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1. INTRODUCTION

Drug use and/or addiction is undoubtedly a serious public health, social and legal matter. The legal policy enacted to address drug mis/use has significant ramifications for individuals and society. The principal argument of this paper is that South Africa's current drug policy is unsound and unconstitutional. The legislative and policy framework is based on the prohibition of certain psychoactive substances deemed illicit and the criminalisation of their production, distribution and use, to wit: prohibition drug policy.

Firstly, I contend that prohibition drug policy is unsound on the grounds that it is senselessly ineffective and grossly counterproductive. This is because the approach of prohibition and criminalisation has failed to deter the demand for drugs, curtail the supply of drugs, or reduce the harms that drugs may cause.¹ Additionally, I will argue that this policy, in fact, causes devastating consequences for society, which greatly exacerbate the harms associated with drugs for individuals and their communities.² Prohibition drug policy has led to the creation of a massive and lucrative illicit drug market that engenders crime, violence and corruption.³ It has rendered illicit drugs far more dangerous and integrated with criminality than might be otherwise under legal regulation.⁴ Draconian law enforcement measures have led to mass incarceration and the imposition of highly disproportionate penalties for non-violent offences.⁵ It has diverted valuable public resources into counterproductive law enforcement measures at the expense of effective evidence-based public health and education interventions aimed at addressing drug misuse.⁶ Furthermore, it has incited social marginalisation and stigmatisation of a significant proportion of the population, many of whom are the most vulnerable people in society.⁷ In light of these ruinous harms, I submit that prohibition drug policy is unsound and dissonant with our South African constitutional democracy, which compels a society based on democratic values, social justice and fundamental human rights.⁸

¹ Royal Society for Public Health 'Taking a New Line on Drugs' (2016) at 3.

² International Drug Policy Consortium 'Taking stock: A decade of drug policy – A civil society shadow report' (2018) at i.

³ United Nations Office of Drugs and Crime 'World Drug Report 2008' (2008) at 216.

⁴ Global Commission on Drug Policy 'Regulation – The Responsible Control of Drugs' (2018) at 7-9.

⁵ Human Rights Watch 'Decades of Disparity: Drug Arrests and Race in the United States' (2009).

⁶ International Drug Policy Consortium op cit note 2 at 9.

⁷ Royal Society for Public Health (2016) op cit note 1 at 3.

⁸ Constitution, Preamble.

Secondly, I contend that prohibition drug policy, and the legislation that enacts it, the Drugs and Drug Trafficking Act⁹ (Drugs Act), is unconstitutional. The South African Constitution¹⁰ demands that an infringement of rights be justified. I will argue that the Drugs Act unjustifiably violates human rights, including: the right to privacy;¹¹ the right to freedom;¹² and the right to human dignity.¹³ Furthermore, alternative drug policies, such as decriminalisation or legalisation, are far less restrictive means of achieving the legitimate purpose of drug control in society. I therefore submit that the Drugs Act is invalid and unconstitutional, as the limitations it imposes on various human rights are unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

Lastly, I contend that prohibition drug policy ought to be replaced instead by the legal regulation of drugs. I submit that legal regulation drug policy is the more effective, just and humane drug policy, aptly suited to our South African constitutional dispensation, which, I argue, compels a drug policy that takes a human rights-based, public health approach to drug control in society.

2. STRUCTURE OF ARGUMENT

Firstly, this paper will consider the legal framework in respect of South Africa's drug policy and the international drug control regime underpinning it. Secondly, it will consider the history of drug policy in order to determine the ideological basis of prohibition drug policy. Thirdly, it will challenge prohibition drug policy on the ground that it is unsound policy. This will be demonstrated by examining the devastating consequences of the so-called 'war on drugs'. Fourthly, it will consider alternative drug policy models, namely: harm reduction; decriminalisation; and legal regulation. Fifthly, it will challenge prohibition drug policy on the ground that it is unconstitutional. This will be demonstrated through a constitutionality limitations analysis of the Drugs Act, in terms of section 36 of the Constitution. Lastly, it will present legal regulation drug policy as the apposite drug control policy for South Africa's constitutional democracy.

⁹ Drugs and Drug Trafficking Act 140 of 1992.

¹⁰ Constitution of the Republic of South Africa, 1996.

¹¹ Constitution, s 14.

¹² Constitution, s 12.

¹³ Constitution, s 10.

3. PROHIBITION DRUG POLICY

A drug policy is the legislative, administrative and executive scheme regarding the control of certain psychoactive substances considered dangerous and/or dependence-producing. Prohibition drug policy refers to the legal system under which the production, supply and use of specified psychoactive substances, ie illicit drugs, are proscribed by law, and persons contravening such laws are subject to criminal punishment.¹⁴ Essentially, prohibition drug policy bans the trade in and the consumption of illicit drugs under criminal penalty of law. Drugs and drug abuse are dealt with in terms of the criminal justice system. In this way, stringent law enforcement together with severe penal sanctions are used in pursuit of the professed aim of deterring and eliminating illicit drug use.¹⁵ Accordingly, the primary focus of the State is on the arrest, prosecution and imprisonment of drug sellers and drug users.

Significantly, the deprivation of liberty of an individual by the State is deemed a legitimate consequence of prohibition drug policy. The policy authorises the State to inhibit persons from engaging in voluntary, non-violent actions of drug consumption, as well as outlaws mutually consenting transactions of drug trade. It is important to recognise that, by definition, drug use and drug trade offences are themselves non-violent actions. Any other criminal offence that may be committed in connection with illicit drugs, eg robbery, murder, etc, is a separate crime, and the criminal justice system is already constituted to deal with such offences involving, for example, involuntary force against another person.¹⁶ The criminalisation of drugs is therefore the most intrusive form and exercise of state authority over its citizens. This is because it imposes state control and limitation of an individual's private conduct. Noncompliance results in penal sanction, which can involve the ultimate deprivation of freedom: arrest and imprisonment. It is therefore crucial to determine whether the limitation of rights that drug prohibition entails is justifiable and valid.

The professed purpose of prohibition drug policy is to deter and eliminate illicit drug use.¹⁷ Criminalising both drug sellers and drug users is purported to be a necessary means of dissuading drug use. Prohibition is therefore a paternalistic and moralistic approach to drug policy. It is paternalistic, as the State assumes authority to restrict the freedom and

¹⁴ Transform Drug Policy Foundation 'After the War on Drugs: Blueprint for Regulation' (2009) at 16.

¹⁵ J A Inciardi *The Drug Legalization Debate* 2 ed (1999) at 20.

¹⁶ J Ostrowski 'The Moral and Practical Case for Drug Legalization' (1990) *Hofstra Law Review* vol 18 issue 3, article 5 at 609.

¹⁷ Inciardi op cit note 15 at 20.

responsibility of individuals in their supposed own interest. The assumption being that certain psychoactive substances – illicit drugs – are so harmful (physically or morally) that they must be prohibited in order to prevent drug users from doing harm to themselves or others. It is moralistic, as drug prohibition is intended to shape norms about the righteousness of drug use. The State imposes its conception of which psychoactive substances are ‘bad’, and therefore illicit, while other similarly harmful psychoactive substances, such as alcohol, tobacco and pharmaceuticals, are legal, or more accurately, legally regulated. I will show below that prohibition is in fact rooted in moral and social reform movements reflecting the American culture and values of the times,¹⁸ including stark racial prejudices. Nevertheless, it may be argued that the State often has an important role to play in all societies in guiding its ‘moral’ values. It is important to note, however, that in our constitutional democracy any limitation by the State of individual rights, whether in an individual’s own interest or the interests of others, must be justified. Moreover, any moralism or value judgement must be in accordance with the “objective, normative value system”¹⁹ embodied in the Constitution.

Advocates for prohibition primarily argue that decriminalisation or legalisation of drugs would lead to an increase in drug use and addiction,²⁰ as well as increase the incidence of drug-related harms. I will however argue that the evidence refutes this supposition, and that prohibition itself in fact causes most drug-related harms. Furthermore, prohibitionists argue that illicit drug use is immoral; it further disrupts the family structure; it jeopardises public health and safety, including increased risks of HIV/AIDS from injection drug use; it increases crime due to use and addiction consequences; and it disproportionately harms marginalised groups and the poor.²¹ Conversely, I will contend that it is in fact prohibition drug policy that exacerbates these harms associated with drug use. Finally, prohibitionists argue that decriminalisation or legalisation of drugs would imply an endorsement of drug use, particularly among the youth, thereby lowering perceptions of harm and risk.²² I will argue, however, that legal regulation does not automatically imply a state endorsement, but rather allows for responsible public health education and management of the risks of drug use. By way of analogy, the legal regulation, including age restriction, together with public health information and social

¹⁸ Ibid.

¹⁹ *Carmichele v Minister of Safety and Security* [2001] ZACC 22 (CC) para 54.

²⁰ Inciardi op cit note 15 at 20.

²¹ Ibid.

²² Ibid.

awareness campaigns in respect of tobacco, does not endorse cigarette usage, but instead responsibly and transparently controls it.

4. LEGAL FRAMEWORK

4.1 International

The overarching legal framework for drug prohibition worldwide is established in three main United Nations Drug Conventions: the Single Convention on Narcotic Drugs of 1961 (Single Convention);²³ the Convention on Psychotropic Substances of 1971 (Psychotropics Convention);²⁴ and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Trafficking Convention).²⁵ This international scheme provides the legal basis for most countries' domestic drug control legislation,²⁶ including that of South Africa.²⁷

The UN Drug Conventions prohibit the possession, use, trade in, distribution, import, export, manufacture, and production of drugs for purposes other than medical and scientific.²⁸ Importantly, the possession, purchase or cultivation of drugs for personal consumption is established as a criminal offence.²⁹ In this way, prohibition and criminalisation is instituted as the dominant drug policy approach in the international drug control regime.

While the Conventions are binding on its signatories, I argue that its enforcement is “[s]ubject to [a country’s] constitutional principles and the basic concepts of its legal system”.³⁰ Therefore, I submit that South Africa ought not be bound by the UN Drug Conventions, as I argue that prohibition drug policy is unconstitutional. In this regard the South African Constitutional Court has held that, “. . . South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be

²³ United Nations Single Convention on Narcotic Drugs, 1961.

²⁴ United Nations Convention on Psychotropic Substances, 1971.

²⁵ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

²⁶ Approximately 180 countries are parties to the three UN drug conventions.

See: https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en

²⁷ South Africa has assented to all three UN drug conventions.

See: https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en

²⁸ Article 4 of the Single Convention.

²⁹ Article 3 of the Trafficking Convention.

³⁰ Article 3 of the Trafficking Convention.

precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution”.³¹

4.2 South Africa

Having subscribed to the UN Drug Conventions,³² South Africa gave effect to the provisions thereto and enacted the Drugs and Drug Trafficking Act (Drugs Act).³³ The Drugs Act prohibits the manufacture and supply of “scheduled substances”^{34,35} the use and possession of drugs;³⁶ and the dealing in drugs.³⁷ Drugs are defined as “any (dangerous) or (undesirable) dependence-producing substances”.³⁸ These are deemed to be those so listed in the Schedules to the Drugs Act, such as cocaine, ecstasy, heroin, etc, with the notable exceptions of alcohol and tobacco. Importantly, the Drugs Act criminalises the supply of, the trade in and the use of drugs,³⁹ and imposes a penal sanction for offences in respect thereto.⁴⁰ Notably, the Drugs Act enacts legal presumptions which ease the ordinary burden of proof upon the State,⁴¹ concomitantly encumbering the accused with the burden of proof of innocence not normally found in South African criminal law.⁴² Essentially, the non-medical use and sale of psychotropic substances (with the notable exceptions of alcohol and tobacco) are prohibited in SA under pain of criminal sanction.⁴³ Thus, SA’s drug control framework is fundamentally punitive in nature and is implemented through the criminal justice system.⁴⁴

In addition, South Africa has adopted a National Drug Master Plan (NDMP), in terms of the Prevention of and Treatment for Substance Abuse Act.⁴⁵ The NDMP is supposed to comprise

³¹ *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 (CC) para 82.

³² South Africa has also ratified the 2000 Convention on Trans-National Organised Crime and is a signatory to both the African Union and the Southern African Development Community (SADC) Drug Control Protocol.

³³ Drugs and Drug Trafficking Act 140 of 1992.

³⁴ Drugs Act, s 1: “scheduled substance” means any substance included in Part I or II of Schedule 1, which are the substances deemed useful for the manufacture of drugs.

³⁵ Drugs Act, s 3.

³⁶ Drugs Act, s 4.

³⁷ Drugs Act, s 5.

³⁸ Drugs Act, s 1. These are listed in terms of Part I or II or III of Schedule 2 of the Drugs Act.

³⁹ Drugs Act, s 13.

⁴⁰ Drugs Act, s 17.

⁴¹ For example, Drugs Act, ss 20 and 21.

⁴² J Burchell *Principles of Criminal Law* 5 ed (2016) at 823.

⁴³ *Ibid* at 821.

⁴⁴ Monique Marks and Simon Howell ‘Cops, drugs and interloping academics: an ethnographic exploration of the possibility of policing drugs differently in South Africa’ (2016) *Police Practice and Research* vol. 17, no. 4, at 341.

⁴⁵ Prevention of and Treatment for Substance Abuse Act 70 of 2008.

the national strategy for the management of substance abuse and the measures to control and manage the supply of and demand for drugs in SA.⁴⁶ It is a policy developed by the Department of Social Development (DSD) that aims to enable cooperation between government and stakeholders in the field of substance abuse prevention by defining priorities and allocating responsibility for drug control efforts.⁴⁷

Significantly, the NDMP 2019-2024⁴⁸ (the Plan) “recognises that the punitive approach has not been successful in tackling drug-related problems. Instead, emphasis should be placed on evidence-based public health and social justice principles that focus on individuals, families, communities, society as a whole, and must underscore social protection and health care instead of conviction and punishment”.⁴⁹ Further, “it is necessary to form relationships between the criminal justice and public health sectors, and to change laws and/or norms to support evidence-based harm reduction”.⁵⁰ Accordingly, I submit that the proposed national strategy for substance abuse management is incongruent with the predominant national legal structures and systems for drug control in SA.⁵¹ The Drugs Act is, nevertheless, the prevailing authoritative drug control legislation. Hence the need to challenge the constitutionality thereof.

5. HISTORY OF DRUG PROHIBITION

Humans (and animals) have been using psychoactive substances such as cannabis, coca and opium for thousands of years.⁵² The purposes for this usage are as varied and widespread as the cultures are globally. Drugs are used for spiritual, nutritional, medicinal, therapeutic, social and recreational practices. However, the international governmental control of the production, distribution and use of certain psychoactive substances arose only in the twentieth century. Governmental drug control certainly appeared in part as a response to disconcerting increases in drug abuse and addiction in the modern world. However, I argue that the particular drug policy – prohibition – instituted in order to address the matter of drug control in society has

⁴⁶ Prevention of and Treatment for Substance Abuse Act, s 3.

⁴⁷ National Drug Master Plan 4th Edition 2019 To 2024 South Africa Free Of Substance Abuse, Department of Social Development at 13.

⁴⁸ National Drug Master Plan.

⁴⁹ National Drug Master Plan at 14.

⁵⁰ National Drug Master Plan at 60.

⁵¹ Simon Howell and Katherine Couzyn ‘The South African National Drug Master Plan 2013-2017: A critical review’ (2015) *SACJ* at 1.

⁵² Kristin Romey ‘Ancient Cannabis ‘Burial Shroud’ Discovered in Desert Oasis’ *National Geographic* 4 October 2016, available at

<https://www.nationalgeographic.com/news/2016/10/marijuana-cannabis-pot-weed-burial-shroud-china-ancient-discovery-scythians-turpan-archaeology-botany/>, accessed on 9 March 2021.

been intrinsically influenced by various external interests not directly related to the potential harmfulness of the psychoactive substances themselves.⁵³ These include ideology, economic interests, domestic and international politics, and, significantly, racial and social prejudices. Correspondingly, the United States of America has been the major driver in international drug control efforts since its inception.⁵⁴ US domestic and foreign policy has forcefully propounded the prohibition-based approach to drug policy, and its dominance continues, as exemplified by the soi-disant ‘war on drugs’.

5.1 Historical prelude

Initially, government control over drugs was minimal and mostly considered as part of the private sphere. Drug use and addiction was deemed as a personal or a medical matter,⁵⁵ and was therefore treated as a health issue as opposed to a criminal matter warranting judicial punishment. At the turn of the twentieth century throughout Europe and North America people of various social classes used drugs such as opium and coca in various forms for mostly palliative and therapeutic purposes; throughout Asia people consumed opium; in East Africa people consumed khat; in the Andean regions of South America people consumed coca leaf; and across the world people consumed cannabis. All for cultural, social and recreational purposes. And of course these practices continue to this day. US pharmacies (which are called drug stores to this day) sold over-the-counter products containing the same ingredients as heroin and cocaine. Common cough mixtures contained opiates, and Coca-Cola was indeed made using the same plant as insufflation cocaine.⁵⁶ Notably, these drugs were typically pharmaceutical opiates or organic cultivars of higher purity (ie free from adulterants or poisons) and of much lower potency than today’s illicit equivalents (eg heroin, crack cocaine, crystal methamphetamine). Due to the numerous preparations and derivatives of psychoactive substances, such as opium, being commercially available and widely used, opiate addiction rates are thought to have been comparatively high.⁵⁷ However, this was initially not regarded as especially problematic, particularly when compared to alcohol and alcoholism. And it was certainly not as problematic and harmful as it later became through the twentieth century to

⁵³ J Sinha ‘The History and Development of the Leading International Drug Control Conventions’ (2001) International Centre on Human Rights and Drug Policy, available at <https://www.hr-dp.org/contents/1114>, accessed on 9 March 2021.

