THE NEED FOR DECRIMINALIZATION OF THE USE OF CANNABIS - A COMPARATIVE LEGAL STUDY

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DECLARATION

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I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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Summary

The research determined if constitutional justification existed for the decriminalisation of the use of cannabis for medical and recreational purposes. Various constitutional values were employed when deciding on the limits of decriminalisation of the use of cannabis. The right to freedom, the right to privacy, dignity and equity were the constitutional rights used by the applicants in the Prince cases to justify the decriminalisation of cannabis use in South Africa. The study provides an in-depth look at the decisions and evidence used in the South African Prince case. The study further provides a comprehensive review of literature, including foreign law. The focus of the study was to identify if the use of cannabis for medical use or recreational use is constitutionally justified in South Africa. The Prince case proved that the limitations placed on the right to privacy were unjustified and the state failed to prove otherwise.

Key Words: Cannabis; *Dagga*; Marijuana; South African Revised Cannabis Legislation; *Minister of Justice and Constitutional Development and Others v Prince*; Legalisation of cannabis in South Africa; cannabis law amendments; private use of cannabis; Constitutional right to privacy; limitations on privacy.

CHAPTER ONE

1. Introduction

South Africa is located in the Southern part of Africa with a population estimate of 58.07 million individuals.[1] South Africans have been cultivating wild cannabis (*Cannabis sativa*) for centuries. Wild cannabis has been used by South African indigenous peoples for recreational, traditional and religious purposes.[2] Cannabis is an annual plant of the *Cannabaceae* family and is colloquially referred to as *dagga*.[3] It was classified in 1753 by Swedish biologist Carl Linnaeus.[4] South Africa's international trade with various countries have made it an attractive drug transit country.[5] South African substance abuse legislation involved an absolute prohibition on dealing in, cultivating and possessing cannabis, until a recent decision made by the Western Cape High Court.[6] Drug trafficking and abuse of narcotics has escalated after the democratically elected government ended the country's socio-economic and political isolation.[7] Legislatively the substances that are listed in Schedules 3 to 8 in the Drugs and Drugs Trafficking Act[8], the Pharmacies Act[9] and the Medicines and Related Substances Act[10] are illegal to produce, distribute or have limited use without the proper legal authorisation.[11] The possession, trade in and usage exceeding the prescribed limits of cannabis, which is a schedule 7 drug, are illegal and punishable in terms of the Drugs and Drug Trafficking Act.[12] This was until the Western Cape High Court ruled that the provisions of such enactments are

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1 Evans https://www.news24.com/SouthAfrica/News/south-africa-is-young-and-female-stats-sa-report-20180723 (Date of use: 19 May 2019).
2 Burchell *Criminal Law* 797.
3 Pollio 2016 *CCR* 234.
4 Linnaeus "Species Plantarum 2" 1027.
5 Peltzer *et al* 2010 *PMC* 2221.
6 Burchell *Criminal Law* 797.
7 Peltzer *et al* 2010 *PMC* 2221.
8 Drugs and Trafficking Act 140 of 1992.
9 The Pharmacies Act 53 of 1974.
10 Medicines and Related Substances Act 101 of 1965.
11 Shaw *et al* 2016 *Criminology* 29.
12 Drugs and Trafficking Act 140 of 1992.

unconstitutional only to the extent that they prohibit, or alternatively restrict the use of cannabis by an adult in a "private dwelling".[13]

The use of cannabis has therefore been "partially decriminalised" by the Western Cape High Court, which made a landmark ruling declaring that it is an infringement of the right of privacy of an individual to prohibit the possession, purchase or cultivation of cannabis for personal consumption by an adult.[14] In light of the recent developments and debate, this study will focus on various issues, including the impact of the judgement passed by the High Court and the judgement upheld and confirmed by the Constitutional Court. The study will further canvass the prohibition and "partial decriminalisation" of the use of cannabis in South Africa and whether there are some categories of use that are constitutionally justifiable, such as recreational use at home and the use of cannabis for medical purposes.

