sup> This reasoning is profoundly racist and contemptuous. At the same time, the use of dagga became a statement for political activism and radicalism; it was linked to opposing the establishment.<sup>172</sup> Its use was seen as an expression of scorn for the law.<sup>173</sup> Thus, seeing their authority being endangered, the apartheid state made the prohibition of dagga part of their political agenda.<sup>174</sup> For the first time, this was not only directed against non-white racial groups but also white middle-class kids who were challenging Apartheid South Africa. Therefore, these developments can at least be seen as being part of the harsh legislation implemented in 1971.

Although this last paragraph shows that it was not all about disguised racism, most of the given legislation was. In general, dagga was seen as a problem and as endangering the claim to power by the white colonists. Different racial groups being in close contact and mixing was to be prevented by all means. The prohibition of dagga through such harsh measures was supposed to secure control and separation. The outcome was that deeply racist laws were designed to oppress racial groups other than the white ruling class. This is why it is true to say that dagga experienced racialised prohibition.

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> Crampton *op cit* note 7 at 31; Paterson *op cit* note 4 at 58.

<sup>171</sup> Paterson *op cit* note 4 at 118-9.

<sup>172</sup> Kowalski *op cit* note 21 at 14.

<sup>173</sup> Paterson *op cit* note 4 at 121.

<sup>174</sup> *Ibid* at 120.

## 5. Conclusion

As evaluated in this chapter, we cannot claim, as yet, to fully understand dagga nor know about its impact without exception.<sup>175</sup> Besides the reasons mentioned above, the lack of research might also have supported the emergence of draconian dagga laws. When James pointed out the small number of first-hand clinical observations, he demonstrated how Bourhill's pseudo-scientific work lacked sufficient research to provide scientifically solid proof.<sup>176</sup> And as time passed and the laws became stricter, the situation concerning the drug did not change for the positive. The significance of dagga increased, correlating to many articles and bodies of research until, in the 1970s, a decline of articles was experienced. If this was due to the harsh new laws or if the laws were implemented due to the former increasing amount of research, is indeed hard to say.

Dagga was made illegal so that any research on it was severely curtailed, or was deemed illegal too,<sup>177</sup> as dagga had a stigma attached to it.<sup>178</sup> And because of too little research on the herb regarding both, the positive as well as the negative effects,<sup>179</sup> it remained unknown and feared.<sup>180</sup> Interestingly, this development occurred in contrast to many other countries, where dagga continued to be investigated.<sup>181</sup> Hence, it would not be surprising if a lot of the fear concerning dagga came from too little research. In addition to the significant reasons evaluated above, this reason can, therefore, be seen as a legitimate cause for the laws remaining so strict for the past 50 years.

Dagga is indeed the black sheep amongst drugs, with punishments being disproportionately severe for various reasons. These different reasons go hand in hand, led by pure racism. As already said in the famous Dagga-couple case and the campaign which followed, today's laws 'are unjust, irrational and based on outdated propaganda. These laws are rooted in our colonial past and its racist agenda.'<sup>182</sup>

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<sup>175</sup> Khan op cit note 5 at 168.

<sup>176</sup> James op cit note 114 at 578.

<sup>177</sup> Crampton op cit note 7 at 30; Khan op cit note 5 at 168.

<sup>178</sup> Khan op cit note 5 at 168.

<sup>179</sup> Ibid at 172.

<sup>180</sup> Crampton op cit note 7 at 30.

<sup>181</sup> Khan op cit note 5 at 172; Minnaar op cit note 97 at 131.

<sup>182</sup> Minnaar op cit note 97 at 145-6.

#### IV. Times are changing – the period of decriminalisation has begun

The legal situation described above has experienced massive changes due to two recent court judgements that partially decriminalise dagga. The first of these landmark judgements is the High Court ruling *Prince v Minister of Justice and Constitutional Development and Others; Rubin v National Director of Public Prosecutions and Others; Acton and Others v National Director of Public Prosecutions and Others*<sup>183</sup> (hereafter referred to as *Prince II.1*) handed down in March 2017 which implemented the partial decriminalisation and was confirmed by the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton*<sup>184</sup> (hereafter referred to as *Prince II.2*) in September 2018.

Because of the great impact these decisions have had on the legal development regarding cannabis, they will be summarised as well as discussed in more detail within this chapter. In order to comprehensively understand the reasoning behind the partial decriminalisation of dagga, it is also important to consider 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<sup>185</sup> (hereafter referred to as *Prince I*) decided in 2002 which, to a certain degree, paved the way for the decriminalisation to be implemented years later.

##### 1. Prince I

In *Prince I* from 2002, Garreth Prince, a South African Rastafarian, applied to be admitted as an attorney. Within the process of application, he disclosed two previous

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<sup>183</sup> *Prince v Minister of Justice and Constitutional Development and Others; Rubin v National Director of Public Prosecutions and Others; Acton and Others v National Director of Public Prosecutions and Others* (4153/2012) [2017] ZAWCHC 30; [2017] 2 All SA 864 (WCC); 2017 (4) SA 299 (WCC), available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2017/30.html&query=%20Prince>, accessed on 05 January 2020.

<sup>184</sup> *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC), available at: <http://www.saflii.org/za/cases/ZACC/2018/30.html>, accessed on 05 January 2020.

<sup>185</sup> *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, available at: <http://www.saflii.org/za/cases/ZACC/2002/1.html>, accessed on 05 January 2020.

convictions for possessing dagga. With cannabis being part of his religion, he also stated that he intended to continue the use of such.<sup>186</sup> The applicant argued that certain provisions, especially of the Drugs Act of 1992<sup>187</sup> and the Medicines Act of 1965<sup>188</sup>, conflicted with his constitutional right to freedom of religion. His focus was on the use and possession of dagga, not on trading it. The Constitutional Court saw section 4(b) of the Drugs Act of 1992 and section 22A of the Medicines Act of 1965 as relevant and considered their constitutionality with regard to the freedom of religion and, in the end, held that the ‘general prohibition against possession or use of drugs is a reasonable and justifiable limitation’ on such in terms of section 36 of the Constitution.<sup>189</sup>

Nonetheless, this case should go down in history as one of the best-known attempts to (partially) decriminalise dagga, although the main focus was linked to freedom of religion. Even though Prince failed in his application, this case once again drew attention to the issue of the potential decriminalisation/legalisation of dagga.<sup>190</sup>

It certainly also inspired new attempts and possible reasons for justifying decriminalisation. One example of this can be directly drawn from the judgements themselves. Interestingly, especially with the background knowledge of the latter court rulings partially decriminalising dagga for private use,<sup>191</sup> Sachs J had already used the term ‘private use’ of dagga, describing the threat posed by this kind of use by the Rastafarian as ‘particularly harmless’.<sup>192</sup> Gerhard Kemp, Professor of Law at Stellenbosch University and criminal law author, however, also published his thoughts on the possible decriminalisation of dagga and is now proven to have been wrong in his assumption that it has to be the Parliament, and not the courts, that will provide South Africa with a more liberal policy in terms of dagga.<sup>193</sup> And yet, Kemp categorised *Prince I* to be part of the way ‘towards the decriminalisation of the use of dagga’, an assumption in which he was correct.<sup>194 195</sup>

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<sup>186</sup> *Prince I* supra note 185 para 1.