⁵⁴ *Ibid.*

⁵⁵ D T Courtwright ‘A Century of American Narcotic Policy’ in D R Gerstein and H J Harwood (eds) *Treating Drug Problems* vol 2 Committee for the Substance Abuse Coverage Study, Institute of Medicine (1992) at 2.

⁵⁶ J Hari ‘Chasing the Scream’ (2019) at 6.

⁵⁷ Courtwright *op cit* note 55 at 2.

now. This paper aims to show that these substantial harms are largely as a result of the prohibition and criminalisation-based approach instituted as the principal drug control policy.

Alcohol was (as it is now)⁵⁸ comparatively far more harmful to both users and broader society. It was recognised that while drugs like opium and cannabis pacified users, drugs like alcohol potentially aggravated a person's behaviour. Alcoholics were notoriously unruly and truculent often injuring themselves and others. Alcoholics' behaviour was a public nuisance which caused serious social harms. In the USA this eventually led to an influential reform coalition, consisting of mainly white, middle-class Protestants to censure alcohol as the principal source of social problems. They professed that drinking alcohol was *morally* wrong, because it led to drunkenness, and drunkenness led to gender-based violence, abandoned children, sexual promiscuity, corruption, poverty, insanity, early death, and of course eternal damnation. Significantly, drinking alcohol was also objectionable because it was associated with certain social groups whose morality was questioned: Catholic immigrants, criminals, vagrants, casual labourers, the poor, and urban blacks.⁵⁹ These reformers eventually achieved their aim through governmental enactment of America's national prohibition of alcohol.⁶⁰ Alcohol prohibition ultimately failed, and the nationwide ban on the production, importation, transportation, and sale of alcohol only lasted from 1920 to 1933. During this period 'the Prohibition Era' became notorious with violent gangsterism, corruption, and importantly, and indeed the very cause of, a highly lucrative illicit market in bootlegged alcohol.

5.2 Changing demographics of drug users: racism

As had been the case with alcohol, the authoritative attitude towards drugs and addicts changed significantly in the early twentieth century. It is argued that this shift in attitude was due to changing perceptions of, importantly, the social and cultural identity of drug addicts, how they picked up their habits, and their supposed behaviour under the influence of drugs.⁶¹ As with alcohol prohibition, contempt for users, imbued by class and ethnic prejudice, was a significant factor in the institution of prohibitive drug control legislation.

⁵⁸ D Nutt et al 'Drug harms in the UK: a multicriteria decision analysis' (2010) *The Lancet* vol 376 issue 9752.

⁵⁹ Courtwright op cit note 55 at 2-3.

⁶⁰ The Eighteenth Amendment to the US Constitution, and the law that implemented it: the National Prohibition Act 1919 (Volstead Act).

⁶¹ Courtwright op cit note 55 at 4.

In the Global North opiate addicts were originally often upper and middle-class whites, many of whom had begun using medicinal opiates such as morphine, which were commercially advertised to relieve the symptoms of various ailments ranging in severity. Generally, these addicts did not cause any great social harm or public disruption, and addicts were thought to suffer from a private vice.⁶² An official government study found that before stringent drug prohibition was instituted, 75 percent of self-described addicts (as opposed to merely users) had steady employment, about 22 percent of addicts were wealthy, while only 6 percent were poor.⁶³ However, the demographics of drug use were changing, and with it the concomitant prejudices associated with these demographics followed.

Michelle Alexander convincingly argues that the main reason for draconian drug control laws being enacted in the USA was that racial and ethnic groups were using certain psychoactive substances, consequently disrupting the social order and purportedly corrupting whites.⁶⁴ A major development in the addict demographic through the first half of the twentieth century was the growing use of heroin by black men. It is argued that drug use among blacks was largely an accessory to urbanization.⁶⁵ Blacks were not considered prevalent drug users early in the twentieth century. Primarily living in the rural South, they were mostly poor with less access to opiates than whites, who could afford doctors and pharmaceutical medicines. Racial segregation laws (Jim Crow), disfranchisement, poverty, industrialisation, etc led to millions of blacks leaving the countryside for cities. Virulent racism of the times ensured educational and occupational limitations for blacks. Unemployment and poverty were (and continue to be) conducive to substance abuse, making urban blacks especially vulnerable.⁶⁶ While white urban immigrants were able to move from the city to safer neighbourhoods through economic mobility, blacks were mostly trapped in the inner city with inferior schools, inadequate services and crime, thus installing the permanence of the 'black ghetto' and inner-city slums.⁶⁷ An environment which virtually assured the perpetuation of poverty, drug abuse and addiction, and which of course continues in cities across the world today.

⁶² Ibid at 3.

⁶³ Hari op cit note 56 at 36.

⁶⁴ Michelle Alexander *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

⁶⁵ Courtwright op cit note 55 at 19.

⁶⁶ Ibid.

⁶⁷ Ibid.

The governmental approach taken was a need to suppress drug addiction to the extent of instituting extreme measures: prohibition and criminalisation. However, I argue that a fundamental issue was overlooked, and continues to be underrepresented, in the authorities' drug misuse analysis and policy response. In order to adequately address the drug addiction afflicting blacks at the time (and indeed almost all drug addiction presently), it would be necessary to address the dire economic and social conditions in black communities.⁶⁸ Instead, the government doubled-down on criminal law enforcement mechanisms, and progressively stiffer judicial mandatory sentences for the possession and sale of drugs were enacted. As the criminal law enforcement measures targeted already disadvantaged and vulnerable groups, like poor racial minorities, the resultant criminality from minor drug offences exponentially exacerbated the problem. In effect condemning entire social groups to lives of criminality. A policy failure which still persists today.

A proper consideration of the historical development of drug policy must take into account the influence of prominent individuals who have greatly shaped the global drug control regime with their status, beliefs and prejudices. Perhaps few did so more than Harry J Anslinger. Harry Anslinger was the first and longest standing commissioner of the Bureau of Narcotics (the precursor to America's Drug Enforcement Administration (DEA)), which sprung from the US Treasury Department's Prohibition Unit's Narcotics Division, partly to distance it from the tumult over the failure of alcohol prohibition.⁶⁹ Anslinger is widely recognised as having had a considerable impact on the development of US drug policy, and consequently international drug control.⁷⁰ As the original 'drug czar', many regard him as the founding father of the war on drugs.⁷¹

It is argued that Anslinger's drug control policy was inexorably and often blatantly linked with racism.⁷² Similarly, racist views prevalent of the times necessarily coloured the public perception of drug addiction, and thus informed drug policy in general to devastating effect. Anslinger conflated drug use, race and culture. He was quoted as saying, "Reefer makes darkies

⁶⁸ Ibid at 21.

⁶⁹ Ibid at 13.

⁷⁰ J C McWilliams 'Unsung Partner against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930-1962' (1989) *The Pennsylvania Magazine of History and Biography* 113(2) at 208.

⁷¹ J C McWilliams *The Protectors: Anslinger and the Federal Bureau of Narcotics (1930-1962)* (1990) at 187.

⁷² Colin Moynihan 'An Exhibition Tells the Story of a Drug War Leader, but Not All of It' *The New York Times* 10 August 2020, available at <https://www.nytimes.com/2020/08/10/arts/design/Anslinger-drug-czar-exhibition.html>, accessed on 9 March 2021.

think they're as good as white men". Also, "There are 100 000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others".⁷³ He was able to exploit the public's antidrug sentiment that arose from the transformation of the demographics of the addict population. Opium smoking was popular among Chinese labourers; heroin and cocaine use was associated with blacks; and marijuana (cannabis) was linked to Mexicans. This public sentiment was facilitated by exaggerated statistics and propagandists – notable government officials would produce official reports of drugs use, crime and race correlations, which contemporary studies have found to be highly unsystematic, statistically inaccurate and grossly biased.⁷⁴ The media also sensationalised and propagated false racist narratives around drug addiction. For example, The New York Times newspaper ran stories typical of the time with headlines such as, 'Negro Cocaine "Fiends" New Southern Menace',⁷⁵ which claimed that cocaine was turning blacks into 'superhumans' who could withstand multiple gun shots; or 'Mexican Family Go Insane',⁷⁶ which promoted the false claims of cannabis-induced 'reefer madness'.

In this way, I argue that prohibition drug policy was entrenched by successfully appealing to the social conservatism, anti-intellectualism and xenophobic and racial fears of the majority of the American public. The government authorities and officials relied on the antidrug public consensus – cultivated by the media, which consistently portrayed drug traffickers as violent villains, and users as subhuman – to implement draconian drug laws and excessively severe prison sentences that would ultimately give rise to America's prison-industrial complex,⁷⁷ as well as the highly disproportionate prison population of drug offenders internationally.⁷⁸

5.3 Moralism

I argue that the changing demographics of drug addiction were exaggerated to highlight the narrative of a deviant subculture which threatened socially conservative norms of the time. The

⁷³ Laura Smith 'How a racist hate-monger masterminded America's War on Drugs' *Timeline* 28 February 2018, available at <https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189>, accessed on 9 March 2021.

⁷⁴ Courtwright op cit note 55 at 7.

⁷⁵ Hari op cit note 56 at 26.

⁷⁶ Ibid at 15.

⁷⁷ Courtwright op cit note 55 at 16.

⁷⁸ 1 in 5 prisoners worldwide is imprisoned for drug offences. Source: International Drug Policy Consortium 'Taking stock: A decade of drug policy – A civil society shadow report' (2018) at 10.

social and cultural identity of drug addicts and the manner in which they picked up their habits were relevant. The majority of new drug users were introduced to illicit drugs by, and then often became part of, a network of experienced users and dealers. An illicit subculture seemingly formed and perpetuated itself through incessant recruiting.⁷⁹ Drug use and addiction went from being a private condition to a socially stigmatised affliction. Drug addiction was analogised to sexually transmitted diseases; as an infection that was acquired by engaging in forbidden self-gratification with evil abettors.⁸⁰ Addicts were deemed unsavoury and dangerous, because, like STDs, they could afflict the lives of innocent others.

I therefore argue that the prohibition-based drug laws that ensued were in essence morality laws. Such laws serve a dual purpose: They are symbolic; defining and reiterating norms as according to the authority. In addition, they are instrumental; employing state power to restrict or eliminate the objectionable behaviour.⁸¹ The state authorities made a judgement regarding the morality of the use of certain illicit drugs (as opposed to legal drugs such as alcohol and tobacco) and enforced this moral determination as law. Certain psychoactive substances were deemed 'bad' (morally wrong), and thus must be forbidden, as they had a pernicious effect on individuals and society. Significantly, this pernicious effect comprised of drug use and addiction being linked with undesirable social groups based on class, cultural and racial prejudices. Once drug use became identified with otherwise immoral or unliked social groups,⁸² drug prohibition was instituted in accordance with a familiar historical legislative response. Throughout history, adjudged 'deviant' groups in society, which have become large or threatening enough to the authoritative norms,⁸³ have been persecuted through governmental action. For example, heresy laws of the Middle Ages (or presently in some parts), or laws oppressing people in the LGBTI community, or racially discriminatory laws of apartheid.

Notably, the unprecedented restrictiveness of prohibition drug policy is highlighted by the fact that, when enacted, prohibition of alcohol applied only to manufacture and sale. Personal use and consumption was not proscribed, and importantly users and addicts (alcoholics) were not effectively criminalised. By contrast, however, there was a powerful, visceral fear of drug users

⁷⁹ Ibid at 6.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² R J Bonnie and C H Whitebread II *The Marijuana Conviction: A History of Marijuana Prohibition in the United States* (1974) at 26-27.

⁸³ Courtwright op cit note 55 at 6.

and addicts and all they stood for as propagated by public officials. Thus, I argue that it was the social and moral connotations of drug use and addiction that mattered more in the public's perception, rather than the actual mental and physical effects of the drugs themselves.⁸⁴ In this way, the drug users themselves were targeted as being dangerous, and consequently vilified, stigmatised and marginalised from accepted society. This self-referential process is exacerbated when the drug using groups are also associated with already feared, hated or discriminated against cultural, racial or economically vulnerable people.

I argue that a consequence of the adoption of a drug policy based on social morality was the favouring of drug control implemented through draconian criminal law enforcement, and eschewing a policy based on scientific and medical practice and treatment. For example, the initial allowance for good faith medical treatment for drug addicts in the early twentieth century was soon quashed by the strict interpretation of criminal drug laws by notoriously harsh law enforcement measures. Law enforcement officials pursued an aggressive anti-maintenance policy,⁸⁵ and indicted numerous criminal prosecutions against addicts, doctors and pharmacists. It was recognised by physicians in the field that illicit drugs were of a lesser (or unproven) danger than other psychoactive substances like alcohol and tobacco, and that addicts would become seriously ill without regular use. However, through threats and actual prosecutions US law enforcement was able to instil enough fear in private legal providers (physicians and pharmacists) to prevent the treatment of drug addicts.⁸⁶ Nevertheless, recognising the potential health crisis, as well as the possible criminal entailments this ensued through facilitating a black market for drugs, in the early 1920s a number of US cities and towns set up municipal 'narcotic clinics'. These public facilities dispensed drugs such as morphine, cocaine or heroin cheaply to their registered patient addicts as a form of organised, public drug addiction treatment (maintenance). However, all of these clinics were eventually shut down by the US federal government. The US government was determined to eliminate both illicit and licit sources of drugs for addicts. They viewed the clinics as dangerous precedents and potential obstacles to the rigorous enforcement of the stringent drug laws. Accordingly, they worked to abort them through a combination of critical inspections, threats

⁸⁴ Courtwright op cit note 55 at 12.

⁸⁵ Maintenance was a medical method of treating drug addiction, which involved managing the taking of opiates in low dosages over time in order to minimise riskiness through administered consumption and avoid suffering the ill effects of sudden withdrawal symptoms.

⁸⁶ Courtwright op cit note 55 at 10.

and law enforcement pressures.⁸⁷ By way of another example, the legal classification of illicit drugs into different schedules corresponding to their supposed dangerousness is not rational, as it is not based on scientific determination of the potential harmfulness of the respective drug.⁸⁸ This is most clearly evidenced by the inaccurate inclusion of psychoactive substances such as cannabis, until recently, being legally scheduled in the same category as heroin, the most serious schedule. They were combined legislatively, because of the presumption that both were euphorogenic, potentially dependence-forming and associated with crime,⁸⁹ regardless of the actual pharmacological evidence, or rather the lack thereof. This is notable because it evidences the unscientific and morality-bias assumptions that informed, and continue to inform, drug control legislation. In this way, rational, evidence-based scientific and medical research around drugs was, and continues to be, eschewed in favour of the prevailing ideology and politics.

5.4 US influence

Analysts argue that the United States of America has been the major driver in international drug control efforts since the beginning of global drug policy.⁹⁰ The USA sought to achieve its domestic drug control objectives by pushing for drug prohibition directly at cultivation sources internationally. It understood that the drug trade was global, which required prohibitive drug control on an international scale. This needed international diplomatic efforts to ensure strict worldwide enforcement. Accordingly, the American drug control policy of prohibition and criminalisation was forcefully pushed through international drug control forums, often instigated at the instance of the USA, at the League of Nations, and then the United Nations. The US international delegation was aggressively represented by Episcopal Bishop Charles Henry Brent, whose religious conservatism drove his crusade against opium in the early twentieth century; Dr Hamilton Wright, a foremost antidrug crusader whose stark racist views motivated his antidrug campaign;⁹¹ and from the early 1930s, Harry Anslinger, who was

⁸⁷ Courtwright op cit note 55 at 11.

⁸⁸ Global Commission on Drug Policy 'Classification of Psychoactive Substances When Science was Left Behind' (2019) at 4-5.

⁸⁹ Courtwright op cit note 55 at 9.

⁹⁰ Sinha op cit note 53.

⁹¹ Hari op cit note 56 at 337.

He reportedly claimed that "it has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the negroes of the South and other sections of the country".

Hamilton Wright 'Report of the International Opium Commission, Shanghai, China, February 1 to February 26, 1909' Rep. Shanghai: North-China Daily News & Herald, 1909, available at <https://archive.org/details/cu31924032583225>, accessed on 9 March 2021.

appointed as the US representative to the UN Commission on Narcotic Drugs (CND). Consequently, almost every major international conference and commission on drug control was formed through American pressure and influence.⁹²

Analysts argue that it is not coincidental that US drug policy dovetailed with its foreign policy.⁹³ America's military and ideological rivals were simultaneously and advantageously assailed for their role in drug supply: for example, 'Imperial' Japan, 'Communist' China, and 'Castro's' Cuba.⁹⁴ This strengthened the favoured prohibition and criminal law enforcement-based drug policy domestically in America, and consequently provided further justification for vigorously pursuing prohibition drug policy internationally. After World War II the USA was able to leverage its newfound hegemony to force the other nations of the UN towards a prohibition-based drug control system. A range of international relations matters from military support, to economic trade deals, to foreign aid, were used as incentives to entice or coerce reluctant states to embrace the US drug control model of prohibition.⁹⁵ By way of example, in the 1930s the USA cut off exports of Mexico's licit supply of medical opiates for its hospitals – in effect depriving patients of legal medical pain relief for standard medical procedures – until Mexico agreed to adopt the prohibition-based model.⁹⁶ The tragic irony is that the country that has since suffered the most devastating consequences of drug prohibition recognised early on the damaging effects that prohibition drug policy can cause (as exemplified by the failure of alcohol prohibition in the USA), but was bullied into compliance, due to geo-political international relations. A trend that continues today.