The Western Cape High Court's order regarding the private use of cannabis applies only to home use and private cultivation of the once illegal drug. Any adult who is found in possession of cannabis in the Western Cape following the judgment and before the offending legislation being amended by Parliament, may rely on the right to privacy as a defence when charged with possession, purchase or cultivation of cannabis. The defence that could be raised would be that the use or cultivation of cannabis is for personal consumption in "a private dwelling".[15]

The Court declared the disputed provisions sections 4(b) and 5(b) of the Drugs Act (read with Part III of Schedule 2 to the Drugs Act); and section 22A(9)(a)(i) of the Medicines Act as well as section 22A(10) thereof (read with schedule 7 of GN R509 of 2003) conflicted with the South African Constitution and were therefore invalid. This invalidity however, was only to the extent that the prohibition on the use, possession, purchase and cultivation of cannabis in

13 *Prince v Minister of Justice and Constitutional Development and Others 2017 ZAWCHC* [132] (hereinafter referred to as the *Prince II case)*.
14 *Prince II case* par [132(1)].
15 *Prince II case* par [132(3)].

a "private dwelling" was considered illegal for personal consumption by adults.

The invalidity of the offending legislation was suspended for a period of 24-months to allow Parliament to correct the defects in the legislation.[16] The amendments to the appropriate legislation will be deemed invalid upon implementation of the impending corrections required by Parliament. If Parliament fails to rectify theses defects within the 24-month time period the amendments will be deemed final.[17] However on application, the Constitutional Court found that before Parliament can correct legislative defects, it is required to satisfy itself on whether the decision taken by the High Court was correct by declaring the abovementioned provisions invalid.[18]

The legal distribution and trade framework were not ruled on in the High Court Judgement.[19] The private use and cultivation is now legally permitted in the Western Cape, however the purchasing and trading of cannabis products are not.[20] The current South African cannabis laws therefore fall somewhere between decriminalisation and amended legalisation. The Constitutional Court ruling made on the 18th of September 2018 confirmed that cannabis is legal and that use or possession or cultivation was not restricted to the home or dwelling but to be used in private.[21] The Constitutional Court has not specified the amount of cannabis that will be deemed lawful for use, possession or cultivation for personal consumption in private. The Constitutional Court identifies that the quantity of cannabis for personal use is a matter that Parliament must attend to in legislation.[22]

16 *Prince II case* par [130].
17 Sitole "Constitutional Court" 3.
18 *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 [39] herein referred to as *Prince II vs Constitution Court*.
19 *Prince II vs Constitutional Court* par [129(8)].
20 *Prince II vs Constitutional Court* par [83].
21 *Prince II vs Constitution Court* par [100].
22 Sitole "Constitutional Court" 3.

According to the findings of a study released by the Soul City Institute in Johannesburg, South Africa ranks among the countries with the highest levels of drug abuse globally. It reveals that close to 10% of the population start experimenting with drugs at the age of 13.[23] Substance abuse is a global challenge with detrimental effects on health, wealth and the security of nations[24] with cannabis being the most regularly used illicit substance amongst the South African youth.[25]

This research dissertation was carried out to determine whether there are in fact constitutional grounds for decriminalising cannabis in certain circumstances, for example private or medical use. A comparison between the South African legal framework and other foreign jurisdictions will be conducted to ascertain the legal position regarding the possession and use of cannabis.

It is understandable that the right balance would not be achieved if there is a blanket prohibition on the use of cannabis. The impact of the judgments served only to entrench that cannabis is understood as a socially and economically ingrained pastime for which there is clearly considerable popular demand and a rich history.[26]

This study will therefore discuss the controversial debate surrounding the decriminalisation of cannabis for medical and recreational uses only, evaluating the constitutional arguments for and against decriminalisation within the context of usage. The study will look at the reasons behind decriminalisation of the use of cannabis and the desired reform of the law in this respect.

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23 Ndondo http://www.soulcity.org.za/research/literature-reviews/soul-city-institute-drug-abuse- youth-south-africa.pdf/view 4 (Date of use:13 October 2017).

24 United Nations http://www.unodc.org/pdf/southafrica/south_africa_guidelines_abuse_prevention.pdf (Date of use: 11 August 2017).

25 Peltzer and Ramlagan 2009 *JSS* 1.

26 Shaw ***et al*** 2017 *Criminology* 29.

2. The aim of the research

The aim of the research is to determine whether there is constitutional justification for the decriminalisation of the use of cannabis for medical and recreational purposes and, depending on the answer to this question, which amendments, if any, should be made to existing legislation in order for such legislation to be constitutionally compliant. The purpose of the study is further to determine whether constitutional justification exists for decriminalising the use of cannabis only in certain circumstances for a certain purpose or whether any use should be decriminalised, irrespective of the purpose. Several constitutional values that are applicable in deciding on the limits of decriminalisation of the use of cannabis will be considered.