<sup>187</sup> The Drugs and Drug Trafficking Act 140 of 1992.

<sup>188</sup> The Medicines and Related Substances Control Act 101 of 1965.

<sup>189</sup> Kemp (ed), Walker, Palmer et al. op cit note 49 at 501.

<sup>190</sup> See e.g. Kemp (ed), Walker, Palmer et al. op cit note 49 at 507.

<sup>191</sup> See especially pages 37-8 and 41-2.

<sup>192</sup> *Prince I* supra note 185 para 154.

<sup>193</sup> Kemp (ed), Walker, Palmer et al. op cit note 49 at 507.

<sup>194</sup> *Ibid* at 501.

<sup>195</sup> This subchapter is partly taken from my research task ‘How was cannabis decriminalized in South Africa and could this model be used in moving forward towards decriminalizing sex work?’ as part of the coursework for PBL5848F, 2019.

## 2. Prince II.1 – High Court

The relevant High Court decision is *Prince II.1* with judgment handed down in 2017. Departing from 2002, in this case, Prince (the applicant), did not focus on religion. The biggest difference presumably is that in 2017 he was not seeking an exception to the existing legal framework in order to be allowed to use and possess dagga for religious means like in his first case. He did not want the (rather small) group of Rastafarians being treated differently to the rest of society not believing in Rastafarianism. Instead, he now focused on questioning the lawfulness of the regulations, in particular section 4(b) and 5(b) of the Drugs Act of 1992 and section 22A of the Medicines Act of 1965, especially with regard to their alleged inconsistency with section 14 of the Constitution. Judge Davis framed the challenge as focusing on 'the extent to which laws that prohibit the use of cannabis and the possession, purchase, and cultivation thereof for personal consumption exclusively are valid'<sup>196</sup>. Thus, this case was not about religious exceptions but about the right of privacy which is highly protected by the Constitution.

In the chronology of the application, the reasoning emphasised the social importance as well as the complexity of the question to be solved.<sup>197</sup> This shows that during the entire process of the decision making, the court had been perfectly aware of the wide scope and importance of its decision. The argumentation is careful and always backs up the statements made, be it in comparison to other decisions or in awareness of the separation of powers which is set out very clearly.<sup>198</sup> There obviously was put a lot of effort into writing this judgment to provide a consistent base on which to uphold the court's decision.

Describing the applicants' causes more precisely and breaking them down into three major points, the reasoning showed a lot of goodwill. The court summarised the applicants' objectives to the argumentation 'that the criminal prohibition of the use and possession of cannabis in their [the applicants] own homes and "properly designated places" was unconstitutional' and that especially 'fundamental rights such as equality, dignity, and freedom of religion were breached',<sup>199</sup> whereas the court itself saw the

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<sup>196</sup> *Prince II.1* supra note 183 para 2.

<sup>197</sup> *Ibid* para 5-6.

<sup>198</sup> *Ibid* para 1, 108, 112, 130.

<sup>199</sup> *Ibid* para 11.

main issue as the right to privacy.<sup>200</sup> It also explicitly dealt with another argument made by the applicants, focusing on the distinction between dagga and other harmful substances as being irrational and unjustifiable in terms of section 36(1) of the Constitution.<sup>201</sup> This is only one of the various paragraphs in the judgement where one gets the impression that the court wanted to make a change through this judgement and its reasoning, and where it seems to really want to rule in favour of the applicants.<sup>202</sup>

At the beginning of the judgment, the court engaged with the first *Prince* judgement from 2002, especially with the minority judgement of Ngcobo J, in which a limited exemption for religious reasons was approved.<sup>203</sup> But since this former judgement exclusively dealt with religious reasons, Davis J did not see it as applicable in this case.<sup>204</sup> Still, he explained Ngcobo's reasons in detail and, after stating that the core is 'whether the infringement of the right to privacy caused by the impugned legislation can be justified in terms of s 36 of the Constitution',<sup>205</sup> he focused on the right to privacy.

The right to privacy is guaranteed by section 14 of the Constitution and on citing Ackerman J,<sup>206</sup> one can see that Davis J wanted to emphasise the importance of the right to privacy's constitutional protection. He also drew links between the right to privacy and the right to dignity as well as between the right to privacy and the right to freedom,<sup>207</sup> stating that the need for protection of the right to privacy would depend on how intimate the relevant personal sphere was.<sup>208</sup> He then focused on the question of limitation, asking if the legislative framework constitutes limitations on the right to privacy,<sup>209</sup> followed by the question as to if those limitations were reasonable and justifiable in terms of section 36 of the Constitution.<sup>210</sup> The judgment included the question of racism, coming to the conclusion that 'this brief recourse to history is reflective of the manifestly impermissible racist and moralistic justifications used for the criminalisation of cannabis a century ago'.<sup>211</sup> Thus, his findings perfectly

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<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> See especially Ibid para 11, 20.

<sup>203</sup> Ibid para 18.

<sup>204</sup> Ibid para 20.

<sup>205</sup> Ibid para 20.

<sup>206</sup> Ibid para 21.

<sup>207</sup> Ibid para 23-4.

<sup>208</sup> Ibid para 22.

<sup>209</sup> Ibid para 25.

<sup>210</sup> Ibid para 28.

<sup>211</sup> Ibid para 34.

correspond with the findings of the previous chapter of this very thesis. Ultimately, the reasoning behind the harsh criminalisation of dagga was likely to be driven by racist ideologies and moralistic pseudo justifications. Saying it this clearly, the judge took a bold step towards an ironclad justification of the decriminalisation of dagga.

Within the same paragraph, the court then again linked this question of racism to the issue of privacy, which it had already dealt with before. In his view, an infringement of such an important right must fulfil high standards, which are not met by ‘private moral views of a section of a community’.<sup>212</sup> In other words, he briefly says that in terms of justification regarding section 36, the right to privacy would be more important and worthy of protection than the private moral views of only a few. These views would therefore not qualify as the legitimisation of infringing such a significant right.<sup>213</sup>

Continuing, the judgement dealt with the effects of dagga on one’s health with the basic outcome that, according to the medical record included by the judge, dagga would not cause harm when used in small amounts.<sup>214</sup> Many of the risks and problems were found to be linked to heavy and abusive use. Hence, any harm caused by dagga was seen to be dose-related. If not overdone, dagga was found not to be detrimental at all.<sup>215</sup>

Davis J’s judgement engaged in detail with cases from other countries, using comparative law as persuasive. The first case he cited is *R v Malmo-Levine; R v Caine*<sup>216</sup>, decided by the Canadian Supreme Court, where the judge linked the right to privacy to individual behaviour in private settings.<sup>217</sup> In the Argentinian Supreme of Justice *Arriola*<sup>218</sup> ruling, Article 14 of the Argentinian Drug Control Legislation was found unconstitutional due to an invasion of the sphere of personal liberty. Thus possession of cannabis for personal consumption was decriminalised in the case that it did not create further harm.<sup>219</sup> Additionally, the Alaskan Supreme Court allowed the

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<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid para 35-61.