Having no modern cultural affinity for organic drug use, such as chewing coca leaves, and grappling with the effects of drug abuse (of much headier processed drugs) among their citizens, Western global powers, lobbied by powerful pharmaceutical manufacturing companies, advocated stringent controls on the production of organic raw materials and on illicit trafficking.⁹⁷ Efforts were thus concentrated on attempting to control the cultivation, production and distribution of drugs at their source nations. In this way, Western powers gained political capital domestically in a time of social conservatism and for being ostensibly 'tough

⁹² Sinha op cit note 53.

⁹³ Courtwright op cit note 55 at 14.

⁹⁴ Ibid.

⁹⁵ Sinha op cit note 53.

⁹⁶ Hari op cit note 56 at 141.

⁹⁷ Sinha op cit note 53.

on crime’, while shifting the real burden of drug control to developing countries in Latin America and Asia and now West Africa. These ‘organic drug material states’ had no cultural inclination or drug problem initially, and were open to socio-cultural organic drug use, with it having been a part of their societies for centuries.⁹⁸ However, they did not have the economic or military power to resist a policy initially imposed on them by the ‘drug manufacturing and retail states’ of primarily Western industrialised nations.

5.5 Summary

It is evident that the history of international drug control provides context which cannot be overlooked in assessing the viability and justifiability of the current drug control policy of prohibition. Conceived out of (hypocritical) puritanical Western ideology and motivated by stark racial prejudice, the underpinnings of the policy are morally compromised. Contempt for users imbued by class and ethnic prejudice was a significant factor in the institution of prohibitive drug control legislation. By successfully appealing to the social conservatism and bigotry of the times, the authorities were able to entrench extremely oppressive morality-based drug laws. The USA and colonial powers were confronted with the adverse effects of drug abuse and addiction domestically, concomitant with increased social and economic disruption as a result of urbanisation, immigration and economic anxiety. But instead of seeking to address both the demand-side factors of drug misuse – such as the socio-medical aspects – as well as the supply of drugs, emphasis was concentrated especially on the latter. The people were thus convinced that the role of the government was to eliminate suppliers, dealers *and users* of drugs, due to their danger; both of the substance and the user themselves. This however was a legislative, administrative and executive decision, and not providence. One that absolved the government of the responsibility to address the important aetiological factors around drug abuse, and to assess alternative, less socially destructive approaches to drug policy. In this way, the ideological interests of developed nations, directed by the US, drove the establishment of an international drug control regime which prioritises punishment through the criminal justice system, rather than treatment through public health. Correspondingly, in 1971 then American President Richard Nixon formally launched the global ‘war on drugs’.⁹⁹ An international campaign, led by the USA, of drug prohibition, military aid and military intervention with the

⁹⁸ Ibid.

⁹⁹ Courtwright op cit note 55 at 30.

objective of eliminating the production, distribution and consumption of certain psychoactive substances deemed illicit. Often at any and all cost.

6. CRITIQUE OF PROHIBITION DRUG POLICY: UNSOUND

I contend that prohibition drug policy is unsound on the grounds that it is wastefully ineffective and vulgarly counterproductive. This is because the drug policy approach of prohibition and criminalisation has failed to deter demand, curtail supply, or reduce the harms that drugs may cause.¹⁰⁰ Furthermore, I argue that this policy, in fact, causes devastating consequences for society, which greatly exacerbate the harms associated with drugs for individuals and their communities.¹⁰¹ This will be demonstrated by examining the devastating consequences of the ‘war on drugs’.

6.1 The Drug War

The war on drugs is estimated to have cost more than one trillion dollars (and counting) over the last fifty years.¹⁰² The enforcement of global prohibition, costing at least US\$100 billion a year, has resulted in one in five prisoners worldwide being imprisoned for drug offences, the vast majority of whom for drug possession for personal use only.¹⁰³ In South Africa drug users constitute more than 80% of drug-related offences.¹⁰⁴ And far from the objective of eliminating production, supply and use approximately 275 million people use illicit drugs worldwide. In South Africa drug users constitute approximately 7% of the population.¹⁰⁵ Thus, contributing to a black market with an annual turnover of approximately US\$500 billion.¹⁰⁶ Supply reduction efforts have proven ineffective with data from the United Nations Office on Drugs and Crime (UNODC) showing no reduction in the global scale of cultivation of opium, coca and cannabis between 2009 and 2018.¹⁰⁷ With regard to demand, again, UNODC data show no significant progress either on reducing demand, or on reducing drug-related health and social risks.¹⁰⁸ While prohibition policy has thus proven ineffective and costly, I argue that it is also devastatingly damaging on people and their communities. I submit that the harmful

¹⁰⁰ Royal Society for Public Health op cit note 1 at 3.

¹⁰¹ International Drug Policy Consortium op cit note 2 at i.

¹⁰² Drug Policy Alliance ‘Making Economic Sense’, available at <https://drugpolicy.org/issues/making-economic-sense>, accessed on 9 March 2021.

¹⁰³ International Drug Policy Consortium op cit note 2 at 10.

¹⁰⁴ National Drug Master Plan at 58.

¹⁰⁵ This is a conservative estimate based on UNODC data. Source: National Drug Master Plan at 28.

¹⁰⁶ International Drug Policy Consortium op cit note 2 at 7-8.

¹⁰⁷ International Drug Policy Consortium op cit note 2 at 7.

¹⁰⁸ International Drug Policy Consortium op cit note 2 at 29.

consequences of the war on drugs including the following:¹⁰⁹ engendering crime and enriching criminals; undermining peace and security; undermining social and economic development; causing environmental devastation; endangering public health; and jeopardising human rights.

6.2 Engendering crime and enriching criminals

A principal rationalisation for the war on drugs is that it is necessary to combat drug crime.¹¹⁰ I however argue that this narrative is in fact utterly misleading. This is because the drug war itself creates and sustains much of the criminality that it is supposed to thwart.¹¹¹ To demonstrate this, it is crucial to understand the distinction between the harms of drug use, and the *drug-related* harm of associated crime.¹¹² The health and social harms of drug use are as a result of the consumption of potentially harmful psychoactive substances themselves. It includes the mental and physical health and relational issues that can arise from drug misuse. This is separate from drug-related harms, which are not directly caused by drug use per se, but are associated and often conflated with drug use. These include the crime, violence and corruption that has become integrated with the illicit drug trade. I submit that this criminality is not due to drug use itself, but rather is a consequence of the adoption of prohibition drug policy and the ensuing war on drugs.

6.2.1 Creating a thriving criminal drug market

The paradox of how prohibition of drugs results in criminality that it is supposed to eradicate is thus. Simple economics dictates that the legislative prohibition of a substance does not eliminate the market for that illicit substance where there are nevertheless strong incentives for that market to exist. The incentives being that there is a high demand for drug consumption,¹¹³ and therefore there is a lucrative profit motive for suppliers of said drugs. This illicit drug market is made more lucrative by the fact that it is unlawful. Prohibition puts heavy pressure on the supply of drugs which causes the massive inflation of drug prices.¹¹⁴ This inflated price reflects the risk related to trafficking in an illegal substance (eg evading and/or bribing law

¹⁰⁹ Count the Costs, Transform Drug Policy Foundation ‘The Alternative World Drug Report’ 2 ed (2016) at 11-15.

¹¹⁰ E A Nadelmann ‘Drug Prohibition In The United States: Costs, Consequences, And Alternatives’ (1989) *Science*, New Series, vol 245, no. 4921 at 939-947.

¹¹¹ Count the Costs (2016) op cit note 109 at 82.

¹¹² Nadelmann op cit note 110 at 941.

¹¹³ As evident by the approximately 250 million drug users worldwide.

¹¹⁴ J A Miron and J Zwiebel ‘The Economic Case Against Drug Prohibition’ (1995) *The Journal of Economic Perspectives* vol. 9 no. 4 at 177.

enforcement), as well as the unrestrained racketeering that can occur in an unregulated market.¹¹⁵ This creates a huge profit incentive for criminal entrepreneurs to engage in the drug trade. In addition, it creates acquisitive crime¹¹⁶ by indigent drug addicts trying to support their costly dependency. It is noteworthy that the UNODC has itself belatedly conceded that a consequence of the international drug control regime is the creation of a lucrative criminal black market.¹¹⁷ Accordingly, the enactment of prohibition drug policy has resulted in the creation of a thriving illicit drug market, which encompasses criminality ranging from the acquisitive crime by addicts to the extreme violence of powerful drug organisations.¹¹⁸

6.2.2 Violence

I argue that the violence associated with the illicit drug market is thus as a consequence of the drug war. While the violence involved in the drug trade is unconscionable, it is instructive to understand the reasons why the violence occurs and is so severe. The illicit drug market is the world's largest illegal industry.¹¹⁹ An industry which has greatly enriched and empowered criminal organisations, and that has corollary corrosive effects, such as money laundering and corruption. An industry which is under no formal regulation. Prohibition drug policy ensures that there are no legally enforceable rules that govern the illicit drug market. So, illicit actors have occupied that jurisdictional vacuum by default in the absence of state authority, and control of the illicit drug trade effectively falls to powerful organised crime groups. These drug organisations span the gamut of criminal enterprise from drug producing cartels to local gangsters fostering the community crime and violence in cities across the world; for example, in the Cape Flats in South Africa.¹²⁰ The absence of legal rules and regulations – due to prohibition drug policy – necessitates another means for these drug gangs to exert command and control over the illicit market: violence. Intimidation and violence is the currency through which drug organisations obtain their power: reputation, influence and 'legitimacy'.¹²¹ Criminal drug organisations cannot obtain status through lawful means. Power and 'legitimacy'

¹¹⁵ Count the Costs (2016) op cit note 109 at 83.

¹¹⁶ Acquisitive crime is when the offender derives material gain from the crime, such as theft, fraud and robbery.

¹¹⁷ UNODC (2008) op cit note 3 at 216.

¹¹⁸ Count the Costs (2016) op cit note 109 at 82.

¹¹⁹ Nathan Vardi 'The World's Biggest Illicit Industries' 4 June 2010, available at https://www.forbes.com/2010/06/04/biggest-illegal-businesses-business-crime_slide.html#6ea20945760a, accessed on 9 March 2021.

¹²⁰ K Goga, Institute for Security Studies 'The drug trade and governance in Cape Town' (2014) ISS PAPER 263 at 1.

¹²¹ David Shirk and Joel Wallman 'Understanding Mexico's Drug Violence' (2015) *The Journal of Conflict Resolution*, vol. 59, no. 8 at 1358.

are established by being the organisation that cannot be easily overrun. This is often most effectively done through asserting itself through violence and intimidation. Disputes obviously cannot be settled lawfully in a courtroom, and so are settled by force. This creates an exponentially vicious cycle of violence in the pursuit of drug enterprises trying to obtain dominance of the lucrative drug market. Thus, in the absence of formal regulation – such as legal contract enforcement; financial rules and reporting; and, importantly, dispute resolution mechanisms – intimidation and violence are the default regulatory tools for criminal organisations to protect their interests and conduct their business.¹²² For example, turf wars over territory or ‘market share’, dispute resolution in the form of gang warfare, and displays of ‘authority’ or ‘legitimacy’ through dominant acts of extreme violence. As Harvard economist Jeffery Miron explains, “Prohibition creates violence because it drives the drug market underground. This means buyers and sellers cannot resolve their disputes with lawsuits, arbitration or advertising, so they resort to violence instead. Violence was common in the alcohol industry when it was banned during Prohibition, but not before or after . . . Violence results from policies that create black markets, not from the characteristics of the good or activity in question”.¹²³ An indication of the fact that violence is a consequence of the status of the drug trade being unlawful is the fact that the millions of illicit drug users worldwide mostly engage in the drug market through non-violent transactions primarily as consumers, despite its prohibition.

6.2.3 The parallel legal drug market

It is instructive to consider the difference between the legal and illegal markets for drugs. The international drug control system is founded on the UN Single Convention.¹²⁴ The Single Convention has two parallel functions.¹²⁵ It institutes the international prohibition of certain drugs for non-scientific and non-medical use, ie cultural or recreational purposes. In addition, it strictly regulates many of the same drugs for scientific and medical uses. This is understandable, as most pharmaceutical medicines are derived from similar psychoactive compounds to their respective illicit drug derivatives.¹²⁶ For example, morphine, which is vital in medical pain relief and palliative care, is essentially medical-grade heroin. This distinction

¹²² Count the Costs (2016) op cit note 109 at 85.

¹²³ Jeffery Miron ‘Commentary: Legalize drugs to stop violence’ *CNN Politics* 24 March 2009, available at <https://edition.cnn.com/2009/POLITICS/03/24/miron.legalization.drugs/index.html>, accessed on 9 March 2021.

¹²⁴ UN Single Convention, 1961.

¹²⁵ Count the Costs (2016) op cit note 109 at 82.

¹²⁶ Global Commission on Drug Policy (2019) op cit note 88 at 13-16.

remains apparent at the national level in domestic drug control legislation. For example, the Drugs Act and the Medicines and Related Substances Control Act¹²⁷ in South Africa.

The Single Convention's two parallel functions have resulted in two parallel markets: A legal market for 'medical' drugs, which is controlled through legal regulation by the relevant authorities, and an illegal market for 'non-medical' drugs, which is controlled by criminal organisations. The difference in criminality between these parallel markets is conspicuous.¹²⁸ By way of example, the legal opiate market accounts for approximately half of global opium production, yet involves none of the organised crime, violence and conflict associated with its illicit counterpart.¹²⁹ Similarly, consider the markets for other psychoactive substances, such as tobacco and alcohol. There is a stark contrast between the alcohol and tobacco industries and the illicit drug trade. There is no violence between competing liquor or tobacco companies, and consumers are not caught in a deadly warfare. This is because there is lawful, enforceable authority – legal regulation – which ensures the peace and security of the alcohol and tobacco markets and its users. Conversely, during the period of alcohol prohibition a similar pattern of violent organised crime emerged, and was abated when alcohol prohibition was abolished.

6.2.4 Corruption

The war on drugs has spawned a deluge of other criminal activities including widespread corruption,¹³⁰ together with its social, political and economically corrosive effects. The massive untaxed profits that accrue from the illicit drug market have fuelled the corruption of individuals and institutions at every level in affected communities, often already blighted by poverty and weak governance.¹³¹ This as an almost inevitable consequence of huge financial inducements, individuals and institutions that are susceptible to exploitation, together with an industry environment and culture whereby violence and coercion are the means of doing business. By way of example, it is the very drug law enforcement institutions and officers that are often the most liable to corruption; evidencing the counterproductive propensity of prohibition drug policy. This is due to the fact that there are necessary points of access between the illegal drug market and lawful society, in order for criminal drug organisations to conduct their trade. These access mechanisms are necessarily exploitable, as they are administered by

¹²⁷ Medicines and Related Substances Control Act 101 of 1965.

¹²⁸ Count the Costs (2016) op cit note 109 at 82.

¹²⁹ Based on International Narcotics Control Board figures for legal opium and UNODC figures for illicit opium.

¹³⁰ Count the Costs (2016) op cit note 109 at 85.

¹³¹ Count the Costs (2016) op cit note 109 at 57.

tractable actors at the interface between the legal and illegal realms. For example, police officers in relation to law enforcement; customs officials in relation to transportation; and financial operators in relation to illicit financial flows. These people are easily corrupted, through bribery or coercion, to ignore or actively participate in illegal acts.¹³² Prisons provide the clearest example of the futile illogicality of drug prohibition with respect to corruption. It is common cause that the illicit drug trade thrives in the very prisons in which offenders are imprisoned for committing drug offences.¹³³ It is also understood that the majority of contraband is smuggled into prisons not by visitor-prisoner contact, but through prison guards.¹³⁴ It is simply a matter of incentives, either positive, often monetary, or negative, in the form of real threats of harm by notoriously violent actors. In this way, prohibition drug policy fosters corruption throughout society at various levels of engagement with ostensibly legitimate actors. Corruption which necessarily has a dire impact on socio-economic development; distorting economies and further undermining the proper functioning of institutions and good governance,¹³⁵ often in already marginalised societies.