3. Problem statement

During February 1999, the South African Drug Advisory Board confirmed an unacceptable increase in substance abuse and its associated problems.[27] This problem has been identified in the National Drug Master Plan, as fuel for crime, poverty, reduced productivity, unemployment, dysfunctional family life, political instability, the escalation of chronic diseases, such as AIDS and Tuberculoses, injury and premature death.[28] Statistics reported by the United Nations World Drug Report of 2014 indicates that 7.06% of South Africa's population abuses narcotics.[29] Substance abuse imposes social, health and economic costs on individuals, families, society and the economy at large. At the individual level, substance abuse has been linked to depression, violent behaviour and various forms of crime, including accidental and premeditated injuries.[30] Other acute symptoms include neurological effects such as the lowering of cognitive skills, effects on the respiratory system and

27 Peltzer *et al* 2010 *PMC* 2221.

28 Peltzer *et al* 2010 *PMC* 2221.

29 Ndondo http://www.soulcity.org.za/research/literature-reviews/soul-city-institute-drug-abuse-youth-south-africa.pdf/view (Date of use: 13 October 2017).

30 Ndondo http://www.soulcity.org.za/research/literature-reviews/soul-city-institute-drug-abuse-youth-south-africa.pdf/view (Date of use: 13 October 2017).

cardiovascular effects. [31] In South Africa, evidence on the impact of substance abuse as well as its prevention are fragmented and more often not located within a comprehensive theoretical framework.[32] The abuse of cannabis has many harmful effects; however the controlled medical use of cultured cannabis has been effective in the treatment of chronic pain that affects millions. The enticing allure of the use of cannabis is that it is clearly safer than opiates. In particular, cannabis appears to ease the pain of multiple sclerosis and nerve pain in general. This is an area where few other options exist, and the existing options are highly sedative.[33]

Although much research has been done on the effects of the use and abuse of cannabis, little attempt has been made to put all this evidence in a coherent narrative that would outline the impact of the problem and assist in creating future prevention and intervention policies.[34]

According to the South African Police Service's annual report, 259,165 counts of illegal drug possession or dealing were recorded in 2015-2016.[35] These charges resulted in 253,735 arrests, accounting for almost a sixth of all arrests. Between 65% and 70% of drug charges are for the possession of cannabis.[36] The problem is therefore whether South Africa is wasting precious resources on arresting and charging individuals for possession and the use of cannabis instead of using those valuable resources to arrest individuals committing crimes of a much more serious nature.

A comprehensive review of literature, including foreign law, will be conducted to determine the constitutional limits of using the criminal sanction to address the private use of cannabis. The crucial issue is whether the blanket

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31 *Prince II case* par [36].

32 Shaw *et al* 2017 *Criminology* 29.

33 Grimspoon https://www.health.harvard.edu/blog/medical-marijuana-2018011513085 (Date of use: 16 May 2018).

34 Peltzer *et al* 2010 *PMC* 2221.

35 Kriegler https://www.news.uct.ac.za/article/-2017-07-31-why-the-south-african-state-needs-to-lose-its-fight-against-marijuana-policy-reform (Date of use: 14 October 2017).

36 Kriegler https://www.news.uct.ac.za/article/-2017-07-31-why-the-south-african-state-needs-to-lose-its-fight-against-marijuana-policy-reform (Date of use: 14 October 2017).

prohibition of the use of cannabis is justified in terms of constitutional values. The focus will be on whether the use of cannabis for controlled medical use or recreational use is constitutionally justified. The following questions will be considered in more detail: Should the current ruling of the High Court in the Prince II case justify the unrestricted cultivation of cannabis at a private residence for private use under the auspices of our constitutional right? Should the advantages and disadvantages of the use of the drug have been considered in more depth before delivering a judgment decriminalising cannabis? What are the counter-arguments for retaining a blanket restriction on the use of cannabis, in view of the fact that evidence states that cannabis is commonly used by not only our adult population but the youth of our country? Would legalising the drug in clearly restricted circumstances lead to the use of more dangerous drugs?

The social, health and economic burdens of alcohol, tobacco and other drugs have impacts globally. Efficient involvement is required and mandated at each level of manufacture of the product in order to reduce the general harm and assisted costs.[37] At a time when governments are joining to prevent individuals from smoking and consuming excessive amounts of alcohol, should the use of cannabis be legalised?