<sup>215</sup> Ibid para 61.

<sup>216</sup> *R v Malmo-Levine; R v Caine* [2003] 3 S.C.R. 571, 2003 SCC 74, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2109/index.do>, accessed on 11 March 2020.

<sup>217</sup> *Prince II.1* supra note 183 para 73.

<sup>218</sup> *Arriola, Sebastián y otros s/ causa n° 9080*, available at:

<http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=6711401&cache=1584358392584>, accessed on 16 March 2020.

<sup>219</sup> *Prince II.1* supra note 183 para 75.

possession of marijuana at home, based on the right to privacy and denial of the state's intrusion, in *Ravin v State of Alaska*<sup>220, 221</sup> The Supreme Court of Mexico had to deal with almost the same issue, concluding similarly.<sup>222</sup> Drawing his conclusion in respect to the comparative law, Davis J found that significant changes in courts and legislation regarding personal consumption were taking place, reflecting 'a clear shift in a consensus in what can be considered to be open and democratic societies, that the criminalisation and possession of cannabis for personal use is no longer effective in preventing harm. In short, there is no longer a consensus that can regard such limitations as justifiable.'<sup>223</sup> The personal view of the judge gets very clear here. He feels that under the circumstances of several countries changing their laws towards decriminalising the use of dagga, he cannot rule in any other way other than also declaring laws which prohibit personal use in private as unconstitutional. This conclusion might seem fairly bold, especially with respect to its severity and alleged duress. Despite the fact that Davis J lists many countries as having softened their laws regarding the personal consumption of dagga,<sup>224</sup> it would be an overstatement to say that every open and democratic society has gone this way. Hence, saying that a decision cannot be made differently these days and that there is no consensus to be found that such limitations can be justifiable, goes too far. Nevertheless, the empirical data of this judgement shows that more and more countries are indeed altering their laws, taking a more liberal approach in terms of the private use of dagga. Therefore, Davis J joins the decisionmakers making these changes possible, regardless of the motivation behind his ruling nor the pressure he felt to rule this way.

Coming to his evaluation, the judge was not convinced by the evidence presented by the respondents, naming it 'unimpressive'<sup>225</sup> and finding that the respondents were not able to discharge the burden placed upon them.<sup>226</sup>

Concluding in a long argument and summing up reasons,<sup>227</sup> the court came to a conclusion and ordered as follows:

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<sup>220</sup> *Ravin v. State*, 537 P.2d 494 (Alaska 1975), available at:

<https://www.courtlistener.com/opinion/1170252/ravin-v-state/>, accessed on 16 March 2020.

<sup>221</sup> *Prince II.1* supra note 183 para 76-80.

<sup>222</sup> *Ibid* para 81-2.

<sup>223</sup> *Ibid* para 84.

<sup>224</sup> *Ibid* para 64-90.

<sup>225</sup> *Ibid* para 92.

<sup>226</sup> *Ibid* para 107.

<sup>227</sup> *Ibid* para 107-12.

‘1. The following provisions are declared inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and invalid, only to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis for personal consumption by an adult:

1.1. sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) read with Part III of Schedule 2 to the Drugs Act; and

1.2. section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act) and s 22A (10) thereof read with schedule 7 of GN R509 of 2003 published in terms of s 22A(2) of the Medicines Act.

2. This declaration of invalidity is suspended for a period of 24 months from the date of this judgment in order to allow Parliament to correct the defects as set out in this judgment.

3. It is declared that until Parliament has made the amendments contemplated in paragraph 1 or the period of suspension has expired, it will be deemed to be a defence to a charge under a provision as set out in paragraph 1 of this order that the use, possession, purchase or cultivation of cannabis in a private dwelling is for the personal consumption of the adult accused.’<sup>228</sup>

With this decision, Davis J made the first big step towards the partial decriminalisation of dagga in South Africa which was approved by the Constitutional Court one year later. Engaging with his judgment and with how carefully it is backed up, it is clear that Davis J considered it a landmark decision.

### 3. Prince II.2 – Constitutional Court

The relevant Constitutional Court decision is *Prince II.2* from 18<sup>th</sup> September 2018. Zondo ACJ, who wrote the (unanimous) judgement, mostly confirmed the High Court’s judgement from March 2017. The biggest departure is the distinction between the use, possession, and cultivation of dagga on the one hand – where he confirmed the judgement – and purchasing (dealing in) dagga on the other hand – where he did not confirm the High Court’s judgement. He also refrained from using the term ‘private dwellings’ but ordered the use of ‘in private’ or ‘in private places’ instead. The period of suspension of 24 months was confirmed, although he stressed that the High Court was neither competent nor was it necessary for it to grant such an order.<sup>229</sup> Briefly, one

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<sup>228</sup> Ibid para 132.

<sup>229</sup> *Prince II.2* supra note 184 para 2.

can say that this Constitutional Court judgement narrowed the High Court judgement down to some extent, through only partially confirming it. Still, it held up the most significant orders, so that, overall, the judgment still favoured the respondents of this case. Being aware of what confirmatory proceedings mean,<sup>230</sup> Zondo ACJ sought to find an answer to the Constitutional Court's issue, 'whether the impugned provisions limit the right to privacy as held by the High Court and, if they do, whether that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors listed in section 36(1) of the Constitution.'<sup>231</sup> The focus of the judgment lays here.

After citing the orders of the High Court as well as the relevant legislative provisions, Zondo ACJ engaged with section 5(b) of the Drugs Act of 1992 in detail, evaluating the High Court's ruling as unclear and misleading in terms of declaring this section as unconstitutional. Section 5(b) itself, he stated, would not prohibit any dealing in drugs, as the High Court read it. His suggestion is to read the section including the definition of the phrase 'deal in' of section 1 of the Drugs Act of 1992. In this way, according to Zondo ACJ, the intended prohibition would be clarified and the unconstitutionality would be confirmed to the appropriate extent.<sup>232</sup>

The judgement also engaged with the scope as well as the content of the right to privacy in detail.<sup>233</sup> In partly citing the same cases as *Prince II.I*, and partly adding more, this judgment proves even greater precision of evaluation and scope than the High Court one. It is more detailed, and thus, more comprehensive.

This judgement overall confirmed the High Court's view that the impugned provisions limited the right to privacy and that this exact limitation could not be seen as reasonable and justifiable in terms of section 36 of the Constitution. The main reason for this view were existing, less restrictive means to achieve the purpose.<sup>234</sup>

As mentioned above, one of the biggest differences in the High Court judgment is that the Constitutional Court refrained from using the term 'dwelling'. Here, the focus was

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<sup>230</sup> Ibid para 39.

<sup>231</sup> Ibid para 40.

<sup>232</sup> Ibid para 24.

<sup>233</sup> Ibid para 43-57.