6.3 Undermining peace and security

The international drug control regime has adopted a policy that regards the use of certain psychoactive substances as an existential “threat”¹³⁶ to society. However, I argue that the war on drugs itself threatens the peace and security of individuals, communities and even nations.¹³⁷ The immensely lucrative illicit drug market, as a result of prohibition drug policy, has led to the empowerment of criminal drug organisations, which threatens governance, stability and public security across societies.¹³⁸ Furthermore, the militarisation of the drug war and ensuing violent conflict have further jeopardised public peace and security.¹³⁹ This is particularly so in the most vulnerable and poor communities, where gang violence fuelled by the illicit drug trade endangers the lives of citizens, including innocent bystanders.¹⁴⁰

¹³² Count the Costs (2016) op cit note 109 at 44.

¹³³ Global Commission on Drug Policy ‘Drug Policy and Deprivation of Liberty’ (2019) at 12.

¹³⁴ Ibid at 13.

¹³⁵ Count the Costs (2016) op cit note 109 at 58.

¹³⁶ UN Single Convention, 1961.

¹³⁷ Count the Costs (2016) op cit note 109 at 12.

¹³⁸ Ibid at 11.

¹³⁹ Ibid at 40.

¹⁴⁰ Carlos H Conde ‘Three-Year-Old Girl Latest Philippines ‘Drug War’ Victim. UN Human Rights Council Should Adopt Resolution to Stop Carnage’ *Human Rights Watch* 1 July 2019, available at <https://www.hrw.org/news/2019/07/01/three-year-old-girl-latest-philippines-drug-war-victim>, accessed on 9 March 2021.

The value of the illicit drug trade provides immense financial power to the criminal enterprises that control it. Through corruption, violence and endless conflict, drug gangs create parallel structures of power and capability that can threaten the integrity of government authority itself.¹⁴¹ This undermines the very legitimacy of state governance where these illicit actors operate.¹⁴² This is particularly concentrated in the most vulnerable and poor communities, wherein insecurity and poverty are amplified by the already existing lack of effective state governance. Furthermore, the use of increasingly militarised enforcement measures in an attempt to eliminate these criminal enterprises and the illicit drug market, as well as the escalating violence between rival drug gangs for market control,¹⁴³ have only further undermined security.¹⁴⁴ All of which has resulted in the senseless death of scores of people.¹⁴⁵

An example of the counterproductive effect of prohibition drug policy which further undermines peace and security is the so-called ‘balloon effect’. The ‘balloon effect’ alludes to the geographical displacement of drug crime through stringent law enforcement measures.¹⁴⁶ Instead of eliminating the drug crime pursuant to the illicit drug market, draconian drug law enforcement often merely displaces it to another location – similar to the effect of squeezing a balloon on one end while the other end swells.¹⁴⁷ Thus, the drug war has only exacerbated and dispersed the harshest impacts of prohibitive drug control – criminality, corruption and violence – more widely,¹⁴⁸ and often to the most vulnerable communities. Notably, the UNODC has itself conceded that a consequence of the international drug control regime is the ‘balloon effect’.¹⁴⁹ Furthermore, the UNODC¹⁵⁰ and UN Security Council¹⁵¹ have identified

¹⁴¹ C Goredema and K Goga, Institute for Security Studies ‘Crime networks and governance in Cape Town. The quest for enlightened responses’ (2014) ISS PAPER 262 at 2.

¹⁴² Count the Costs (2016) op cit note 109 at 43.

¹⁴³ D Werb et al ‘Effect of drug law enforcement on drug market violence: A systematic review’ (2011) *International Journal of Drug Policy*, vol 22, no 2, at 87-94.

¹⁴⁴ Count the Costs (2016) op cit note 109 at 41.

¹⁴⁵ Drug Policy Alliance ‘Drug War Statistics’, available at <https://drugpolicy.org/issues/drug-war-statistics>, accessed on 9 March 2021.

¹⁴⁶ UNODC (2008) op cit note 3 at 216.

¹⁴⁷ Count the Costs (2016) op cit note 109 at 41.

¹⁴⁸ Count the Costs (2016) op cit note 109 at 47.

¹⁴⁹ UNODC (2008) op cit note 3 at 216.

¹⁵⁰ UNODC ‘Organized crime and drug trafficking major threats to international peace and security, UNODC head tells Security Council’ 23 November 2021, available at <https://www.unodc.org/unodc/en/frontpage/2011/November/organized-crime-and-drug-trafficking-major-threats-to-international-peace-and-security.html>, accessed on 9 March 2021.

¹⁵¹ UN Security Council ‘Security Council, Concerned at Threat Posed by Illicit Cross-Border Trafficking, Asks for Assessment of UN Efforts in Helping States Counter Challenges’ 25 April 2012, available at <https://www.un.org/press/en/2012/sc10624.doc.htm>, accessed on 9 March 2021.

the illicit drug trade as a major cause of insecurity in regions spanning Central and South America, West Africa, and South East Asia.

6.4 Undermining development

I argue that the war on drugs is actively undermining social and economic development in the most fragile regions and communities.¹⁵² The devastating impacts of corruption, violence and conflict, brought about through the illicit drug trade, undermine governance and exacerbate socio-economic challenges in society. This is most keenly felt in marginal and underdeveloped regions, where vulnerable populations are exploited and weak governmental institutions are exposed.¹⁵³ The criminality and instability pursuant to the drug war thus traps vulnerable communities in a state of perennial underdevelopment.¹⁵⁴

A core function and responsibility of government is the social and economic development of the society which it governs.¹⁵⁵ Yet, government enactment of prohibition drug policy, and its aggressive implementation via the war on drugs, instead compromises development in precisely the communities in which it is most needed. Criminal drug organisations generally gravitate to already underdeveloped regions where the economic infrastructure is weak and state governance is fragile.¹⁵⁶ This is because such conditions make it possible to set up a parallel illicit economy, wherein the impoverished community has few viable alternatives to working within the illicit drug economy,¹⁵⁷ nor can they otherwise resist these powerful criminal gangs. The consequent instability and criminality brought about by the conditions of violence and corruption the drug war ensues necessarily further undermines development,¹⁵⁸ locking these communities in a vicious cycle of crime and poverty. Moreover, high levels of drug market-related crime and violence exacerbate economic destabilisation by shifting labour and capital flows, deterring invest and discouraging tourism.¹⁵⁹ These negative effects are compounded, as this obstructs future development efforts, thus trapping these communities in permanent underdevelopment. Furthermore, the negative development implications of

¹⁵² Count the Costs (2016) op cit note 109 at 54.

¹⁵³ Count the Costs (2016) op cit note 109 at 12.

¹⁵⁴ Ibid.

¹⁵⁵ Section 195(1) of the Constitution states that “Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: . . . (c) Public administration must be development-oriented”.

¹⁵⁶ Goga op cit note 120 at 1.

¹⁵⁷ Count the Costs (2016) op cit note 109 at 54.

¹⁵⁸ Ibid.

¹⁵⁹ Count the Costs (2016) op cit note 109 at 58.

endemic violence and crime is particularly immense for poor communities.¹⁶⁰ The World Bank reports that, on average, countries wherein violence is endemic have poverty rates over 20% higher than in other nations, and horrifically have child mortality rates twice as high.¹⁶¹ This is troublingly resonant in a developing country like South Africa, wherein these conditions are constantly felt by communities marred by gang violence fuelled by the illicit drug market, such as the Cape Flats.

6.4.1 Wasting public money

Any governmental policy aimed at addressing the real harms that drugs may cause in society will require public funding and resources. However, I argue that the current policy of drug prohibition involves a profligate expenditure,¹⁶² which is not even achieving its intended aims of substantially reducing drug supply or use. The wasted public expenditure on counterproductive efforts of prohibition drug policy is particularly missed in the very communities in which vital development initiatives, such as infrastructure, education and public health, are most needed. Furthermore, this represents a significant opportunity cost for other important areas of development and social policy.¹⁶³ The UNODC has itself conceded that a consequence of the international drug control regime is “policy displacement”, whereby resources for public health – which ought to be the driving concern behind drug control – are neglected in favour of resources for criminal law enforcement responses.¹⁶⁴ As the United Nations Development Programme has noted, “the international drug control system seems to have paid less attention to consequences for human rights and development than to enforcement and interdiction efforts. Evidence shows that the economic, human and social costs of the implementation of drug policy have been enormous. Current drug policies have also diverted public institutional and budgetary resources away from development priorities”.¹⁶⁵ This wasted expenditure has been placed in perspective by Health Poverty Action by noting that while over US\$100 billion is spent annually on the drug war, “the Overseas Development Institute (ODI) estimates that the additional financing needed to meet the proposed Sustainable Development Goal of universal health care is US\$37 billion a year”.¹⁶⁶

¹⁶⁰ Count the Costs (2016) op cit note 109 at 57.

¹⁶¹ World Bank ‘World Development Report 2011: Conflict, Security, and Development’ (2011).

¹⁶² Count the Costs (2016) op cit note 109 at 14.

¹⁶³ Count the Costs (2016) op cit note 109 at 59.

¹⁶⁴ UNODC (2008) op cit note 3 at 216.

¹⁶⁵ UN Development Programme ‘Addressing the Development Dimensions of Drugs Policy’ (2015) at 10.

¹⁶⁶ Health Poverty Action ‘Drug Policy and the Sustainable Development Goals: Why drug policy reform is essential to achieving the Sustainable Development Goals’ (2015) at 5.

6.5 Causing environmental devastation

Climate change is a foremost issue facing humanity, having repercussions extending to peace and security,¹⁶⁷ development,¹⁶⁸ and human rights.¹⁶⁹ It is therefore imperative to consider the adverse environmental impacts of the current drug control policy. I argue that prohibition drug policy and the war on drugs have had devastating consequences for the environment causing deforestation and pollution,¹⁷⁰ which necessarily exacerbates the global climate crisis.

Prohibition drug policy aims to eradicate the production and supply of illicit drugs through supply-side interventions, as this paper shows, often with disregard to various consequential costs. This includes the environmentally destructive practice of drug crop eradication.¹⁷¹ Typically undertaken without consent or forewarning, drug crop eradication often involves the aerial spraying of dangerous chemical herbicides; for example, as occurs in South Africa.¹⁷² The chemicals used are hazardous; killing plant life indiscriminately, destroying habitats of animals and contaminating water sources.¹⁷³ Furthermore, drug crop eradication does not even effectively eliminate drug production, simply displacing illicit production elsewhere through the ‘balloon effect’.¹⁷⁴ It does however amplify deforestation and environmental degradation as illicit drug farmers and producers are pushed into increasingly remote and fragile ecosystems.¹⁷⁵

Criminal drug organisations target areas for agricultural drug production that are remote, have weak economic infrastructure and governance, and are impoverished, so farmers have few

¹⁶⁷ Emyr Jones Parry ‘The Greatest Threat To Global Security: Climate Change Is Not Merely An Environmental Problem’ *UN Chronicle*, available at <https://www.un.org/en/chronicle/article/greatest-threat-global-security-climate-change-not-merely-environmental-problem>, accessed on 9 March 2021.

¹⁶⁸ UN Sustainable Development Goals ‘Climate change threatens progress across sustainable development, warns new UN report’ 9 July 2019, available at <https://www.un.org/sustainabledevelopment/blog/2019/07/sdg-progress-report-2019/>, accessed on 9 March 2021.

¹⁶⁹ P Alston ‘Climate change and poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2019) A/HRC/41/39 para 8.

¹⁷⁰ Count the Costs (2016) op cit note 109 at 132.

¹⁷¹ Article 14 paragraph 2 of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires the eradication of certain drug crops.

¹⁷² Kimon de Greef ‘Battle to stop dagga spraying. Activists take steps to prevent SAPS helicopters destroying marijuana crops’ *GroundUp* 20 April 2016, available at <https://www.groundup.org.za/article/battle-stop-dagga-spraying/>, accessed on 9 March 2021.

¹⁷³ Count the Costs (2016) op cit note 109 at 15.

¹⁷⁴ UNODC (2008) op cit note 3 at 216.

¹⁷⁵ K McSweeney ‘The Impact of Drug Policy on the Environment’ (2015) The Open Society Foundation at 2.

alternative means of earning a living outside of the drug trade,¹⁷⁶ or otherwise resisting. These areas are often some of the most ecologically diverse and sensitive in the world.¹⁷⁷ Consequently, illicit drug cultivation – due to prohibition drug policy – and drug crop eradication endangers biodiversity, accelerates deforestation, and drives illicit drug crop growers to pursue environmentally hazardous methods of drug production.¹⁷⁸ In this way, the unregulated cultivating of drug crops results in the unsafe disposal of toxic waste, polluting soil, groundwater and waterways,¹⁷⁹ as well as the uncontrolled harmful transformation of ecologically diverse lands. I therefore submit that prohibition drug policy and its drug war ought to bear responsibility for this environmental devastation,¹⁸⁰ which is to the detriment of us all.

6.6 Endangering public health

The tragic irony of prohibition drug policy in general and the war on drugs in particular is that while it was purportedly initiated under the guise of protecting public health, it has in fact substantially endangered public health.¹⁸¹ I argue that punitive criminal justice measures have increased the risks of drug use to health, caused serious public health harms, and have retarded proven more effective harm reduction public health responses to drug abuse.

Prohibition drug policy greatly exacerbates the health risks associated with drug use.¹⁸² This is because drug prohibition increases the danger of both illicit drugs themselves and the conditions around illicit drug use. Precisely because the trade in illicit drugs is unlawful, illicit actors are not bound by the rules and regulations that govern licit markets. Consequently, while drug use does carry risks, these risks are significantly increased where illicit drug producers and suppliers are not constrained by regulations,¹⁸³ such as medical and scientific health and safety standards for other like psychotropic consumables, like alcohol. The repercussion is that drugs of unknown potency and quality, often containing hazardous adulterants, are supplied indiscriminately.

¹⁷⁶ Count the Costs (2016) op cit note 109 at 132.

¹⁷⁷ K McSweeney op cit note 175 at 2.

¹⁷⁸ Count the Costs (2016) op cit note 109 at 132.

¹⁷⁹ Count the Costs (2016) op cit note 109 at 12.

¹⁸⁰ K McSweeney op cit note 175 at 16.

¹⁸¹ Count the Costs (2016) op cit note 109 at 28.

¹⁸² National Drug Master Plan at 58.

¹⁸³ Count the Costs (2016) op cit note 109 at 28.

The simple economics of the unregulated illicit trade in drugs increases their harmfulness. This is because criminal markets tend to produce drugs in more potent and risky forms.¹⁸⁴ Since drugs are prohibited, producers and traffickers deal in more concentrated and portable drug preparations in order to avoid legal detection while also maximising profitability. Smaller volumes of higher strength substances are more profitable and easier to transport than larger volumes of less potent ones.¹⁸⁵ By way of example, during US alcohol prohibition in the 1930s alcohol spirits, like whisky, which are more concentrated and heady but more profitable for bootleggers, replaced the (illicit) sale of beer and wine. Beer and wine were nonetheless far more popular among consumers before prohibition, and indeed continue to be more popular forms of alcohol today. Logically, it is more efficient and profitable to transport a truck carrying a full load of bottles of whisky than of beer.¹⁸⁶ Similarly, under drug prohibition the black market has replaced less potent raw organic drug materials with processed and highly potent drugs. For example, injectable heroin has supplanted medical opiates; medical cocaine has devolved to the more potent smoked crack cocaine; and new synthetic drugs have arisen which are substantially more potent such as fentanyl, where these might not exist otherwise in a properly regulated market. Furthermore, because illegally produced and supplied drugs obviously lack any health and safety regulations, these substances are therefore of unknown and highly variable potency and purity. This drastically increases their risk when compared to their counterparts on the legal pharmaceutical market. In addition, there are increased risks of poisoning due to the adulterants and bulking agents added by criminal suppliers to maximise their profits. Consequently, the risk of overdose is greatly increased. By way of analogy, imagine if every time you had a beer you did not know whether it was 5 or 50 percent alcohol by volume (ABV); or worse, if it has been ‘spiked’ or not.¹⁸⁷ In this way, prohibition drug policy fosters more harmful drugs that greatly increase the probability of users suffering avoidable health harms, including death through overdose.

Furthermore, prohibition drug policy creates dangerous conditions around illicit drug use. Criminalising people who use drugs, especially young people, in effect encourages

¹⁸⁴ Count the Costs (2016) op cit note 109 at 30.

¹⁸⁵ Ibid.

¹⁸⁶ Hari op cit note 56 at 230.