These questions will be considered by weighing and balancing various constitutional values.

4. Research methodology

The research involves a literature desk top study which discusses current South African legislation and prevailing laws in relation to cannabis as well as the laws of foreign jurisdictions which may be of value for possible reform of South African Law. A legal comparison will include a discussion of the law of Canada legalising the use of cannabis, since the South African Constitution is

[37] Giesbrecht and Haydon 2006 *DAR 633.*

similar to that of Canada.[38] The Law of Mexico and Alaska will also be reviewed since the prohibition of the use of cannabis was also challenged on constitutional grounds in these jurisdictions. The literature review will also canvass the law of Malawi which prohibits the use of cannabis but purports to have a Constitution and Bill of Rights resembling that of South Africa.[39]

5. The Framework of the dissertation

Chapter One: Introduction

This chapter will include the problem statement, the point of departure, the aim of the study, the projected time scale, the research methodology, and an outline of chapters.

Chapter Two: The development of the law relating to the use of cannabis in South Africa

This chapter will focus on the development of laws relating to the use of cannabis and the examination of prevailing laws relating to the prohibition of cannabis, including a brief introduction on the historical, medical and recreational uses of cannabis. Further, discussion on the impact of the Prince cases on current legislation will be considered.

Chapter Three: The Prince case

38 Woolsey 1910 *The American JIL* 1.
39 Yusuf 1995 *AYIL* 55.

This chapter will focus on the Prince case, the arguments and theories used to support the right to privacy and the constitutional grounds of decriminalisation. This chapter will further examine the interpretation of the Prince II case, the interpretation of the judgment passed and the effect of the order made by the Constitutional Court of South Africa.

Chapter Four: Decriminalisation of the use of cannabis on constitutional grounds in foreign jurisdictions

This chapter will focus on the foreign jurisdictions Alaska, Canada, Mexico and Malawi to identify the constitutional grounds on which they have realized the regulated decriminalisation of cannabis, in order to determine whether the use of cannabis should be decriminalised for medical and recreational purposes.

Chapter Five: Conclusion, findings and recommendations

This chapter intends to examine the various constitutional values that are applicable when deciding the implementation of limits on the decriminalisation of the use of cannabis with reference to the law of other jurisdictions. This evidence will then be considered critically to identify the way forward in South Africa.

CHAPTER TWO

1. Introduction

This chapter will examine the development of laws relating to the prohibition of cannabis and include a brief introduction on the historical, medical and recreational uses of cannabis. The impact of the Prince cases on existing legislation within the South African Republic will be considered.

2. A historic overview of the use of cannabis

The sacred *Athara Vedic* Hindu scriptures of India refer to *bhang* [40] as being the first plant propagated on earth by Lord Shiva, who transported it from the Himalayas intended as an intoxicant. [41] The consumption of cannabis in India was therefore associated with the worship of Lord Shiva.[42] The *Atharva Veda* 11.6.15 states: "We tell of the five kingdoms of herbs headed by Soma; darbha, bhanga and barley, and the herb saha release us from anxiety." [43] Cannabis use in India precedes written records and was recognized long before the development of institutionalised beliefs.[44] Folklore, medicinal and sacramental tradition use of cannabis represents human spirituality and healing.[45]

Cannabis sativa is amongst one of the most primitive agricultural crops cultivated by man. The Chinese were among the first nations to make use of cannabis crops. Archaeological discoveries have indicated that cannabis was used for its fibre as early as 4000 BC.[46] Textiles and paper composed of

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40 Aggrey *Art of weed* 16. Bhang is an edible preparation of cannabis, originating from the Indian subcontinent.
41 Green *Cannabis* 43.
42 Green *Cannabis* 43.
43 *Atharva Veda 11.6.15.*
44 Ferrara *Sacred Bliss* 13.
45 Ferrara *Sacred Bliss* 13.
46 Li 1974 *Econ Bot* 437.

cannabis were found in the tomb of Emperor Wu of the Han dynasty dating back to 104-87 B.C.[47]