<sup>234</sup> Ibid para 58-86.

on dagga being cultivated in a private place and meant to be consumed in private by an adult person. Interestingly, this private place might also be outside, e.g. a garden; it does not have to be inside an enclosure.<sup>235</sup> This topic appeared within the discussion of section 5(b) of the Drugs Act of 1992 where, as stated above, Zondo ACJ uses a different approach than the High Court. At the end of the day, however, he came to the same conclusion, revealing an inconsistency in the Constitution.<sup>236</sup> Regarding the possession, the term ‘dwelling’ is challenged again in latter paragraphs, drawing distinctions between different scenarios. This judgment emphasises that the focus should not be on the private dwelling but the personal consumption (in private). The example used is of someone who steps out of his/her private dwelling in possession of dagga, with the intent to use it for personal consumption, will be seen as committing an offence – this is contrary to someone possessing dagga within his/her home for the same reason.<sup>237</sup> Following this line of reasoning, Zondo ACJ concluded this section by saying that, in his view, ‘as long as the use or possession of cannabis is in private and not in public and the use or possession of cannabis is for personal consumption of an adult, it is protected’ by the right to privacy.<sup>238</sup>

This judgement separates the issue of use, possession, and cultivation from the one of purchase. Any dealing in it shall be prohibited. Developing his reasoning, Zondo ACJ talked about how dealing in dagga is a ‘serious problem’. In his view, purchasing the drug would always happen through a dealer. And since dealing is such a significant problem in South Africa, the court cannot (indirectly) allow dealing in dagga, not even in the personal sphere. Hence, the court sees the prohibition of dealing in the drug as a reasonable and justifiable limitation to the challenged right to privacy.<sup>239</sup> The judge’s line of reasoning in this section seems to be thoughtful and consistent; he builds his reasoning on valid points and comes to a comprehensible conclusion. Nevertheless, there is one important counterargument against this reasoning: the lack of a system to fight the black market. Legalising and decriminalising dagga, including its trading, would create a new, and most importantly, legal, market. Supply chains as well as the process of purchase of the customer, including the product’s quality, could be

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<sup>235</sup> Ibid para 85.

<sup>236</sup> Ibid para 86.

<sup>237</sup> Ibid para 98.

<sup>238</sup> Ibid para 100.

<sup>239</sup> Ibid para 88.

monitored and controlled. Elaborating on this mental-experiment a little more, the conclusion is that the black market would suffer severe losses; it might even vanish entirely.<sup>240</sup> This argument gained popularity among supporters of the legalising/decriminalising of dagga. Not including dealing in the drug when legalising/decriminalising the use of it, in the way that Zondo ACJ deals with the issue, does, however, not outline how to eradicate the black market. Hence, despite the judge's valid reasoning, this lack of fighting the black market by not legalising/decriminalising trading dagga, could be seen as a missed opportunity.

Following on his reasoning, Zondo ACJ declared 'the relevant provisions to be constitutionally invalid to the extent that they criminalise the use or possession of cannabis in private by an adult for his or her personal consumption in private'.<sup>241</sup>

Also within the remedy, practical issues were raised. The judgement engaged with the question of how a police officer is supposed to determine whether cannabis in someone's possession is meant for personal consumption or not.<sup>242</sup> To find a solution, the judge proposed to treat the question in a similar way to the crime of negligent driving. When applied this way, he stated, it depends on the officer's observation. The conceivable uncertainties created by this subjective observation would not exceed those uncertainties which appear in cases of negligent driving but would be comparable. In a case of negligent driving, these uncertainties are generally accepted.<sup>243</sup> Ultimately, however, it would be the court that decides whether the requirement of personal consumption is met or not.<sup>244</sup>

Davis J, in the High Court case, explicitly named racism as a reason for the harsh dagga laws. Zondo ACJ does not express a similar view, nor does he make any reference to the prior judgement concerning this argument. The only section where the term racism appears is paragraph 65. There, the outdated language of the former white ruling class is reprehended, speaking again of the 'social evil'. Still, this cannot be seen as dissent against Davis J, since Zondo ACJ only cites another court decision without giving his own evaluation.<sup>245</sup> On the contrary, in not opposing the prior judgement's reasoning

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<sup>240</sup> Compare e.g. Minnaar op cit note 97 at 136, 138, in particular regarding the desired consequences of legislative changes in the USA.

<sup>241</sup> *Prince II.2* supra note 184 para 101.

<sup>242</sup> *Ibid* para 113.

<sup>243</sup> *Ibid* para 115-7.

<sup>244</sup> *Ibid* para 123.

<sup>245</sup> *Ibid* para 65.

and carefully disproving it, Zondo ACJ may tacitly be demonstrating his agreement with Davis J's view.

Summarising, it can be said that this Constitutional Court judgement also took a significant step, and thus, cannot be seen other than as a big part of the movement towards the decriminalisation of dagga. Davis J was the first one to take this bold step and decriminalise dagga. With this, he certainly played the biggest part. The Constitutional Court confirmed his decision which significantly strengthened the decriminalisation as well as the reasoning behind it. In adding more case examples to his reasoning, Zondo ACJ entrenched the whole line of argument, hedging it and making it even more legitimate. Therefore, the part he played is also of considerable importance. Where we go from here and how we can probably make use of the partial decriminalisation, will be part of the following chapter.

#### V. From harsh punishments to decriminalisation – what's in it for the criminal justice system?

Taking a look back on the past chapter shows that the process of developing and reinforcing harsh punishments for minor misconduct appears to be overcome, finally leading to the partial decriminalisation of dagga. In this chapter, I will evaluate why the recent judgements implementing the partial decriminalisation are of such great importance and what kind of benefits they might bring. Ultimately, not only do adult individuals, now legally able to use and possess dagga in certain circumstances, benefit from the recent decriminalisation, so does society. To expand on this point, this chapter will focus on the impact of the partial decriminalisation on the criminal justice system by drawing links between the judgements and the functioning of the system.

As the Retired Justice of the Constitutional Court, Edwin Cameron, demonstrates in his recent article, the prisons are desperately overcrowded, therefore providing bad conditions for their inmates, and, contrary to the expectations of them as correctional facilities, are breeding grounds for more crime.<sup>246</sup> South Africa has one of the highest

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<sup>246</sup> Edwin Cameron 'The Crisis of Criminal Justice in South Africa' (2020) 137 *SALJ* 33, 41, 49; regarding the state of overcrowding also see 'Thematic Report on Criminal Justice and Human Rights in South Africa' available at <https://acjr.org.za/resource-centre/UNHRC%20RSA%20REVIEW%20-%20Crim%20justice%20-%20human%20rights.pdf> at 27-8, accessed on 21 June 2020.

incarceration rates in the world and one of the highest recidivism rates in the world.<sup>247</sup> Therefore, it is hardly surprising that there are warnings of overcrowded prisons ‘creating crime’ instead of ‘curbing it’.<sup>248</sup> Further, statements like ‘our criminal justice system is flawed, in some ways fatally defective, and needs to be overhauled’<sup>249</sup> are as little surprising as they are accurate. This observation of a deteriorating criminal justice system is also reflected in statistics, where declining approval rates of the courts are to be found, dropping from 63.9 per cent in 2013/14 to only 41.1 per cent in 2017/18.<sup>250</sup>

Reasons for this disastrous situation can first and foremost be found in the criminal politics of the 1990s and their general shift to harsh new policies.<sup>251</sup> The post-apartheid expected ‘crime wave’<sup>252</sup> as well as the so-called ‘tough (on) crime policy’<sup>253</sup> led to increased sentences being imposed and growing carceral periods. Without expanding the infrastructural and institutional capacity of the prisons, the consequence was an increasing prison population, leading to overcrowded buildings not being able to cope with the amount of occupants.<sup>254</sup> Hence, South African prisons can no longer be seen as rehabilitation centres, preparing their inmates for life after prison, but rather as overcrowded penal institutions. In the end, the shift towards stricter punishments did not result in any improvement regarding crime rates.<sup>255</sup>

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<sup>247</sup> Cameron op cit note 246 at 49.