¹⁸⁷ Example adapted from Johann Hari ‘Everything you think you know about addiction is wrong’ *TED Talk*, available at https://www.ted.com/talks/johann_hari_everything_you_think_you_know_about_addiction_is_wrong?language=en, accessed on 9 March 2021.

increasingly risky forms of consumption in dangerous criminal environments.¹⁸⁸ For example, injecting rather than safer forms of consumption, such as smoking or ingesting, which increases the risk of users transmitting blood-borne viruses, such as HIV.¹⁸⁹ Moreover, as an activity which is criminal, drug use necessarily becomes unclean and unsafe. For example, needle-sharing and other unsafe drug consumption behaviours have led to excessive overdose deaths and exacerbated the epidemics of HIV and hepatitis in many countries.¹⁹⁰ Thus, serious public health issues such as the HIV/AIDS pandemic are worsened by the war on drugs.¹⁹¹

Nevertheless, some may argue that drug use ought to be so hazardous and that the increased danger concomitant with prohibition and criminalisation is necessary in order to deter drug use. Regardless of the (un)conscionableness of such an argument, the fact is that research shows that the war on drugs has had an insignificant effect on reducing supply and deterring drug use.¹⁹² Simply stated, prohibition and criminalisation fails to meaningfully deter drug use. Furthermore, while some people might be perplexed at the idea of making drug use safer, it is argued that the current position is nonsensical: we must not eliminate the danger of drug use, because people must not use dangerous drugs.¹⁹³ Regardless, millions of people use drugs despite their prohibition. To support a policy which greatly increases the dangers of drug use is simply inhumane.¹⁹⁴

Moreover, the war on drugs has had an adverse effect on the provision of medical opiates for pain relief and palliative care.¹⁹⁵ Unduly restrictive regulations and policies have been imposed ostensibly in an attempt to control the illegal diversion of drugs. However, the evidence shows that while the supply of the illicit market is largely unaffected, the effect on medical patients in need of legal medical treatment is excruciating. According to the World Health Organization (WHO), these measures result in 5.5 billion people – including 5.5 million with terminal cancer

¹⁸⁸ T Rhodes ‘The “risk environment”: a framework for understanding and reducing drug-related harm’ (2002) *International Journal of Drug Policy* vol 13, issue 2 at 85-94.

¹⁸⁹ Count the Costs (2016) op cit note 109 at 29.

¹⁹⁰ Transform Drug Policy Foundation ‘Decriminalisation of people who use drugs: Reducing harm, improving health, helping the vulnerable and releasing resources’ (2017) at 1.

¹⁹¹ International Drug Policy Consortium op cit note 2 at 8.

¹⁹² G Murkin, Transform Drug Policy Foundation ‘Will drug use rise? Exploring the key concern in the debate on drug policy reform’ (2016) at 29.

¹⁹³ J Ostrowski ‘The Moral and Practical Case for Drug Legalization’ (1990) *Hofstra Law Review* vol 18, issue 3, article 5 at 693.

¹⁹⁴ Ibid.

¹⁹⁵ Count the Costs (2016) op cit note 109 at 34.

– having low to non-existent access to opiate medicines. More powerful opiate preparations such as morphine are unattainable in over 150 countries.¹⁹⁶

Lastly, prohibition drug policy has retarded proven more effective harm reduction public health responses to drug abuse. Unsuccessful and counterproductive law enforcement action is extremely expensive and diverts public resources away from proven public health interventions,¹⁹⁷ such as needle-exchange programmes and supervised drug consumption and treatment clinics. Moreover, the threat of criminalisation ensures that drug users are hesitant to try to obtain much needed medical treatment.¹⁹⁸ It is thus evident that although prohibition drug policy has been advanced as a crucial strategy to protect public health, in actuality it greatly exacerbates the risks associated with drug use, and indeed creates further public health harms.

6.7 Jeopardising human rights

It is necessary to begin by clarifying that this section pertains to a general argument that the drug war, like all wars, has resulted in collateral damage that includes jeopardising human rights, often of the most vulnerable in society. Accordingly, I argue here that prohibition drug policy is unsound on the grounds that it has resulted in devastating consequences which necessarily undermine a range of human rights. A more thorough analysis in respect of particular human rights violations in terms of the South African Bill of Rights will be undertaken in the constitutionality enquiry further in the paper.¹⁹⁹

It is asserted that the war on drugs is in fact a misnomer. It is in effect a war on people.²⁰⁰ Prohibition drug policy criminalises the millions of people who supply and use drugs. Its bearing is therefore on people. The enactment of a criminalisation-based policy has led to the institution of draconian criminal law enforcement measures imposed on people. This has resulted in oppressive human rights abuses, which include: the demonisation and discrimination of individuals and social groups; the compromising of children's rights; the

¹⁹⁶ Ibid.

¹⁹⁷ Count the Costs (2016) op cit note 109 at 35.

¹⁹⁸ Count the Costs (2016) op cit note 109 at 28.

¹⁹⁹ See Chapter 8.

²⁰⁰ Global Commission on Drug Policy 'The War on Drugs is a War on People – It's Time to Change That' 11 January 2018, available at <https://www.globalcommissionondrugs.org/the-war-on-drugs-is-a-war-on-people-its-time-to-change-that>, accessed on 9 March 2021.

imposition of cruel, inhuman and degrading punishment; and political scapegoating through the attrition of civil freedoms.²⁰¹

6.7.1 *Demonisation and discrimination*

A disgraceful implication of a drug policy based on criminalisation is the demonisation and discrimination of people. I argue that prohibition drug policy has propagated the stigmatisation and marginalisation of already vulnerable social groups, including: people with substance use disorders; racial and ethnic groups; women; children; and people living in poverty.²⁰² Tellingly, the UNODC has itself since acknowledged the stigmatisation of drug users as a consequence of the drug war.²⁰³

Significantly, criminalisation has led to the stigmatisation of *people* who use drugs, and not simply drug use itself (the *action* of consumption). The distinction is subtle but it is consequential, as the person behind the action becomes forgotten and imbued in the vilification process.²⁰⁴ This is manifest in media portrayals of people who use drugs or are dependent on drugs through flagrant referral to these human beings as ‘junkies’ or ‘clean/dirty’ to describe a person’s drug-using status.²⁰⁵ In an age of greater awareness and sensitivity of social identity and diversity, it is absurd that a societal group can be denigrated so unreservedly. Nevertheless, the media just reverberates and deepens public antipathy towards drug users that the political and legal regime engenders through enacted prohibition drug policy. I argue that this antipathy is unsurprising in light of the moralistic rhetoric in international drug control laws, which refers to drug addiction as a “serious evil”, and a “threat” which the international community has a “duty” to “combat”, because it is “fraught with social and economic danger to mankind”.²⁰⁶ This diction unashamedly provokes the stigmatising of drug use by portraying people who use drugs as a grave threat to society. The consequence of this is to dehumanise drug users.²⁰⁷ The vilification of a societal group necessarily has human rights implications for the individuals concerned, not least of all an impingement of their human dignity.

²⁰¹ Count the Costs (2016) op cit note 109 at 68.

²⁰² Count the Costs (2016) op cit note 109 at 104.

²⁰³ UNODC (2008) op cit note 3 at 216.

²⁰⁴ Johann Hari ‘Everything you think you know about addiction is wrong’ *TED Talk*, available at https://www.ted.com/talks/johann_hari_everything_you_think_you_know_about_addiction_is_wrong?language=en, accessed on 9 March 2021.

²⁰⁵ Count the Costs (2016) op cit note 109 at 106.

²⁰⁶ United Nations Single Convention on Narcotic Drugs of 1961 as Amended by the 1972 Protocol, Preamble.

²⁰⁷ Count the Costs (2016) op cit note 109 at 106.

The consequence of this stigmatisation and dehumanisation of drug users and sellers is the further marginalisation of vulnerable social groups.²⁰⁸ This is because drug criminalisation tends to inculcate discrimination and prejudice at broader social and political levels, which augments pre-existing inequalities.²⁰⁹ In this way, the most acutely affected social groups, such as people of colour living in impoverished urban areas, will thus experience recurring forms of discrimination.²¹⁰

6.7.1.1 Racial discrimination

It is argued that the racial prejudice from which prohibitory drug control historically arose remains shamefully entrenched in practice today.²¹¹ In effect, criminal drug law enforcement has systemically become a conduit for institutionalised racial discrimination. This is most evident in the USA, where blacks and Hispanics are significantly more likely to be stopped and searched, arrested, prosecuted, convicted, and imprisoned for drug offences; notwithstanding, their rates of both drug dealing and drug use are equivalent to other racial and ethnic groups.²¹² Black people in the USA are ten times more likely to be imprisoned for a drug offence than white people, despite the similarity in levels of drug use.²¹³ This trend is global though.²¹⁴ Similar levels of disproportionately high racial and ethnic discrimination in the criminal justice system and prisons are found in the United Kingdom,²¹⁵ Canada²¹⁶ and Australia.²¹⁷ I contend that in a racially charged and economically stratified society such as South Africa, the result of a criminal law-based policy is that representative individuals and groups are similarly targeted, harassed and detained.²¹⁸

Importantly, this is a structural issue. Pervasive racial discrimination recurs as law enforcement measures target poor, urban neighbourhoods where the drug trade is more conspicuous, and

²⁰⁸ Ibid at 105.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Michelle Alexander *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

²¹² Human Rights Watch 'Decades of Disparity: Drug Arrests and Race in the United States' (2009) at 16.

²¹³ Ibid.

²¹⁴ Count the Costs (2016) op cit note 109 at 109.

²¹⁵ Release 'The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England & Wales' (2013).

²¹⁶ T Campbell 'Pros & Cons: A Guide to Creating Successful Community-Based HIV and HCV Programs for Prisoners' (2011) *Prisoners with HIV/AIDS Action Support Network*.

²¹⁷ Australian Institute of Criminology 'Australian crime: facts and figures 2011' (2011) Australian Government.

²¹⁸ M Marks and S Howell 'Cops, drugs and interloping academics: an ethnographic exploration of the possibility of policing drugs differently in South Africa' (2016) *Police Practice and Research* vol. 17, no. 4 at 342.

wherein certain racial and ethnic groups are statistically more likely to reside.²¹⁹ Thus, the drug war being ineluctably concentrated in poor communities of colour makes racial discrimination inevitable.²²⁰ It is therefore the institutionalisation of the policy of drug criminalisation itself which embeds and amplifies the structural racial inequality in the criminal justice system. This is because when the law cannot possibly punish all of the people committing drug crimes, it only punishes some.²²¹ Inevitably, those who get arrested, prosecuted and imprisoned are the most marginalised in society. It has hence been retorted that prohibition drug policy would have been repealed already had privileged white people been convicted for drug offences at the same rates as poor people of colour.²²²

I submit that this differentiation in the implementation of drug law enforcement between racial groups amounts to unfair and unjust racial discrimination. This is because in terms of international law,²²³ as well as South African law,²²⁴ unfair discrimination against any person on the ground of race is prohibited where the action has the *effect* of doing so; and not merely the intention. Thus, even where law enforcement may not necessarily intend to unfairly discriminate against someone on the basis of race, evidently the effect of prohibition drug policy and criminal drug law enforcement is racially discriminatory.

6.7.1.2 Women

Prohibition drug policy also disproportionately impacts upon women.²²⁵ Women are primarily convicted for minor or non-violent drug offences, and are not often the principal figures in criminal drug organisations. Women tend to be used in the drug trade as low-level, expendable

²¹⁹ Count the Costs (2016) op cit note 109 at 109.

²²⁰ Michelle Alexander, quoted by Kathleen Wells ‘Author and Legal Scholar, Michelle Alexander, Talks About The War on Drugs and Mass Incarceration (Part 2)’ *The Huffington Post* 5 September 2012, available at http://www.huffingtonpost.com/kathleen-wells/author-and-legal-scholar-_b_1503309.html, accessed on 9 March 2021.

²²¹ A study in New York City found that in the city’s less affluent area of Brownsville, Brooklyn the chances of being arrested for cannabis possession are 150 times higher than in the more affluent Upper East Side of Manhattan. Source: J Dwyer ‘A Smell of Pot and Privilege in the City’ *The New York Times* 20 July 2010, available at <https://www.nytimes.com/2010/07/21/nyregion/21about.html>, accessed on 9 March 2021.

²²² D Husak ‘Four points about drug decriminalization’ (2003) *Criminal Justice Ethics* 22:1 at 25.

²²³ The Committee on the Elimination of Racial Discrimination has formally stated that international law “requires all state parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect”. Source: United Nations ‘Consideration Of Reports Submitted By State Parties Under Article 9 Of The Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: United States Of America’ (2008) at 2.

²²⁴ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 7.

²²⁵ Count the Costs (2016) op cit note 109 at 109.

drug traffickers, often referred to in the media using the stigmatising and dehumanising term ‘drug mules’.²²⁶ Yet, sentencing for drug trafficking, even though a non-violent offence, typically carries severe penalties, which often fail to distinguish between quantities carried and other relevant mitigating circumstances.²²⁷ These women frequently come from impoverished backgrounds, and are typically driven to drug trafficking either by poverty or by coercion and exploitation from men higher up the illicit drug trade hierarchy.²²⁸ This has resulted in alarming statistics that reflect the discrimination suffered by women due to the drug war. Globally, women are imprisoned for drug offences more than for any other crime.²²⁹ One in four women in prison in Europe and Central Asia is imprisoned for drug offences.²³⁰ In South Africa the figure is approximately 10 percent.²³¹

6.7.2 *Compromising children’s rights*

A central justification for prohibition drug policy has been the need to protect children.²³² The claim being that certain drugs are so harmful that they must be forbidden, in order to safeguard society’s youth from their corrupting effects. However, it is argued that contrary to protecting young people, the war on drugs actively endangers them.²³³ The drug war undermines children’s rights through an endless bloody conflict, in which children are exploited as participants or tragically killed in illicit drug-market violence.²³⁴

It is prudent to affirm that certain psychoactive substances certainly can cause real mental and physical harms to society’s youth. Accordingly, the sensible response to these risks ought to be aimed at preventing drug use among the youth. However, prohibition drug policy does not imply rigorous or effective drug control. In fact, the evidence shows that penal drug law enforcement does not actually deter young people from using drugs,²³⁵ nor, importantly, does

²²⁶ Ibid at 110.

²²⁷ Ibid at 109.

²²⁸ Ibid at 110.

²²⁹ UN Women ‘Report on the progress of the World’s Women 2011-2012: In Pursuit of Justice’ (2011) at 62.

²³⁰ E Lakobishvili ‘Cause for Alarm: The Incarceration of Women for Drug offences in Europe and Central Asia, and the need for legislative and Sentencing reform’ Harm Reduction International (2012).

²³¹ Chandré Prince ‘High rate of women in prisons’ *Times Live* 5 August 2011, available at <https://www.timeslive.co.za/news/south-africa/2011-08-05-high-rate-of-women-in-prisons/>, accessed on 9 March 2021.

²³² Hari op cit note 56 at 252.

²³³ Count the Costs (2016) op cit note 109 at 118.

²³⁴ Ibid.

²³⁵ D Hale and R Viner ‘Policy responses to multiple risk behaviours in adolescents’ (2012) *Journal of Public Health*, vol. 34, suppl 1 at 11-19.

it meaningfully stop their access to them.²³⁶ The current policy instead ensures that the illicit drug trade is entirely unregulated and controlled by criminal entities. Consequently, it is easier for children to procure certain illicit drugs than it is legal ones.²³⁷ Whereas sellers of controlled psychoactive drugs like alcohol, tobacco, or pharmaceuticals require licences to operate and are bound by age restriction laws, illicit drug dealers are not and sell indiscriminately, including to children.²³⁸

Furthermore, children and young people are the most vulnerable to drug war violence, criminality and exploitation. Often driven by poverty and circumstance, many young people are manipulated into the illicit drug trade through both the economic and cultural enticement of gangsterism and the absence of other meaningful opportunities for inner-city youngsters.²³⁹ Young people are seen as highly impressionable and expendable to those higher up the criminal organisation, and so recruitment of children is common among drug cartels and street gangs.²⁴⁰ The victims of drug market-related violence have predominantly been young males, and increasingly, women and children are becoming victims too. In Mexico, for example, up to 4 000 women and 1 000 children were killed in violence linked to the illicit drug trade between 2006 and 2010.²⁴¹ Moreover, many children lose their parents due to the war on drugs.²⁴² For example, in 2010 it was estimated that 50 000 children had lost a parent in the violence of the drug war.²⁴³ In this way, the drug war has devastated countless families.

The protection of children is a paramount concern in considerations about drug policy. Children's best interests are of paramount importance in our law.²⁴⁴ However, it is evident that instead of protecting this most vulnerable of groups, the war on drugs seriously compromises children's rights. The violence, criminality and exploitation that the drug war ensues cannot be

²³⁶ Count the Costs (2016) op cit note 109 at 119.

²³⁷ Damon Barrett *Children of the Drug War: Perspectives on the Impact of Drug Policies on Young People* (2011).

²³⁸ Count the Costs (2016) op cit note 109 at 120.

²³⁹ S B Duke 'Drug Prohibition: An Unnatural Disaster' (1995) 27 *CONN. L. REV.* 571 at 593.

²⁴⁰ Count the Costs (2016) op cit note 109 at 125.

²⁴¹ Catherine Bremer 'Special report: Mexico's growing legion of narco orphans' *Reuters* 6 October 2010, available at

<https://www.reuters.com/article/us-mexico-drugs-orphans-idUSTRE6952YW20101006>, accessed on 9 March 2021.

²⁴² Human Rights Watch 'Collateral Casualties: Children of Incarcerated Drug Offenders in New York' (2002) vol. 14, no. 3 at 2.

²⁴³ C Bremer op cit note 241.