Africa also has a rich history of smoking cannabis for medical and recreational purposes and many archaeologists and historians have taken interest in the noteworthy quantity of smoking pipes that were discovered at various locations across the continent, dating as far back as 600BCE.[48] The predicted entry of cannabis into Africa is said to have been through the Arab trading circles. By the twelfth century, Arab traders had established large settlements in Zanzibar and Kilwa.[49] Philips and van der Merwe state that the first solid evidence of cannabis smoking in Africa was disclosed by J.C. Dombrowski in 1971 in central Ethiopia.[50] Ceramic pipe bowls were excavated by J.C Dombrowski in the Lalibela Caves located in the Begemeder Province of Ethiopia.[51] These pipe bowls were tested for the presence of cannabinolic compounds, and an associated radiocarbon date of 80 A.D was established.[52] Dombrowski dated a number of artefacts from which he concluded that dagga smoking was practiced in the African continent of Ethiopia in the thirteenth or fourteenth century.[53]

There are several hypotheses as to how cannabis entered South Africa. *Cannabis sativa* has been used in both Southern and Eastern Africa for many centuries. However insufficient documented information is available with regard to its origin, distribution and use within South Africa.[54] In the absence of reliable accounts, linguistic and archaeological evidence are heavily relied upon. One thus has to rely on linguistic evidence in order to explain routes of cannabis into South Africa.[55]

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47 Li 1974 *Econ Bot* 437.
48 Zangato *Early Smoking Pipes in the North-Western Central African Republic* 365.
49 Du Toit *Cannabis in Africa* 10.
50 Philips 1983 *African History* 303.
51 Van der Merwe 1975 *Cannabis and Culture* 77.
52 Dombrowski *Excavations*160.
53 Flatau *History of dagga* 3.
54 Du Toit *Dagga* 81.
55 Du Toit *Dagga* 83.

Many of these theories identify early travellers that circumvented the Cape from the East, as well as Arab traders that travelled to the Mozambique coast from India. These routes were the initial migratory routes that were used to introduce cannabis into Southern Africa and allowed it to have been distributed to the local Hottentot and Bantu tribes who were indigenous to Southern Africa.[56]

The first mention of cannabis in South East Africa was made in 1609, by Friar João Dos Santos, a missionary who wrote a long narrative of his travels in South East Africa entitled "Ethiopia Oriental; e caria historia de cousas notaveis do Oriente".[57] Dos Santos described how the indigenous people grew cannabis throughout Ethiopia, referring to it as "bangue".[58] Santos described how the African natives dried the leaves and stalks, ground them into a fine powder, and then consumed the powder with the addition of water.[59] His literature described the indigenous peoples as acting in a drunken state after consuming the powdered cannabis. [60] According to Dos Santos[61]:

> Throughout the whole of Kaffraria a certain herb is found, which the Kaffirs sow, and which they call bangue; it is exactly like an ear of coriander, resembling it greatly in the grain and ear, but not in the leaf, which is like that of a clove gilliflower. The Kaffirs dry the leaf and stalk, and when they are well dried they pound them to powder, of which they eat a handful, and then drink some water, after which they are quite satisfied and their stomachs comforted.[62]

The journal recording of Dos Santos further described the indigenous peoples as using animal horns as pipes, or alternatively inhaling smoke using clay tubes that they made.[63]

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56 Du Toit *Dagga* 83.
57 Denis *The Dominican Friars in Southern Africa: A Social History* 11.
58 Santos *Eecodes of South- Eastern Africa* 210.
59 Santos *Eecodes of South- Eastern Africa* 210.
60 Flatau *History of dagga* 3.
61 Extracted from the Journal of Friar Joao dos Santos documented in 1609.
62 Santos *Eecodes of South- Eastern Africa* 210.
63 Santos *Eecodes of South- Eastern Africa* 437.

The Founder and first commander of Cape Town, Jan van Riebeeck was the Administrator of the Dutch East India Company. Jan van Riebeeck's journal entry dated the 21st of June 1658 describes cannabis as "daccha", "a dry herb which the Hottentots chew, which makes them drunk and which they highly esteem."[64] This was however believed to be confused with "Leonotis leonurus", a wild cannabis variation that was frequently smoked and chewed by the Khoikhoi.[65] It was believed to be native to Southern Africa, referred to as wild cannabis or dagga and used as a substitute for cannabis. The uncertainty created much confusion about the accuracy of many documented recordings.[66]

The definite route and date of entry of cannabis into Southern Africa therefore eludes researchers. It has been established however, that the distribution was by the movements of various settlers into and around Africa. The cultivation and use of cannabis was primarily by many of the indigenous Southern African tribes.[67]