<sup>248</sup> Former Inspecting Judge, Hannes Fagan, as cited in Cameron op cit note 246 at 49.

<sup>249</sup> Jameelah Omar ‘Violence against women: Law is not the solution’ *Daily Maverick* 6 September 2019, available at <https://www.dailymaverick.co.za/opinionista/2019-09-06-violence-against-women-law-is-not-the-solution/>, accessed on 27 April 2020; for more statements addressing the current status and need for reform see also Kelly Moulton ‘Editorial: Persistent failures and one victory?’ (2019) 68 *SA Crime Quarterly* at 3; Lisa Marqua-Harries, Grant Stewart and Vanessa Padayachee ‘Towards transforming a system - Re-thinking incarceration for youth (and beyond)’ (2019) 68 *SA Crime Quarterly* at 33-4; Cameron op cit note 246 at 32; Lukas Muntingh ‘Prisons, overcrowding and preventing Covid-19 transmission’ *Daily Maverick* 30 April 2020, available at <https://www.dailymaverick.co.za/article/2020-04-30-prisons-overcrowding-and-preventing-covid-19-transmission/>, accessed on 21 June 2020; Gareth Newham for ISS Today ‘South Africa’s problems are not caused by foreigners’ available at <https://www.dailymaverick.co.za/article/2019-09-05-south-africas-problems-are-not-caused-by-foreigners/>, accessed on 21 June 2020.

<sup>250</sup> Gareth Newham and Miché Roberts ‘Policy Brief – How civil society can contribute to effective prosecutions’ available at <https://issafrica.s3.amazonaws.com/site/uploads/pb145.pdf> at 4, accessed on 21 June 2020.

<sup>251</sup> Cameron op cit note 246 at 36-45.

<sup>252</sup> Martin Schönleich & Antoinette Louw as cited in Cameron op cit note 246 at 35.

<sup>253</sup> Redpath as cited in Cameron op cit note 246 at 35-6.

<sup>254</sup> Cameron op cit note 246 at 41, 45.

<sup>255</sup> *Ibid* at 45.

Particular attention must be paid to remand prisoners who usually constitute nearly a third of the prison population.<sup>256</sup> More than half of these remand prisoners, however, will be released due to acquittal, withdrawal of the charges or because their charges were struck off the roll.<sup>257</sup> In this light, it is no surprise that it is said that pre-trial detentions contribute immensely to the overpopulation of prisons, especially given the fact that many remand prisoners, even if they are to be sentenced, could be released on bail but are not able to afford it.<sup>258</sup> Their time in prison often turns out to be very hard, with remand prisoners and their families often experiencing a heavy and negative socio-economic impact such as the loss of the detainee's work and income as well as his/her care and support, while at the same time being subjected to increasing emotional distress and altered living arrangements.<sup>259</sup> In sum, the situation in remand prisons tends to be even worse than in detention centres for convicted detainees, a finding, which is also encouraged by data from Pollsmoor.<sup>260</sup>

In considering drug crimes in this context, it is important to say that most of the 300000 people who are arrested for drug-related crimes each year are picked up for small cannabis offences.<sup>261</sup> Processing these drug arrests takes a considerable amount of time, usually two to two-and-a-half hours, time that could better be spent with other policing tasks such as patrols.<sup>262</sup> In general, and especially regarding drugs, high imprisonment rates lead to rising crime, which again increases the fear of crime and the demand for harsher punishments, ending in increasing imprisonment rates.<sup>263</sup> As this vicious circle takes its course, it illustrates best that the so-called 'war on drugs',

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<sup>256</sup> Nontsasa Nako 'Editorial: Decolonising the South African prison' (2018) 66 *SA Crime Quarterly* at 4; Clare Ballard 'Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform' available at <https://acjr.org.za/resource-centre/Remand%20detention%20in%20South%20Africa.pdf> at 5, accessed on 21 June 2020.

<sup>257</sup> Thato Masiangoako 'Rationalising injustice – The reinforcement of legal hegemony in South Africa' (2018) 66 *SA Crime Quarterly* at 9; Clare Ballard op cit note 256 at 5; with regard to a study from 2008 with a similar result see also Jean Redpath 'Liberty not the only loss - The Socio-Economic Impact of Remand Detention in the Western Cape' available at <https://acjr.org.za/resource-centre/liberty-not-the-only-loss-report.pdf> at 55, accessed on 21 June 2020.

<sup>258</sup> Untalimile Crystal Mokoena and Emma Charlene Lubaale 'Decolonising prisons in South Africa – The need for effective bail affordability inquiries' (2018) 66 *SA Crime Quarterly* at 34.

<sup>259</sup> Redpath op cit note 257 at 4, 59.

<sup>260</sup> Muntingh op cit note 249.

<sup>261</sup> Anine Kriegler 'Dagga law details now up to Parliament' available at <https://www.news.uct.ac.za/article/-2018-09-21-dagga-law-details-now-up-to-parliament>, accessed on 27 March 2020.

<sup>262</sup> South African Government Media Statement 'Western Cape Community Safety on Provincial Policing Needs and Priorities Report 2018/19' 11 October 2019, available at <https://www.gov.za/speeches/western-cape-community-safety-provincial-policing-needs-and-priorities-report-201819-11-oct>, accessed on 24 September 2020.

<sup>263</sup> Cameron op cit note 246 at 52-3.

relying on harsh punishments and strict imprisonment, has failed. On the contrary, the ‘war on drugs’ is wasting extensive resources and lives.<sup>264</sup>

It would be prudent to consider more suitable punishments for drug-related offences, especially when they are not violent, such as shorter sentences, probation, community service, electronic monitoring, or medical treatment.<sup>265</sup> Also, minimum sentences have not proved to be overly effective, as Cameron evaluates in detail throughout his article. This will not be expanded on here as this is not the focus of the thesis.<sup>266</sup> Some scholars even go as far as to demand the release of those being incarcerated for drug use or possession in order to ease prison overcrowding,<sup>267</sup> a request which seems to have potential in achieving to lower overcrowding since drug offences constitute around 10 per cent of all alleged offences.<sup>268</sup> Particularly in remand detention, drug offences committed by the poorest who are able to afford bail, are overrepresented.<sup>269</sup>

Given this scenario described above, the need for change is obvious. The South African criminal justice system needs to be unclogged in order to have a chance of functioning again. This is where the recent judgements and their direct as well as indirect contribution to the functioning of the criminal justice system come into play. As evaluated in detail in the previous chapter, the Constitutional Court partially decriminalised the use, possession, and cultivation of dagga to the extent of personal consumption by an adult in private. Concerning the criminal justice system, the court quotes the prior High Court decision that ‘[t]he evidence, holistically read together with the arguments presented to this court, suggests that the blunt instrument of the criminal law as employed in the impugned legislation is disproportionate to the harms that the legislation seeks to curb insofar as the personal use and consumption of cannabis is concerned’.<sup>270</sup>

On the same page as this quote is the focus of today’s police work regarding dagga. A very useful source that helps to assess police intentions is the Western Cape

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<sup>264</sup> Cameron op cit note 246 at 58; see also Marqua-Harries, Stewart and Padayachee op cit note 249 at 35 making the same point; Jason Eligh ‘The Evolution of Illicit Drug Markets and Drug Policy in Africa’ available at <https://enact-africa.s3.amazonaws.com/site/uploads/2019-06-30-continental-report-3-3.pdf> at 54, accessed on 21 June 2020.