²⁴⁴ Constitution, s 28(2).

deemed to be in the best interests of children. Especially where children and young people are invariably on the frontline of the drug war. Many tragically caught in the deadly crossfire.²⁴⁵

6.7.3 Cruel, inhuman and degrading punishment

In a constitutional democracy it is a fundamental legal precept that imprisonment of a person may only be imposed for a public purpose, such as protecting society or an individual from harm, or to punish some legal wrongdoing.²⁴⁶ There must therefore be a legitimate aim and justified reason. Importantly, the harm must be such that it warrants legal intervention. Meaning that the harm must be the kind of harm that is relevant to deserve criminal sanction.²⁴⁷ In this regard, the South African Constitutional Court has held that, “the [S]tate’s right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment”.²⁴⁸ Furthermore, the measure imposed by the State ought to go no further than is necessary to achieve this purpose. In constitutional law this is known as the proportionality principle.²⁴⁹ The Constitutional Court of South Africa has held that, “proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading”.²⁵⁰ I argue that drug use is not the kind of relevant conduct in which the State has a right to impose criminal punishment. The criminalisation of people who use drugs is, therefore, unwarranted and a grossly disproportionate penalty to the extent that it amounts to cruel, inhuman and degrading punishment.

Consider, for example, the countless actions in which people engage that are harmful but are nonetheless not unlawful, such as: smoking tobacco; drinking alcohol; eating unhealthy foods; extreme sports activities; etc. It is submitted that drug use is of this kind of harm.²⁵¹ It is risky and may be harmful to the user, though, importantly, it does not cause direct harm to another person. I therefore argue that, as with the abovementioned comparable harmful activities, it is not in the legitimate authority of the State to criminalise this conduct. Though it may be the proper function of government to *regulate* such conduct. This is because in a constitutional

²⁴⁵ Damon Barrett ‘The Impacts Of Drug Policies On Children And Young People’ (2015) Open Society Foundation.

²⁴⁶ I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2013) at 275.

²⁴⁷ Michael Huemer ‘America’s Unjust Drug War’ in Bill Masters (ed) *The New Prohibition* (2004) at 7.

²⁴⁸ *S v Coetzee and Others* [1997] ZACC 2 (CC) para 162.

²⁴⁹ I Currie and J de Waal op cit note 246 at 275.

²⁵⁰ *S v Makwanyane and Another* [1995] ZACC 3 (CC) para 94.

²⁵¹ Michael Huemer op cit note 247 at 2.

democracy the rights to freedom²⁵² and human dignity²⁵³ grant an individual self-autonomy to choose to engage in conduct even though it may be harmful to oneself. It is, hence, why neither suicide nor attempted suicide is a crime in South Africa.²⁵⁴ Furthermore, drug use does not cause another person direct harm, and any indirect harm is not of the kind that merits criminal sanction.²⁵⁵ It is important to be reminded of the distinction between drug use itself and drug-related harms. For example, driving a motor vehicle while intoxicated is unlawful, because it has the grave potential of directly causing actual harm to another person. This harm is drug-related, as it is a harm that, although could be a potential consequence of drug/alcohol consumption, is entirely separable and certainly not inevitable. One can consume drugs/alcohol independent from driving a motor vehicle. It is for this reason that while driving under the influence of alcohol is illegal, alcohol itself is not. Similarly, while driving a motor vehicle sober could (and statistically does) lead to causing actual harm to another person in the event of an accident, cars themselves are not prohibited. Instead, the State controls the potential harms of these activities through legal regulation. The harm of drug use itself, separate and distinct from any related but independent harm (eg driving while intoxicated) is, thus, I submit, of the kind that is properly suited to legal regulation and not criminality.

Furthermore, I argue that the drug war has had an important detrimental effect on many regular people and their relationship with the law. Millions of otherwise law-abiding citizens engaging in non-violent, consensual activity are criminalised for their lifestyle choices of using drugs.²⁵⁶ Or more specifically, particular drugs that have been deemed forbidden. After entering the criminal justice system these minor offenders are statistically far more likely to remain in lives of criminality,²⁵⁷ due to, for example, criminal records, often condemning many to lives of criminality that might not have been otherwise. The mass incarceration of millions of non-violent drug offenders is, I submit, a great failure of human rights-based constitutional legal systems.

²⁵² Constitution, s 12.

²⁵³ Constitution, s 10.

²⁵⁴ Jonathan Burchell *Principles of Criminal Law* 5 ed (2016) at 582.

²⁵⁵ For an action to be considered harmful, it should be directly so and should constitute actual harm. In other words, the action itself must be what violates the rights of another person.

²⁵⁶ Count the Costs (2016) op cit note 109 at 13.

²⁵⁷ Recidivism rates in South Africa are estimated to be between 55% and 95%. Source: P B B Murhula and S B Singh 'A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature' (2019) *African Journal of Criminology and Justice Studies* vol 12, no 1 at 22.

Lastly, for the people who suffer from substance use disorders, I posit that criminalisation is a particularly cruel punishment. This is because subjecting people who are in need of medical support and treatment to instead suffer in neglect or endure the harshness of the criminal justice system is frankly unconscionable. Imprisonment is not recognised by medical science as a treatment for drug abuse, and unsurprisingly is not effective in healing drug addiction.²⁵⁸ I therefore argue that to compound the suffering of a human being for the purpose of sending a message that drugs are ‘bad’ is grossly disproportionate to any supposed wrong, moral or legal, that a drug user may commit. It is understandable and acceptable that the message from the State is that drug use is potentially harmful. What is unacceptable, however, is that criminalisation drug policy patently denigrates the human dignity of people who use drugs. It is thus a cruel, inhuman and degrading punishment.

6.7.4 Political scapegoating

I argue that a great injustice of the war on drugs is the political scapegoating through the attrition of civil freedoms.²⁵⁹ The conflation of harms from drug use with the far more devastating drug-crime, pursuant to the drug war, has allowed for spectacular political scapegoating. Furthermore, this has come at the cost of the erosion of private, cultural and economic rights.²⁶⁰ This is because by blaming social issues – unemployment, underdevelopment, crime, violence, poverty, etc – on drugs, it distracts from the actual underlying social and economic challenges in society, and, importantly, absolves the government of its responsibility to address these. This is all the more egregious when it is the very policy of drug prohibition enacted by the State that exacerbates these socio-economic challenges. The tragic irony is that these harms are then used to justify the perpetuation or escalation of the precise policy that initially produced them,²⁶¹ further undermining human rights.

The misconception that drug use belongs to a marginalised demi-monde has allowed drug policy to be the sole purview of the criminal justice system when instead it ought to be informed and administered by public health, education and development officials. This is because experts

²⁵⁸ Global Commission on Drug Policy (2019) op cit note 88 at 7.

²⁵⁹ Count the Costs (2016) op cit note 109 at 68.

²⁶⁰ Count the Costs (2016) op cit note 109 at 77.

²⁶¹ Stephen Rolles (ed) Transform Drug Policy Foundation ‘A Comparison of the Cost-effectiveness of Prohibition and Regulation of Drugs’ (2009) at 8.

consider extra-legal factors to be better predictors of drug use than a country's drug laws.²⁶² In particular, criminal drug laws do not have a significant deterrent effect.²⁶³ Drug misuse is often a symptom of broader social and economic issues and not necessarily the cause of them.²⁶⁴ Research shows that “[p]ublic health capacity, religiosity, cultural history, wealth, employment and other social features significantly impact drug prevalence and dependence in a given society”.²⁶⁵ Importantly, levels of inequality in society have a direct impact on the levels of drug misuse.²⁶⁶ I submit that this necessarily has substantial drug policy implications for a country like South Africa, and ought to be duly considered. Accordingly, drug policy ought to take a “multi-disciplinary and multi-sectoral approach”²⁶⁷ to drug control and not simply one rooted in the criminal justice system. I therefore argue that prohibition drug policy is not just an abrogation of control of the drug market, but also an abrogation of responsibility by the State. In a constitutional democracy wherein government accountability is foundational,²⁶⁸ I submit that this constitutes a dereliction of state duty and the undermining of the rights owed to citizens.

6.8 Summary

The warmongering around drugs has been so vociferous that the real consequences of the drug war have been drowned out. Evaluation of drug law enforcement predominantly focuses on process measures, like arrests and drug seizures, instead of more meaningful outcome indicators that might demonstrate its failure, such as levels of drug availability, or wider health and social costs.²⁶⁹ Prohibition drug policy has thus conflated the harms to public health from drug use itself with the harms to public safety from illicit drug market-related crime. This approach erroneously combines ‘drugs and crime’ as synonymous, ie ‘the drug threat’. However, the UNODC has acknowledged that the prohibition-based international drug control system itself creates the criminal drug market.²⁷⁰ Thus, the international drug control regime itself is effectively the cause of illicit drug production and trafficking globally, which it

²⁶² G Murkin op cit note 192 at 15.

²⁶³ Ibid at 13.

²⁶⁴ R Wilkinson and K Pickett ‘The Spirit Level: why equality is better for everyone’ (2010) *Journal of Social Policy* vol. 42, issue 4 at 71.

²⁶⁵ Release ‘A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe’ by Ari Rosmarin & Niamh Eastwood (2012) at 13.

²⁶⁶ R Wilkinson op cit note 264 at 71.

²⁶⁷ National Drug Master Plan at 19.

²⁶⁸ Constitution, s 1(d).

²⁶⁹ Global Commission on Drug Policy ‘Taking Control: Pathways To Drug Policies That Work’ (2014) at 36.

²⁷⁰ UNODC (2008) op cit note 3 at 216.

combats through the ever-escalating drug war. This has resulted in the devastating consequences of engendering crime and enriching criminals through a lucrative illicit drug market, which breeds violence, cultivates criminality and sows corruption throughout society. None of which is associated with comparable legal markets. Moreover, the drug war has only wrought further marginalisation of some of the most vulnerable social groups. In the senseless and conscienceless pursuit of eliminating the illicit drug market at all costs, the war on drugs punishes certain demographics far more readily and regularly than others.²⁷¹ However, the imposition of the harmful consequences of the drug war are not harms that are due to drug use itself, but rather are pursuant to the deliberate enactment of a prohibition and criminalisation-based drug policy.²⁷² A policy choice that undermines public peace and security; undermines social and economic development; causes environmental devastation; endangers public health; and necessarily jeopardises human rights. Accordingly, it is necessary to consider alternative drug policy models.

7. ALTERNATIVE DRUG POLICY MODELS

7.1 Harm reduction

In contrast to the punitive approach of prohibition, harm reduction is a pragmatic approach that refers to policies, programmes and practices that have as its main priority the decrease in the negative health and social consequences of drug use and drug control laws for the individual and society,²⁷³ rather than necessarily demanding a reduction in drug consumption per se. This approach can be contrasted with abstentionism, the dominant rule of prohibition, which emphasises a decrease in the overall prevalence of drug use.²⁷⁴ Harm reduction recognises that the prevalence of drug use is neither a useful nor accurate indicator of harm. This is because such an approach conflates both problematic and non-problematic drug use, despite the fact that the risks associated with each, and thus the response required, are significantly different.²⁷⁵ Harm reduction therefore accepts that some use of psychoactive substances is inevitable, and that some level of drug use is normal in society. It acknowledges that drug use, although carrying risks, also provides the user with benefits that must be taken into account if drug-taking behaviour is to be properly understood. Accordingly, amelioration of drug-related harms

²⁷¹ Count the Costs (2016) op cit note 109 at 113.

²⁷² S Rolles op cit note 261 at 8.

²⁷³ Harm Reduction International 'What is Harm Reduction?', available at <https://www.hri.global/what-is-harm-reduction>, accessed on 9 March 2021.

²⁷⁴ J A Inciardi and L D Harrison (eds) *Harm reduction: National and international* (2000) Sage Publications Inc at 2.

²⁷⁵ G Murkin op cit note 192 at 9.

is considered a more feasible approach than futile efforts to eliminate drug use entirely.²⁷⁶ Harm reduction models thus support attenuating punitive criminal justice measures, especially for more trivial offences such as personal use, possession and small-scale dealing. The emphasis is focused on treatment, rehabilitation and education, rather than imprisonment for drug users.²⁷⁷

Harm reduction is fundamentally grounded in an aim to protect human rights.²⁷⁸ A drug user's decision to use drugs is accepted as being one's choice; no moral judgement is made to either condemn or support drug consumption.²⁷⁹ The human dignity and rights of drug users are respected; the use of drugs does not mean that people forfeit their human rights. Accordingly, treating people who use drugs with compassion and dignity is integral, and the stigmatisation and discrimination of drug users disavowed. This is in line with an approach that favours treatment over punishment for individuals who use drugs.

Furthermore, it is evidence-based. Harm reduction policies and practices are informed by and championed based on evidence that shows certain interventions to be practical, feasible, effective, and safe in diverse social, cultural and economic communities.²⁸⁰ Accordingly, interventions such as needle and syringe exchange programmes (NSP),²⁸¹ opioid substitution therapy (OST)²⁸² and drug consumption rooms (DCR)²⁸³ are strategies that are supported by harm reduction drug policy as having a strong positive public health impact. Various studies show that these drug treatment programmes have been effective in reducing drug use and other drug-related high-risk behaviours.²⁸⁴

Harm reduction has its roots in Western Europe, wherein countries such as the Netherlands, Switzerland and Portugal take a public health or socio-medical approach to drug use and its

²⁷⁶ Inciardi and Harrison op cit note 271 at 6.

²⁷⁷ Inciardi op cit note 15 at 24.

²⁷⁸ Harm Reduction International 'The Global State of Harm Reduction' (2018).

²⁷⁹ Inciardi and Harrison op cit note 271 at 6.

²⁸⁰ Harm Reduction International op cit note 278.

²⁸¹ The free provision of sterile needles and syringes for injection drug users is a simple, inexpensive way to reduce the risk of spreading HIV infection.

²⁸² A type of harm reduction initiative that offers people who are dependent on opioids (such as heroin) an alternative, prescribed medicine – most typically methadone or buprenorphine – which is swallowed rather than injected.

²⁸³ Legally regulated, supervised healthcare facilities for drug users as safe injecting sites, overdose prevention sites, etc.

²⁸⁴ Inciardi op cit note 15 at 25.

consequences.²⁸⁵ The primary force behind the harm reduction movement arose as a response to the AIDS pandemic in the 1980s.²⁸⁶ Several European countries adopted harm reduction policies to curtail the spread of HIV/AIDS among injection drug users. These nations took the position that AIDS represented a greater threat to public health than did drug use, and that AIDS prevention ought to take precedence over antidrug measures.²⁸⁷ Harm reduction initiatives are proven to reduce the incidence and prevalence of blood-borne diseases, such as HIV/AIDS and viral hepatitis, among drug users.²⁸⁸ Essentially, harm reduction programmes save lives; people would otherwise die unnecessarily simply because they used certain drugs.

However, harm reduction has its limitations. Harm reduction is foremost a pragmatic response to particular drug-related harms in society. It is therefore generally implemented as practical programmes to address certain severe drug use issues especially in relation to public health; for example, injection drug use and the high risk for transmission of deadly blood-borne viruses. Accordingly, harm reduction practices have been incorporated into many countries' drug policies, and applied typically only as an auxiliary strategy to combat 'the drug problem' without necessarily changing the primary prohibitionist model that underpins it. Harm reduction programmes are presently operating at some level in almost half of the 179 countries in the world where injection drug use has been documented.²⁸⁹ Nonetheless, the vast majority of these countries primarily institute a prohibitionist-based drug policy. This is because harm reduction can be applied as a secondary medical approach in the form of drug treatment alongside the primary legal approach of attempted drug prevention through prohibition drug policy.

Nevertheless, I argue that specific interventions that form the core of current harm reduction practice – such as NSPs, OST and DCRs – are a symptomatic response to harms either created or exacerbated by prohibition drug policy. Thus, while amelioration of the public health harms for drug users in this manner is certainly important, it is primarily implemented merely as a treatment for 'the drug problem', which is operating within a harm-causing drug prohibition legal and institutional framework.

²⁸⁵ Inciardi and Harrison *op cit* note 274 at ix.

²⁸⁶ *Ibid* at 3.

²⁸⁷ *Ibid* at ix.

²⁸⁸ Harm Reduction International *op cit* note 278.

²⁸⁹ *Ibid*.

7.2 Decriminalisation

Decriminalisation involves a more substantial reorientation away from a criminal justice-based policy model towards a more substantive public health-based model.²⁹⁰ Building on the fundamental principles of harm reduction, decriminalisation furthers its aims by establishing institutional and legal reform. Institutional reform comprises of moving responsibility for drug policy decisions, budgets, etc from government departments responsible for criminal justice to those responsible for public health.²⁹¹ Legal reform comprises of shifting the focus of law enforcement from demand-side to supply-side imposition, ie from drug users to drug producers. Accordingly, decriminalisation drug policy refers to the removal of penal sanctions for the use of illicit drugs. Significantly, however, the production and supply of illicit drugs remain criminal offences. In practice, it involves the removal of criminal sanctions for the possession of small quantities of illicit drugs for personal use. Sometimes civil or administrative sanctions are imposed instead.²⁹² Thus, the possession and use of small amounts of drugs may officially remain unlawful, but not criminal, that is, there is no imposition of a permanent criminal record for drug-use offences.

Properly construed decriminalisation is part of a broader drug policy approach that is rooted in placing a primacy on public health. Accordingly, experts assert that a crucial factor in the successful implementation of decriminalisation drug policy is the degree to which it is a part of a wider policy reorientation and resource reallocation away from punitive enforcement measures and towards evidence-based health and social interventions.²⁹³ This is because decriminalisation creates an enabling environment for harm reduction initiatives and other health interventions.²⁹⁴ This is in stark contradistinction to criminalisation drug policy which necessarily precludes this space by marginalising and stigmatising drug users and effectively making them criminals.