<sup>265</sup> Cameron op cit note 246 at 58.

<sup>266</sup> Cameron op cit note 246.

<sup>267</sup> Eligh op cit note 264 at 57.

<sup>268</sup> Redpath op cit note 257 at 29.

<sup>269</sup> Ibid at 31-2.

<sup>270</sup> *Prince II.2* supra note 183 para 34.

Community Safety on Provincial Policing Needs and Priorities Report 2018|19, published on 14 October 2019.<sup>271</sup> The report emphatically urges the need for law enforcement agencies to not focus on drug users but the drug trade and its manufacturing thereof instead.<sup>272</sup> This perfectly coincides with the Constitutional Court judgement, which explicitly abandons the idea of decriminalising any dealing in dagga, saying that there cannot be any purchase - which as such could be decriminalised - without a sale.<sup>273</sup> At the same time, this explicitness of the Constitutional Court might even help raise acceptance and sympathy concerning the South African Police Service (SAPS). Noticing a clear focus on dealers and manufacturers, people will probably be less afraid to get into trouble or even be arrested for small dagga offences. This, however, could promote the acceptance of SAPS in society, especially when SAPS representatives trying to solve a case are in need of support and call for help from communities. Hence, this goes hand in hand with the expressed SAPS strategy to focus on the ones who benefit from trading in dagga. SAPS need help from communities to overcome drug-related crime,<sup>274</sup> rebuild trust, and gain support in fighting the 'bigger fish'.<sup>275</sup>

In line with this approach is another claim to be found in the SAPS report, namely the aim of removing drugs from the streets.<sup>276</sup> Although this goal did not find its way into the Constitutional Court judgement, the judgement might help to achieve it. Favouring the use and possession of dagga in private, but still explicitly prohibiting it in public, could support the intended removal. With this, we have another instance where the Constitutional Court judgement and the SAPS report agree and aim for the same goal.

In the end, the report concludes that, concerning the fight against drugs, measures other than harsher penalties and laws, must be taken.<sup>277</sup> This is a take-out which coincides

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<sup>271</sup> South African Government Media Statement op cit note 262.

<sup>272</sup> South African Government Media Statement op cit note 262; also SAPS Media Statement 'Intelligence driven K-9 Operation lands suspect behind bars for selling cannabis' 20 April 2019, available at <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=20215>, accessed on 27 April 2020.

<sup>273</sup> *Prince II.2* supra note 183, especially para 87-8, 129 No. 8.

<sup>274</sup> South African Government Media Statement op cit note 262.

<sup>275</sup> An example that this strategy seems to work can be found in the following media statement concerning a major dealer that was arrested with the help of the community: SAPS Media Statement 'Table View police confiscated cannabis weighing over 43 kg' 17 December 2018, available at <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=18552>, accessed on 27 April 2020.

<sup>276</sup> South African Government Media Statement op cit note 262.

<sup>277</sup> *Ibid.*

with what supporters of a more liberal drug policy have been demanding for a long time. It supports them in their assumption that the ‘war on drugs’ has irrefutably failed.

Evaluating this from a practical point of view, it seems as if the Constitutional Court judgement has already started to have an impact. In December 2016, Pollsmoor has had an occupation of 250 per cent<sup>278</sup> and there is data suggesting that about 16 per cent of all admissions at Pollsmoor Remand Detention Facility in the year preceding July 2017 were for drug possession.<sup>279</sup> The report itself states that before September 2018, one out of six remand prisoners at Pollsmoor was there for cannabis possession.<sup>280</sup> The Constitutional Court judgement, however, seems to have had a significant effect on dagga-related arrest numbers since these have decreased by 30.6 per cent in the Western Cape since the judgement was handed down.<sup>281</sup>

#### 1. The possible impact of Sonke Gender Justice

When talking about declining arrest numbers, we certainly also need to take into account the achievements of the non-profit organisation, Sonke Gender Justice, if only for reasons of completeness. Sonke Gender Justice has been challenging overcrowding, and especially the situation at the Pollsmoor Remand Detention Facility, for many years. In December 2016, they experienced a major success when the Western Cape High Court decided in their favour, challenging overcrowding at Pollsmoor Remand.<sup>282</sup> In the aftermath of this order, the number of remand prisoners at Pollsmoor decreased significantly, in June 2017 the set goal of less than 150 per cent capacity, was met.<sup>283</sup> Although these noteworthy short-term improvements are certainly having a very positive impact, they were not meant to last long. Being aware of the reason why the numbers have decreased so drastically, mainly being transfers of prisoners to other facilities, Sonke Gender Justice has already criticised the

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<sup>278</sup> Redpath op cit note 257 at 32.

<sup>279</sup> Ibid at 46.

<sup>280</sup> South African Government Media Statement op cit note 262.

<sup>281</sup> Ibid.

<sup>282</sup> ‘Court Order in Pollsmoor Remand Overcrowding Case’, available at <https://genderjustice.org.za/publication/court-order-pollsmoor-remand-overcrowding-case/>, accessed on 13 August 2020; Final Order in *Sonke Gender Justice v Government of South Africa* 24087/15 (unreported), available at <http://genderjustice.org.za/publication/court-order-pollsmoor-remand-overcrowding-case/>, accessed on 13 August 2020.

<sup>283</sup> ‘The Pollsmoor Remand Case, explained’, available at <https://genderjustice.org.za/card/pollsmoor-remand-case-explained/what-has-been-the-impact-of-the-case/>, accessed on 13 August 2020.

Government's plan in handling the situation superficially and ineffectively at this early stage.<sup>284</sup> One of the major criticisms was that the plan did not tackle any of the underlying issues of overcrowding. Thus, this shows that although Sonke Gender Justice welcomed the existence of the plan as well as the declining numbers, they did not expect the effects to be long-lasting, at least not at this high level. Later figures proved them to be right. Having achieved a historical low in June 2017, overcrowding levels started to rise again shortly after, reaching 169 per cent in April 2018.<sup>285</sup> The Government promised improvement. It has, for instance, urged the courts to review in detail bail conditions and the process of bail review applications.<sup>286</sup> Still, the numbers of remand prisoners have varied greatly over the past years, even though they fell slowly overall.<sup>287</sup> As a result of the above, Sonke Gender Justice challenging overcrowding, has certainly had an impact on the decreasing numbers of remand prisoners at Pollsmoor after September 2018. However, since apart from the high drop in early 2017 the numbers are only going down slowly over the past years, this impact is rather to be seen as long-term improvement. Due to the lack of a special incident linked to Sonke Gender Justice explaining the drastic decrease of more than 30 per cent in the short period of time after the Constitutional Court judgement was handed down, they cannot be given sole credit for that drop. The reason is more likely to be the court's decision on the partial decriminalisation of dagga.

However, the falling numbers are not to be underestimated. Decreasing arrests for dagga offences (by nearly a third) mean a significant decrease of total arrests too, and thus, of remand prisoners. Fewer remand detainees mean fewer people and their families suffering from the negative impact and the losses which cut into their lives due to the time spent in prison.<sup>288</sup> At the same time, the many other risks and dangers related to disproportionally long arrests for small dagga offences, such as being recruited by gangs while awaiting trial, or being unable to pay bail, are lowered. Also, less dagga-related arrests might help the criminal justice system to reduce overcrowding and relieve the clogged courts of long waiting lists. These decreasing

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<sup>284</sup> 'The Pollsmoor Remand Case, explained' op cit note 283; Ariane Nevin 'Prison overcrowding: No more band-aid solutions', available at <https://genderjustice.org.za/article/prison-overcrowding-no-band-aid-solutions/>, accessed on 13 August 2020.

<sup>285</sup> 'The Pollsmoor Remand Case, explained' op cit note 283.

<sup>286</sup> Ibid.

<sup>287</sup> Ehpsa Case Study 'Pollsmoor – Reducing overcrowding in a South African remand detention facility', available at <https://genderjustice.org.za/publication/pollsmoor/>, accessed on 13 August 2020.

<sup>288</sup> For a negative impact possibly experienced see Clare Ballard op cit note 256 at 4.

arrest numbers probably indicate that the police choose to apply the judgement wisely in practice and follow its suggestions, as they possibly revise arrests. It might also be the first indication of a demanded shift from measuring police performance on drug policing only on arrests towards measuring it on a more careful scale looking at an overall picture of arrests, prosecutions, and convictions.<sup>289</sup> In the end, the judgement of the Constitutional Court might help to improve the criminal justice system and support its recovery.

## 2. The newly introduced Cannabis Bill

Another new feature regarding the decriminalisation of dagga is the recent introduction of the awaited Cannabis for private purposes Bill (Cannabis Bill)<sup>290</sup> by the Parliament. In the Bill's Memorandum to objects, it is referred to the Constitutional Court's decision from September 2018 in which the Parliament was given the task of amending certain passages of legal Acts which, according to the judgement, were inconsistent with the right to privacy entrenched in section 14 of the Constitution. The court did not acknowledge those passages to be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

In accordance with the task given to the Parliament, the preamble declares that the Bill is '[t]o

- respect the right to privacy of an adult person to possess cannabis plant cultivation material; to cultivate a prescribed quantity of cannabis plants; to possess a prescribed quantity of cannabis; and to smoke and consume cannabis;
- regulate the possession of cannabis plant cultivation material; the cultivation of cannabis plants; the possession of cannabis; and the smoking and consumption of cannabis by an adult person;
- protect adults and children against the harms of cannabis;
- provide for the expungement of criminal records of persons convicted of possession or use of cannabis;
- delete and amend provisions of certain laws; and
- provide for matters connected therewith.<sup>291</sup>

To provide these goals, the Bill contains definitions, exact prescribed quantities for personal use by an adult person, various possible offences and penalties as well as

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<sup>289</sup> South African Government Media Statement op cit note 262.

<sup>290</sup> The Cannabis for private purposes Bill 19 of 2020.

<sup>291</sup> Ibid at 2.

regulations and the repeal or amendment of laws. The definitions are provided in order to facilitate its interpretation. Clause 2 is meant to emphasise the importance of the constitutional right to privacy, enabling an adult person to use, possess, and cultivate dagga freely in private. Hence, this clause is seeking to fulfil the demands formulated by the judgement. The following clauses, however, introduce justifiable limitations on this right to privacy. In detail, clause 3 criminalises the cultivation, possession, provisioning, and dealing in cannabis plants and cannabis plant cultivation material while clause 4 limits the possession, provisioning, and dealing in dagga itself. Clause 5 then deals with aspects pertaining to smoking and other methods of consumption of dagga. The following clause 6 then imposes offences involving children, offences the judgement does not deal with explicitly. The different offences are divided into classes from A to D, the sentences for which are regulated in clause 7. Clause 8 provides for the expungement of criminal records for certain cases. Concluding the Bill, clause 9 gives the minister the power to make regulations to further regulate aspects provided for in the Bill and clause 10 as well as the attached Schedule 5 engage with the exact repeals and amendments of existing pieces of legislation the Parliament was expected to make.

As mentioned above, the Constitutional Court referred it to the Parliament to ensure that the queried legal provisions would be in accordance with the Constitution by 18th September 2020. Otherwise, the interim arrangements made by the court would become final. How the different aspects regarding dagga were regulated would be up to the Parliament. The court left it to the legislator to decide on whether to just alter the provisions inconsistent with the Constitution or to create a whole new legal Bill. Hence, in introducing an Act where the Parliament concentrated different aspects regulating dagga in a comprehensive way in one piece of legislation, it acted within the given range of opportunities. In this respect, it is not objectionable that the Parliament has amended the Drugs Act<sup>292</sup> to remove dagga completely from it. This is because by deleting dagga as a drug in the sense of Schedule 2, the Act is no longer applicable to dagga. Therefore, the provisions of the Drugs Act, which were previously applicable to dagga, are no longer referring to such, and thus, are no longer incompatible with the Constitution. The new regulations made in the Cannabis Act, again, are in accordance with the court's requirements. The Medicines Act<sup>293</sup>, on the

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<sup>292</sup> The Drugs and Drug Trafficking Act 140 of 1992.

<sup>293</sup> The Medicines and Related Substances Control Act 101 of 1965.

other hand, was not altered. This means that the interim regulations made by the court regarding the unconstitutional provisions of the Medicines Act will remain effective even though the Cannabis Bill is in place.

In Schedule 3 and 4, the Cannabis Act made provisions in terms of prescribed quantities which also reflect the judgement's demands. With determining the limits of quantities, the legislator has therefore complied with what the court neither wanted to claim for itself nor saw itself in the position to assess.

As evaluated by now, the Bill partially falls short of what the Constitutional Court considered to be important and worthy of change. In many ways, however, it goes beyond what the court has demanded, not only in terms of creating an entirely new Act. Thus, it refers to the National Road Traffic Act from 1996,<sup>294</sup> altering numerous sections in terms of their reference on drivers under the influence of dagga. The National Road Traffic Act has not been mentioned in the Constitutional Court judgement at all. This shows that the Parliament used its chance to regulate even more than prescribed by the court, the chance to alter some legislation it deemed to be changed. Another aspect where the Parliament took the opportunity given to it to go beyond the scope of the judgement is the treatment of hemp as a variety of dagga. As to the Bill, the Department of Agriculture, Land Reform and Rural Development has requested that both the Drugs Act and the Medicines Act be altered in order to provide for the commercial production of hemp. In including such regulation, the Parliament followed up on this request.