Approximately 25-30²⁹⁵ countries have instituted formal decriminalisation drug policies with varying degrees of operation. For example, different threshold quantities used to determine the

²⁹⁰ Count the Costs, Transform Drug Policy Foundation 'The War on Drugs: Options and Alternatives' (2012) at 6.

²⁹¹ Ibid.

²⁹² Ibid at 7.

²⁹³ A Stevens 'Portuguese drug policy shows that decriminalisation can work, but only alongside improvements in health and social policies' LSE European Politics and Policy Blog, 10/12/12, available at <http://blogs.lse.ac.uk/euoppblog/2012/12/10/portuguese-drug-policy-alex-stevens/>, accessed on 9 March 2021.

²⁹⁴ Count the Costs (2012) op cit note 290 at 7.

²⁹⁵ Depending on which definitions are used.

user/supplier distinction. Various non-criminal sanctions are adopted, including fines, warnings and treatment referrals. Additionally, a distinction is made between *de jure* decriminalisation, wherein the policy is defined by law with specific changes to the legal framework; and *de facto* decriminalisation, wherein the policy has the same effect but is achieved through the non-enforcement of criminal drug laws that technically remain in force.²⁹⁶ Accordingly, there is a wide variation in these models and their particular implementation in various countries around the world. This indicates the flexibility of decriminalisation drug policy, as it can be more responsive to the particular challenges that different countries face with respect to drug use and drug-related harms. I therefore argue that this is a more suitable and effective manner to address a society's 'drug problem', which is inherently multifaceted and interrelated to a society's cultural, social and economic proclivities, rather than the simplistic and often single-minded moralistic approach of drug criminalisation.

Nevertheless, decriminalisation drug policy can at best only aim to reduce the harms created and the costs incurred by the prohibition of drugs and the criminalisation of people who use drugs. Significantly, it does not address the devastating harms associated with the criminal trade in illicit drugs and the concomitant damaging law enforcement measures pursuant thereto.²⁹⁷ It is primarily for this reason that the legalisation and regulation of illicit drugs is proffered as the most viable drug policy alternative.

7.3 Legalisation (Legal regulation)

Legal regulation drug policy establishes a lawful system of regulatory controls on the production, supply and use of currently illicit drugs.²⁹⁸ This is comparable to like psychoactive substances such as alcohol, tobacco and pharmaceuticals. The policy of legal regulation is based on ensuring public control of the illicit drug market. This is contrary to popular misconceptions that the legalisation of drugs implies relaxing control or liberalising the drug trade.²⁹⁹ In actuality, it involves instituting governmental control into a domain where currently there is none. Prohibition drug policy is effectively an abrogation of control of the illicit drug market. By definition, under prohibition mechanisms of control regulating the trade in illicit drugs are expressly proscribed as unlawful. Yet the illicit drug market nevertheless subsists,

²⁹⁶ Count the Costs (2012) op cit note 290 at 7.

²⁹⁷ Ibid.

²⁹⁸ Transform Drug Policy Foundation 'Debating Drugs: How To Make The Case For Legal Regulation' (2014) at 4.

²⁹⁹ Count the Costs (2012) op cit note 290 at 9.

instead being controlled by criminal organisations. The illicit drug market is hence markedly ruled by lawlessness, corruption and violence. The primary argument for legal regulation drug policy is, therefore, as the antithesis to and logical conclusion of the critique of prohibition drug policy. If prohibition drug policy is both ineffective, as it does not eliminate drug use and drug trade, as well as actively counterproductive, as it causes substantial drug-related harm, then it stands to reason that by reclaiming the market from criminal profiteers and bringing it under the control of the State, legal regulation can substantially reduce major harms associated with the illicit drug trade.³⁰⁰ In this way, responsible public actors can manage the public health and safety challenges of drug usage by implementing strictly enforced systems of regulation with a clearly defined role for enforcement agencies to ensure compliance within this framework.

7.4 Summary

In light of the abovementioned alternative drug policy approaches, this paper argues that the policy of prohibition results in indefensible negative consequences, which includes an unregulated criminal drug market that results in unacceptably high social harms. In light of these ruinous consequences, I submit that prohibition drug policy is unsound on the grounds that it is senselessly ineffective and grossly counterproductive. I now turn to the contention that prohibition drug policy, and the legislation that enacts it, the Drugs Act, is unconstitutional.

8. CONSTITUTIONALITY OF THE DRUGS ACT

8.1 Preamble

Constitutional rights and freedoms are not absolute.³⁰¹ Any right entrenched in the South African Bill of Rights³⁰² may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on equality, freedom and human dignity.³⁰³ Thus, a limitation of a right is unconstitutional if the infringement thereof is not justifiable in accordance with the Constitution. It is trite that there is a two-stage analysis in determining whether there is an unconstitutional violation of the right concerned.³⁰⁴ First, the scope of the right must be assessed in order to determine whether the law concerned has infringed the right. Second, if there has been an infringement it must be

³⁰⁰ Ibid.

³⁰¹ I Currie and J de Waal op cit note 246 at 151.

³⁰² Constitution, Chapter 2.

³⁰³ Constitution, s 7(3) and s 36.

³⁰⁴ *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13 (CC).

determined whether it is nevertheless justifiable in terms of section 36 of the Constitution, the limitations clause.³⁰⁵ This involves a balancing of competing rights and State interests in order to determine the justifiability of any infringement. Furthermore, a limitations analysis must be conducted through the prism of the foundational values animating of our constitutional democracy.³⁰⁶

8.2 Constitutional impugment

As argued in the first part of this paper, prohibition drug policy has had devastating consequences on communities and individuals. These include the endangering of public health; the undermining of peace and security; and the stigmatisation, marginalisation and discrimination of people. This necessarily has had serious negative implications for human rights, particularly those of the most vulnerable in our society. It is therefore submitted that prohibition drug policy, and the drug control legislation that enacts it, the Drugs Act, is dissonant with the Constitution, which entrenches a society based on democratic values, social justice and fundamental human rights.³⁰⁷ Nevertheless, for the purposes of a legal challenge to the constitutionality of the Drugs Act it is necessary to impugn the legislation on the grounds that it violates a constitutional right. Accordingly, I argue that the Drugs Act violates the right to privacy;³⁰⁸ the right to freedom and security of the person;³⁰⁹ the right to bodily and psychological integrity;³¹⁰ and the right to human dignity.³¹¹ It is noteworthy that an individual's right to privacy is linked to the right to freedom,³¹² as well as to the right to dignity.³¹³

8.2.1 *Whether the Drugs Act limits constitutional rights*

The Constitutional Court provides valuable guidance on the matter. The Constitutional Court has ruled that certain provisions of the Drugs Act violate the right to privacy and, therefore, are invalid to the extent that they prohibit and make the use or cultivation of cannabis in private

³⁰⁵ I Currie and J de Waal op cit note 246 at 295.

³⁰⁶ *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* [2017] ZAWCHC 30 (WCC) para 30.

³⁰⁷ Constitution, Preamble.

³⁰⁸ Constitution, s 14.

³⁰⁹ Constitution, s 12(1).

³¹⁰ Constitution, s 12(2).

³¹¹ Constitution, s 10.

³¹² *Prince (WCC)* para 24.

³¹³ *Ibid* para 23.

by an adult for their own personal consumption a criminal offence.³¹⁴ Thus, the Constitutional Court held that the impugned provisions not only limited the right to privacy but did so unjustifiably, and so unconstitutionally. This invalidity extends only in regard to an adult's private use or cultivation for their own personal consumption of cannabis. The Constitutional Court made clear that it did not sanction the (commercial) trade in cannabis for the reason that "dealing in cannabis is a serious problem in this country".³¹⁵ However, it is argued, with respect, that the Constitutional Court did not apply its reasoning to its fullest extent and necessary conclusion. That is, the justification for the decriminalisation of cannabis applies equally to all illicit drugs. Moreover, the Constitutional Court simply stated that the illicit trade in cannabis is a serious problem without ascertaining why this is so. I submit that had it done so the Constitutional Court would, or should, have determined that the ruinous harms associated with the illicit drug trade – 'the drug problem' – are as a consequence of the policy of prohibition and criminalisation of drugs itself. Conversely, the legal regulation of drugs would bring these psychoactive substances under public control and significantly reduce the associated harms. Accordingly, I argue that the Drugs Act in its entirety and in regard to all illicit drugs is unconstitutional.

8.2.2 *Scope of the right to privacy*

While the Constitutional Court found that the right to privacy is limited by the impugned provisions of the Drugs Act in regard to cannabis,³¹⁶ I argue that the same is true of all illicit drugs. This is because "[i]f privacy [is] considered to be analysed as a continuum of rights which starts with an inviolable inner core moving from the private to the public realm where privacy is only remotely implicated by interference, it must follow that those who wish to partake of a small quantity of [an illicit drug] in the intimacy of their home do exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the State".³¹⁷ This follows from the fact that the Drugs Act authorises the State to inhibit persons from engaging in voluntary, peaceful actions of drug consumption, be it in regard to cannabis or any other drug. Thus, the State prohibiting and criminalising the use of

³¹⁴ *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 (CC).

³¹⁵ *Ibid* para 88.

³¹⁶ *Ibid* para 58.

³¹⁷ *Prince (WCC)* para 25.

any drug necessarily deprives that person of their rights. What must however be determined is whether that deprivation is nevertheless justifiable.

8.2.3 Nature of the right to privacy

The Constitutional Court has held that, “[a] very high level of protection is given to the individual’s intimate personal sphere of life . . . and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place”.³¹⁸ Furthermore, the Constitution “recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity”.³¹⁹ I argue that there can be no more intimate personal sphere of life than one’s own mind. The effect of psychoactive substances is on the mood and mind of a user. Thus, a restriction on the ability to control, through altering, one’s own mind/mood is necessarily an infringement on that individual’s most intimate of personal spaces.

8.2.4 Nature of the right to freedom and security of the person

The right to freedom includes: the right not to be deprived of freedom arbitrarily or without just cause;³²⁰ the right to be free from violence;³²¹ and the right not to be treated or punished in a cruel, inhuman or degrading way.³²² It is argued that the ‘just cause’ required for the deprivation of freedom means that measures which are not consonant with the fundamental tenants and principles of our constitutional democracy are invalid.³²³ In addition, it is argued that the principles of proportionality and non-excessiveness determine the legitimate scope of the State’s authority to use this power.³²⁴ Proportionality requires that the harm to be prevented by the deprivation of freedom should be sufficient to justify this use of State power. Non-excessiveness requires that the least violent means should be used to achieve the legitimate public purpose for which the power is exercised.³²⁵ In this regard, the Constitutional Court has held that “[the State] must . . . take appropriate steps to reduce violence in public and private

³¹⁸ *Bernstein v Bester* [1996] ZACC 2 (CC) para 77.

³¹⁹ *Khumalo v Holomisa* [2002] ZACC 12 (CC) para 27.

³²⁰ Constitution, s 12(1)(a).

³²¹ Constitution, s 12(1)(c).

³²² Constitution, s 12(1)(e).

³²³ I Currie and J de Waal op cit note 246 at 276.

³²⁴ *Ibid* at 282.

³²⁵ *Ibid*.

life. Coupled with its special duty toward children, this obligation represents a powerful requirement on the [S]tate to act”.³²⁶

As argued above,³²⁷ the deprivation of freedom that the Drugs Act imposes is without just cause. This is because drug use does not cause direct harm to another person. Thus, it is not the relevant kind of harm that warrants criminal sanction, and is insufficient to justify this State action. Furthermore, the imposition of criminal liability for drug use is a grossly disproportionate and excessive action in order to prevent any potential harm of drug use. It is also possibly the most intrusive and violent means to do so, and is thus unjust. Moreover, the violence pursuant to the illicit drug market, as a result of the Drugs Act, is a severe breach of the State’s duty to prevent violence. Particularly where this violence is as a consequence of the State’s legislative and law enforcement actions. Lastly, I submit that measures which do more harm than good violate the proportionality principle.³²⁸ The criminalisation of people who use drugs, which as a policy exacerbates the harms of drug use and threatens the safety and well-being of the whole of society, and thus does significantly more harm than good (if any at all), is, therefore, a grossly disproportionate penalty.

8.2.5 Nature of the right to bodily and psychological integrity

Every person has the right to bodily and psychological integrity,³²⁹ which includes the right to security in and control over their body.³³⁰ This comprises of the right not to be interfered with and being allowed to live the life one chooses.³³¹ The purpose of this right is to protect an individual’s right to bodily self-determination.³³² Accordingly, self-determination and autonomy are meaningless without the power to have control over one’s own body and mind. I argue that the jurisprudence on the right to psychological integrity and control over one’s body/mind ought to be interpreted so as to include the concept of ‘cognitive liberty’.³³³ Cognitive liberty comprises the freedom of thought,³³⁴ yet more specifically the idea that individuals should have the right to autonomous self-determination over their own

³²⁶ *Christian Education South Africa v Minister of Education* [2000] ZACC 11 (CC) para 47.

³²⁷ See Chapter 6.7.3.

³²⁸ I Currie and J de Waal op cit note 246 at 276.

³²⁹ Constitution, s 12(2).

³³⁰ Constitution, s 12(2)(b).

³³¹ I Currie and J de Waal op cit note 246 at 287.

³³² *Ibid* at 271.

³³³ C Walsh ‘Psychedelics and cognitive liberty: Reimagining drug policy through the prism of human rights’ (2016) *International Journal of Drug Policy* 29 at 86.

³³⁴ Constitution, s 15(1).

consciousness or the alteration thereof; which right is currently infringed by the prohibition and criminalisation of drugs.³³⁵ This is because a constitutional democracy places a primacy on an individual's autonomy and "rebels at the thought of giving government the power to control men's minds",³³⁶ which is reminiscent instead of an Orwellian regime. Thus, the right to use drugs naturally derives from the idea that individuals own their own bodies and have the right to decide how their own body/mind should be used.³³⁷ Nevertheless, this is not simply a narrow right to use drugs, but a necessary aspect of the right to self-determination; a right to engage in any action which is peaceful; and which does not deprive others of their rights.³³⁸

8.2.6 Nature of the right to human dignity

Human dignity is innate³³⁹ and the source of an individual's rights to privacy, to freedom and to bodily and psychological integrity.³⁴⁰ Dignity fundamentally relates to an individual's identity, their moral agency and autonomy.³⁴¹ Thus, respect for human dignity entails recognising that all individuals are able to make their own choices.³⁴² The Constitutional Court has held that, "self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity".³⁴³ I therefore argue that the effect of prohibition and criminalisation through the Drugs Act denigrates the human dignity of people who use drugs, particularly those persons who suffer from drug dependency disorders. This is most evident in the stigmatisation and marginalisation often of the most vulnerable persons caught up in the drug war.

8.2.7 The importance of the purpose of the limitation

The State is required to show that there is a substantial State interest which justifies the limitation.³⁴⁴ It is argued that any justification based on a moral judgement is invalid. This is because, "[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate

³³⁵ C Walsh op cit note 333 at 83.

³³⁶ *Stanley v Georgia* 394 U. S. Reports 557 (*Stanley*).

³³⁷ M Huemer 'America's Unjust Drug War' in Bill Masters (ed) *The New Prohibition* (2004) at 7.

³³⁸ J Ostrowski 'The Moral and Practical Case for Drug Legalization' (1990) *Hofstra Law Review*: vol. 18: issue. 3, article 5 at 609.

³³⁹ Constitution, s10.

³⁴⁰ I Currie and J de Waal op cit note 246 at 251-2.

³⁴¹ P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) at 457.

³⁴² I Currie and J de Waal op cit note 246 at 253.

³⁴³ *Barkhuizen v Napier* [2007] ZACC 5 (CC) para 57.

³⁴⁴ *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8 (CC).

purpose”.³⁴⁵ Thus, the moralistic (and prejudicial) roots of prohibition drug policy can no longer provide any basis for the criminalisation of drugs. This is particularly so in a constitutional democracy wherein moral and religious pluralism is entrenched in the right to freedom of conscience, religion, thought, belief and opinion.³⁴⁶

Accordingly, the contemporary position of the State is that the purpose of drug prohibition is the protection of “the health, safety and psychological well-being of persons affected by the use of [drugs]”, and that “the [Drugs Act] serves an important governmental purpose in the war against drugs”.³⁴⁷ It is thus taken that the purpose of the Drugs Act is the legitimate aim of drug control in order to address drug-related harms in society.

This drug policy position is predicated on three assumptions: firstly, that criminalising drugs and drug users is necessary to deter people from using drugs; secondly, that interdiction enforcement against the supply of drugs restricts their availability, and thus their use, to a meaningful extent; and thirdly, that levels of use are a good proxy measure for levels of harm, both to drug users themselves and the broader society.³⁴⁸ I however argue that all of these assumptions are erroneous. Accordingly, the Drugs Act is not only woefully ineffective in its aims, but also substantially exacerbates drug-related harms and is thus counterproductive.

8.2.8 The nature and extent of the limitation

The Drugs Act institutes prohibition and criminalisation of drugs and drug users. It is therefore the most intrusive sanction the State can impose. The nature and extent of the limitation is thus “quite invasive”.³⁴⁹

8.2.9 The relation between the limitation and its purpose

Law must be rationally related to a legitimate government purpose, and not arbitrary. The absence of a rational connection will result in the law being unconstitutional.³⁵⁰ I argue that the Drugs Act is arbitrary, irrational and thus unconstitutional.

³⁴⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at para 37.

³⁴⁶ Constitution, s 15.

³⁴⁷ *Prince (CC)* para 63.

³⁴⁸ G Murkin op cit note 192 at 5.

³⁴⁹ *Prince (CC)* para 66.

³⁵⁰ *New National Party v Government of the RSA* 1999 (5) BCLR 489 (CC) para 19.

This is because the prohibition of drugs with the notable exceptions of alcohol and tobacco is an arbitrary differentiation. Alcohol and tobacco, like cocaine and heroin, are dependence-producing substances with significant social costs.³⁵¹ Furthermore, although it may be surprising to some, it is a veritable fact that alcohol and tobacco are amongst the most harmful and deadly psychoactive substances.³⁵² The difference between such psychotropic drugs is not qualitative but quantitative. Therefore, the differentiation between ‘legal’ and ‘illegal’ drugs is entirely arbitrary. This is evident in the perhaps surprising fact that the UNODC – the organisation that presides over the international prohibitionist drug control regime – has determined that approximately 90% of people who use illicit drugs worldwide do so non-problematically.³⁵³ This is consistent with scientific evidence that the physiological risks associated with drug use of even the most ‘hardcore’ drugs are no more harmful than other comparable legal psychoactive substances.³⁵⁴ In fact, alcohol and tobacco are significantly the more deadly psychoactive substances,³⁵⁵ and yet, few people in a constitutional democracy would accept their prohibition. This is not to say that these substance are not dangerous. Indeed they are. Hence, the need for their control through legal regulation.

It is argued that the fact that prohibition and criminalisation neither deters drug use nor reduces illicit drug supply renders the Drugs Act ineffectual and baseless. The presumption underlying the Drugs Act is that without criminalisation to act as a deterrent, drug use would dramatically increase. However, this is simply false.³⁵⁶ Comparative studies of drug control laws in various countries evidence no link between punitive law enforcement and lower levels of drug use.³⁵⁷ Furthermore, the speculative prediction of increased drug-related harms in the absence of drug prohibition does not itself provide a good reason to continue to punish drug use, unless there is already a justification to punish drug use in the first place.³⁵⁸ This paper has comprehensively argued that there is not. Moreover, the Drugs Act fails to restrict the supply of illicit drugs. In

³⁵¹ M A R Kleiman, A J Saiger ‘Drug Legalization: The Importance of Asking the Right Question’ (1990) 18 *HOFSTRA L. REV.* at 527.

³⁵² D Nutt et al ‘Drug harms in the UK: a multicriteria decision analysis’ (2010) *The Lancet* vol 376 issue 9752 at 1558-1565.

³⁵³ G Murkin op cit note 192 at 9.

³⁵⁴ Carl Hart *High Price: A Neuroscientist's Journey of Self-Discovery That Challenges Everything You Know About Drugs and Society* (2014).

³⁵⁵ D Nutt et al ‘Drug harms in the UK: a multicriteria decision analysis’ (2010) *The Lancet* vol 376 issue 9752.

³⁵⁶ Transform Drug Policy Foundation ‘Debating Drugs: How To Make The Case For Legal Regulation’ (2014) at 8.

³⁵⁷ L Degenhardt et al ‘Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys’ (2008) *PLoS Med* 5(7): e141.

³⁵⁸ Douglas Husak ‘Four points about drug decriminalization’ (2003) *Criminal Justice Ethics* 22:1 at 29.

fact, notwithstanding variations between types of illicit drugs, regions and population groups, drug availability and use worldwide have generally risen since the enactment of prohibition drug policy globally.³⁵⁹ Thus, the Drugs Act provides no practical benefit. It does however result in devastating harms.

The purpose of drug control legislation is to have some measure of control over drugs, so as to prevent or ameliorate the harms associated with drug use. However, it is argued that the Drugs Act abrogates control over drugs, and indeed substantially exacerbates drug-related harms. As this paper has extensively argued, prohibition drug policy results in consequences and costs to communities and individuals which greatly exceed the harms of drug use while undermining a myriad of human rights. I therefore submit that legislation which brings about consequences diametrically opposed to the purposes for which it is enacted cannot be rational, and thus the Drugs Act is invalid.

8.2.10 Less restrictive means to achieve the purpose

Notwithstanding the legitimate purpose of drug control in society, “the State would still need to show why a less restrictive means to achieve that purpose does not exist”.³⁶⁰ It is argued that “there are a multitude of options available to [address drug misuse in society] as opposed to the blunt use of the criminal law. It is precisely for this reason that [the High Court] contends that less restrictive means must be employed to deal with the problem [of substance abuse and drug-related harms], a conclusion clearly advocated in the position articulated by the Central Drug Authority [and National Drug Master Plan]”.³⁶¹ This is particularly so when the means employed – prohibition and criminalisation – are ineffective, disproportionate and maximally invasive.

I submit that comparative democratic societies based on freedom, equality and dignity have successfully employed a less restrictive drug policy to address drug control and drug misuse in society. The policy of decriminalisation of drug use and possession has been enacted in Portugal since 2001; in the Czech Republic in 2010;³⁶² and in the State of Oregon in the United

³⁵⁹ P Reuter and F Trautman ‘Report on Global Illicit Drug Markets 1998-2007’ (2009) European Commission.

³⁶⁰ *Prince (WCC)* para 104.

³⁶¹ Albeit in relation to cannabis. *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* [2017] ZAWCHC 30 (WCC) para 107.

³⁶² Susan Houlton (ed) ‘New drug guidelines are Europe’s most liberal’ *DW* 7 January 2010, available at

States of America in 2020. Ghana is the first country in Africa to announce the decriminalisation of personal possession and use of all illegal drugs.³⁶³ In addition, in 2009 the Supreme Court of Argentina declared legislation which criminalised the possession of drugs for personal consumption unconstitutional. The Court found that the relevant legislation violated the sphere of personal liberty which was protected from intrusion from the State. This was further unwarranted wherein the circumstances of drug use do not bring about any material danger or harm to the rights and welfare of others. The Court noted, “drug possession for personal consumption in itself does not provide any reason to affirm that the accused have carried out anything more than a private act or that they have offended public morals or the right of others”,³⁶⁴ further that, “criminalizing an individual [for drug use] is undeniably inhumane”.³⁶⁵

Furthermore, decriminalising drug use is supported by various human rights-focused organisations, including: Human Rights Watch;³⁶⁶ the UN Office of the High Commissioner for Human Rights;³⁶⁷ the World Health Organisation; the World Bank; the UN Development Programme; UNAIDS; and UNICEF.³⁶⁸

8.3 Summary

I therefore submit that the Drugs and Drug Trafficking Act is unconstitutional, as the limitations it imposes on the rights to privacy, freedom and dignity are unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom. Furthermore, the prohibition of drugs and the criminalisation of people who use drugs is not the least restrictive means of achieving the legitimate purpose of drug control in society. This is because decriminalisation is a viable alternative drug policy which has proven successful in comparable constitutional democracies.

<https://www.dw.com/en/new-czech-drug-guidelines-are-europes-most-liberal/a-5096375>, accessed on 9 March 2021.

³⁶³ National Drug Master Plan at 23.

³⁶⁴ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/8/2009, “Arriola, Sebastián y otros / Recurso de Hecho” (Arriola Case) (A. 891. XLIV).

³⁶⁵ D Cozac ‘Rulings in Argentinean and Colombian courts decriminalize possession of small amounts of narcotics’ (2009) *HIV AIDS Policy Law Rev.* Dec;14(2):54-5.

³⁶⁶ Human Rights Watch ‘Americas: Decriminalize Personal Use of Drugs’ 4 June 2013, available at <https://www.hrw.org/news/2013/06/04/americas-decriminalize-personal-use-drugs>, accessed on 9 March 2021.

³⁶⁷ Transform Drug Policy Foundation ‘The UN Chief Executives Board Unanimously Endorses Decriminalisation Of People Who Use Drugs’ (2019) at 3.

³⁶⁸ Ibid.

It stands to reason that a drug policy that ameliorates harms is preferable to one which causes or warrants harms. I therefore argue that while decriminalisation is a preferable policy to prohibition drug policy, it nevertheless falls short of the standards demanded by the Constitution. This is because the most devastating drug-related harms are as a consequence of the illicit drug market. This is for the very reason being that the drug market is illegal. Whereas, legal regulation would instead eliminate the illicit drug market and its concomitant ruinous harms of corruption, criminality and violence. I therefore submit that legal regulation drug policy is more congruous with the ‘objective normative value system’³⁶⁹ espoused by the Constitution.

9. LEGAL REGULATION DRUG POLICY

I submit that a valid drug policy should aim to protect the young and the vulnerable; reduce crime; mitigate health risks; promote security and development; use public resources effectively; and protect human rights.³⁷⁰ I argue that legal regulation drug policy is the more effective, just and humane drug policy, aptly suited to our South African constitutional dispensation, which, I submit, compels a drug policy that takes a human rights-based, public health approach to drug control in society.

Advocates of prohibition drug policy may argue that legal regulation and market control of non-medical psychoactive drugs is immoral, a form of surrender to criminality, or a decline towards anarchy and debauchery.³⁷¹ However, such a sensationalist view is contrary to the contemporary understanding that drug misuse is a multidimensional matter which creates social issues that can be most usefully comprehended with medical and sociological determinations.³⁷² The motivations for and behaviours around drug use are many and varied, as are the consequences of this use, ranging from beneficial use,³⁷³ through non-problematic use,³⁷⁴ to problematic and chronic dependent use. Accordingly, instead of attempting to use the blunt instrument of the criminal justice system to punish and eradicate a supposed moral wrong – as prohibition drug policy does – legal regulation drug policy aims to develop a system of

³⁶⁹ *Carmichele v Minister of Safety and Security* [2001] ZACC 22 (CC).

³⁷⁰ Transform ‘Debating Drugs: How To Make The Case For Legal Regulation’ (2014) at 4.

³⁷¹ Transform (2009) op cit note 14 at 5.

³⁷² *Ibid* at 6.

³⁷³ C J Morgan et al ‘Harms and benefits associated with psychoactive drugs: findings of an international survey of active drug users’ (2013) *Journal of Psychopharmacology* at 500.

³⁷⁴ The UNODC has determined that approximately 90% of people who use illicit drugs worldwide do so non-problematically.

laws, procedures and practices that will help governments and their communities effectively manage the reality of the health and social challenges that drug use potentially occasions. Legal regulation drug policy affirms that it is the proper function of government in modern societies to regulate potentially harmful or risky conduct through rules and operation of law.

The criticism that legalisation is reckless liberalisation of the drug market is a straw man fallacy, whereby legalisation drug policy is mistakenly equated with the total absence of all drug control legislation. Legal regulation drug policy aims to institute drug control measures through responsible and accountable public infrastructure, in order to effectively regulate non-medical psychoactive drug production and availability. Its purpose is to take back control of the drugs market from those actors least likely to manage it constructively. Under prohibition drug policy every illicit drug supplier is by definition unlicensed, and therefore beyond any form of accountable governmental authority or management.³⁷⁵ This has resulted in devastating harms as a consequence of an illegal drug market that includes extreme violence and corruption.

Significantly, there are a variety of regulatory models within the legal drug control policy approach with varying degrees of restrictiveness.³⁷⁶ These range from laissez-faire unlicensed sale, similar to caffeinated drinks. Licensed sale, similar to alcohol and tobacco, including various levels of restrictions on advertising, age limits, public consumption, etc. Finally, there is a highly regulated and controlled framework, similar to the medical regulations on pharmaceutical drugs, eg a licensed medical dispensary or pharmacy, including to the extent of requiring a prescription for designated drugs.

By way of illustration, Figure 1 depicts the spectrum of legal policy frameworks for regulating the production, supply and use of drugs. At either end of the spectrum there are effectively unregulated markets: the criminal market under prohibition at one end, and the legal, commercial free market at the other end. A completely unfettered free market in drugs, albeit legal, has more in common with the criminal drug market than a properly legally regulated drug market, and would likely lead to serious personal and social harms. In the middle there is an optimum level of government regulation, wherein drug policy is both effective and just,³⁷⁷

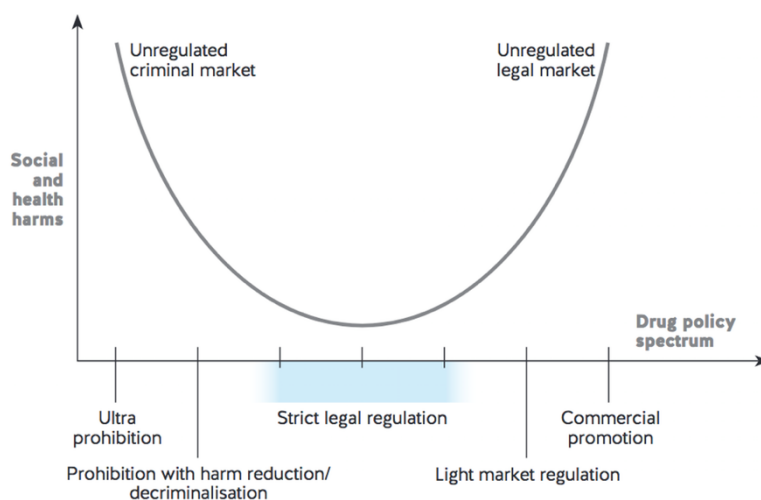
³⁷⁵ Transform (2009) op cit note 14 at 8.

³⁷⁶ Ibid at 20.

³⁷⁷ D Pinnock 'A new approach to criminalisation could end Cape Town's drug wars' *The Conversation* 27 August 2019, available at

as overall social harms are minimised and human rights are protected. This applies to all drugs, ie medical pharmaceutical and recreational drugs, including alcohol and tobacco.

Figure 1: Spectrum of drug policy approaches.³⁷⁸



Nevertheless, it is important to recognise that legal regulation drug policy cannot eliminate problematic or dependent drug abuse.³⁷⁹ The legal regulation of drugs is not a panacea for drug misuse and the harms that this may cause individuals and others. There is an acknowledgement that the legal control and regulation of the supply of drugs is only one aspect of a multifaceted matter. The broader issue of drug misuse in society includes a range of interrelated fields which takes into account the underlying psychosocial factors of drug use. Comprehensive drug policy therefore embraces public health interventions, drug education and prevention, treatment and recovery, and importantly the role of socioeconomic policy issues – including poverty, inequality and social exclusion – and how these impact on drug use and demand for consumption.³⁸⁰

I argue that the replacement of prohibition drug policy with a legally regulated drug control system would, however, enable and empower a public health and social wellbeing-based approach that could produce comprehensive and enduring outcomes to dealing with drug

<https://theconversation.com/a-new-approach-to-criminalisation-could-end-cape-towns-drug-wars-121769>, accessed on 9 March 2021.

³⁷⁸ Adapted from Transform Drug Policy Foundation 'How to Regulate Cannabis: A Practical Guide' 2 ed (2016) at 29.

³⁷⁹ Transform (2009) op cit note 14 at 10.

³⁸⁰ Ibid.

misuse in society.³⁸¹ Prohibition drug policy fosters both conceptual and practical obstacles to addressing the actual public health and safety issues around problematic drug use.³⁸² The conceptual obstacles include the moralisation of drug use and the vilification of drug users, which serves only to punish, stigmatise and marginalise those persons in need of the most support. The practical obstacles include the resources allocated towards the criminal justice system which could otherwise be directed towards constructive harm reduction initiatives. Instead, legal regulation drug policy enables and empowers holistic reform by advancing the discourse around drug use and removing the political and ideological impediments, so as to promote an environment that constructively confronts the social conditions that underlie problematic drug use, and better address broader drug-related harms.³⁸³ Thus, as a legal policy alone, legal regulation drug policy can only eliminate or reduce the devastating harms which are generated or worsened specifically by prohibition drug policy and illicit drug markets – though this would surely be a meaningful advancement from the status quo. However, as an integral part of a comprehensive drug policy, it additionally constitutes a significant paradigm shift in how we understand and deal with drug misuse in society. It is the argument of this paper that such reform is constitutionally required.

10. CONCLUSION

This paper has contended that prohibition drug policy is unsound on the grounds that it is senselessly ineffective and grossly counterproductive. This is because prohibition drug policy fails to reduce demand, restrict supply or mitigate the harms associated with drugs. Moreover, prohibition drug policy in fact greatly exacerbates drug-related harms for individuals and society. In light of the devastating consequences pursuant to the drug war, I therefore submit that prohibition drug policy is untenable. In addition, this paper has contended that prohibition drug policy, and the legislation that enacts it, the Drugs and Drug Trafficking Act, is unconstitutional. This is on the grounds that it unjustifiably violates the right to privacy, the right to freedom, and the right to human dignity. Furthermore, the alternative drug policy of decriminalisation is a far less restrictive means of achieving the legitimate purpose of drug control in society. This paper finally contended that prohibition drug policy ought to be replaced instead by the legal regulation of drugs. This, on the grounds that it is especially apt

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid.

for our South African constitutional democracy founded on the values of freedom, equality and human dignity.

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