Also, the significant and extensive protection of children included in the Act as a central aspect of such is very interesting. By changing the Child Justice Act of 2008<sup>295</sup> as well as putting explicit emphasise on sufficient age when coming to private use, possession, and cultivation of dagga, the legislator protects the weakest members of society, children. In doing so, the Parliament took an important step which should always be considered when granting more freedom: that living out this freedom is not to be at the expense of others but that it is enjoyed without harming anyone else. Thus, by easing the regulations regarding dagga for adults in private, it is crucial to, at the same time, protect children not being able to protect themselves from effects that might be very harmful to their health and growth. In general, the Bill seems to find a good

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<sup>294</sup> National Road Traffic Act 93 of 1996.

<sup>295</sup> Child Justice Act 75 of 2008.

balance between giving freedom to some but also protecting others worth protection such as children and other people in public places that do not want to (or should not) get in touch with dagga. This can also be seen in explicitly regulating prescribed commercial and trafficable quantities.

Overall, the Bill meets the requirements set out by the judgement. Most of the requirements are to be found in the new regulations drawn up by the Bill. Through comprehensive regulation in a separate Act, the regulations concerning dagga also become clearer and more easily accessible which is a huge advantage. Thus, this Act has the potential to put an end to many of the uncertainties and unclarities around dagga which society as well as SAPS seem to be struggling with these days. Apart from the sections concerning the Medicines Act, the interim provisions made by the court will be replaced by the new Bill once enacted. The inclusion of so many different departments also testifies to a precise and thorough working method and a process, during which the various aspects of the topic were dealt with in detail. All in all, the Bill proves itself to be a well-rounded piece of legislation which fits in well, continuing the path of liberating dagga policies in South Africa.

## VI. Conclusion

This thesis details the history of the criminalisation of cannabis as well as its partial decriminalisation around 100 years later. The decriminalisation was finally achieved due to the ruling in *Prince II.2* which can be seen as the ‘successor’ of Prince’s well-known first attempt in 2002. While there are some parallels between Prince’s various attempts to challenge the legislation, they differ significantly, not only in their outcome but in their approach and scope. The ruling of *Prince I* in 2002 was pervaded by unwillingness. At the time, comfort with the situation as it was seemed to be the dominant motive, however in 2018, it was shown that there was more commitment to change. *Prince II.2* was related to the drive and willingness to bring about change to an unjust and outdated setting. But this energy to change has not always been used for good as can be noticed when examining the history.

As described in the second chapter, dagga was cultivated and used by the indigenous tribes long before van Riebeeck and the first settlers arrived. The herb was brought to southern Africa via the early trade routes from Asia and used for both recreational and

medical purposes. Even during the colonial period dagga remained a legal substance, until the early 19<sup>th</sup> century when the settlers' attitude started to change. With the implementation of the first national statute in 1922, the long history of harsh punishments began, and took its course through the Weeds Act of 1937, the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 and the Drugs and Drug Trafficking Act 140 of 1992, up until the partial decriminalisation in March 2017, which was later confirmed in September 2018.

In the third chapter, I focus on the punishments implemented by the legislation, relating these to the estimated risks posed by dagga, and ultimately confirm dagga to be the black sheep among drugs. Differences in the punishments are pointed out, leading to the conclusion that punishments for dagga offences were disproportionately harsh in terms of its harm, the legal development being inconsistent and inappropriate. I would argue that dagga experienced a racialised prohibition. This is followed by investigating possible reasons for this disparity, coming to the conclusion that various reasons were relevant. With dagga becoming a political issue, making the 'non-white' population of their use while keeping the perceived threat originating from it as small as possible was crucial for the estimated white superior class. In other words, there are very legitimate foundations for the prohibition of dagga, such as medical reasons and the protection of the youth, which certainly played a role in prohibiting the drug or at least had the potential to do so. And yet, the one reason standing out was racism. Furthermore, the subject lacks research which considerably complicates drawing conclusions from scientific data.

Chapter four focuses on the rulings involving the decriminalisation, discussing in detail the approaches taken in *Prince II.1* and *Prince II.2*, consensus and differences, strengths, and weaknesses. The chapter lays out how the legal situation changed due to the judgements and how the use, possession, and cultivation of dagga by an adult person in private, has been partially decriminalised. The legal argument behind the decriminalisation is the inconsistency of certain regulations prohibiting the use, possession, and cultivation of dagga with the right to privacy as referenced from section 14 of the Constitution.

Emphasising the significant and practical impact of the Constitutional Court judgement, chapter five links it to the positive effects that it might have on the desperately overwhelmed criminal justice system. First, I point out the bad conditions

of the South African criminal justice system, which suffers from overcrowded prisons, being significantly clogged by small dagga offences. I argue how the situation is the best proof of how the so-called ‘war on drugs’, always reacting with harshness and stricter, more severe punishments, has failed. Since the judgement was handed down, however, imprisonment rates have decreased significantly. This will probably take some pressure off the justice system due to decreased overcrowding and less cases before the courts. At the same time, it is crucial to argue for a focus on the dealing and manufacturing of dagga as well as other, harder drugs and prosecuting the influential drug dealers instead of insignificant small-time offenders.

Although the achievement reached due to the Constitutional Court judgement is significant, the discourse around cannabis is still far from complete and will no doubt continue to be debated. Now, that we have the Parliament’s decision on how to deal with the court’s demands in form of the Cannabis Bill, we certainly came one step further. But since it was published very recently, we will have to wait for reactions as well as the impact that the Bill will have.

We also cannot say with certainty that these recent changes will have the desired effect of helping the criminal justice system, as pointed out in chapter five. But there seems to be a chance that it will. And as long as it might bring significant and lasting improvements, the chance to evolve should be grabbed. After seeing how deteriorating punishments have failed disastrously, it is worth it to try another way. Dagga ‘is here to stay’; it has inevitably ‘become a feature of both the geographical and social landscape of southern Africa, and total elimination of the plant is simply not an option’.<sup>296</sup> That is exactly why it is important to seize the opportunity and tackle it now, to ensure practicable and justifiable outcomes.

Making better outcomes possible would include collecting scientifically reliable data and continuing to move forward based on these in order to prevent repetition of the same mistakes made in the past. When it comes to dagga offenders, their suffering from social stigmatisation for being classified and treated as proper criminals<sup>297</sup> is to be challenged. It is imperative to focus on improving the functioning of the criminal justice system and the provision of some more resources. In addition, it is necessary to focus on identifying the more powerful figures in the drug world as well as on harder,

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<sup>296</sup> Paterson op cit note 4 at 127.

<sup>297</sup> Du Plessis as cited in Minnaar op cit note 97 at 150.

far more dangerous drugs, with more efficiency. All of this obviously would not make up for the strict and unjust history surrounding dagga. Decriminalising but nevertheless regulating dagga, as the important policy consideration it is, is a very good step in the right direction.

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