2.1 The recreational use of cannabis

African societies have developed diverse recreational uses of cannabis. One of which was the smoking of cannabis with a pipe which was invented in sub-Saharan Africa and practised worldwide.[68] The recreational use of cannabis throughout Southern African dates back to 1609. In 1920, more than 300 years later, cannabis was prohibited across the African continent. Its legalised counterpart, tobacco, which became a popular cash crop under the ruling of the colonial administration, was not subjected to prohibition.[69] The majority of

64 Riebeeck *Journal of Jan van Riebeeck* 1656.
65 Flatau *History of dagga* 3.
66 Pretorious *"African plants and herbs in asthma therapy"* 24.
67 Flatau *History of dagga* 3.
68 Duvall http://africanhistory.oxfordre.com/view/10.1093/acrefore/9780190277734.001.0001/acrefore9780190277734-e-44 1 (Date of use: 2 November 2018).
69 Duvall http://africanhistory.oxfordre.com/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-44 1 (Date of use: 2 November 2018).

Africans opposed the prohibition of cannabis and as a result, cannabis manufacturing remained considerable despite its illegality.[70] Cannabis was not only used for its recreational intoxication properties, but also by traditional healers of Southern Africa for its medicinal properties.[71]

In 2000 South Africa started re-evaluating the laws that made possession, cultivation and the use of cannabis illegal.[72] Garreth Prince approached the High Court, arguing that legislation prohibiting Rastafarians from possessing and using cannabis, unjustifiably limited the right of Rastafarians to religious freedom as guaranteed by section 15 of the Constitution.[73] Garreth Prince relied on the constitutional right to freedom of religion to contend that the impugned provisions were "overboard".[74]

Rastafarianism[75] first appeared in Jamaica in the 1930's. In time the Rastafarian culture developed into a way of life for its followers.[76] The Rastafarian movement was introduced to South Africa on 28 December 1997, when Rastafarian supporters from most parts of South Africa convened to attend a gathering in Grasmere, Johannesburg.[77] These movements were responsible for laying the foundation for the Rastafarian religious movement in South Africa.[78] It was estimated in the initial Prince case that there are approximately twelve thousand actively practicing Rastafarians in South Africa.[79] In essence, the Rastafarian culture does not have a large following in South Africa.

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70 Duvall http://africanhistory.oxfordre.com/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-44 1 (Date of use: 2 November 2018).

71 Carrier and Klantsching *Africa and the War on Drugs* 20.

72 *Prince v President of Law Society of Cape of Good Hope (CCT) 2002 ZACC1; 2002(2)SA 794; 2002 (3)* BCLR [7] *hereinafter referred to as the Prince I case*.

73 *Prince I case* par [27].

74 *Prince I case* par [27].

75 Estate *Rastafari* 1. Rastafarianism is a religious movement among Jamaicans.

76 Chawane 2014 *JSR* 214.

77 Chawane 2014 *JSR* 220.

78 Chawane 2014 *JSR* 220.

79 *Prince I case* par [15].

The use of cannabis is central to the Rastafarian religion as further outlined in the Prince I case.[80] In accordance with Rastafarian tradition, cannabis is consumed by inhalation of the drug through crafted smoking devices including but not limited to remanufactured cigarettes or water-pipes.[81] Cannabis is also ritually burned, eaten, drunk, or bathed in.[82] Moreover; cannabis is used in medicines, and religious ceremonial gatherings in the Rastafarian culture.[83] Rastafarians consider intoxicants such as liquor, tobacco or street drugs as illicit.[84] Rastafarianism is a religion that is protected by sections 15 and 31 of the South African Constitution.[85] Garreth Prince's appeal to the Constitutional Court was however dismissed.[86] The Constitutional Court dismissed the appeal on the grounds that a religious exemption to allow the use of cannabis by individuals practicing the Rastafarian religion would impair the state's ability to enforce its legislation in the interest of the public and would further dishonour its international obligations.[87]

The recreational use of Cannabis was however "partially legalised" in 2018 when Prince and others referred a case to the High Court to consider the limitation of the right to privacy, dignity and equality in light of the prevailing legislative prohibition on the use of cannabis. On the strength of the right to privacy enshrined in the Constitution and the duty of the Courts to protect the right, cannabis was legalised for private use by adults in private.

2.2 The medical use of cannabis

The medical use of cannabis root was referred to by the Roman historian, Pliny the Elder, in 79 CE, who wrote in book 20 of the National Histories "a decoction of the root in water relaxes contractions of the joints and cures gout

80 *Prince I case* par [18].
81 *Prince I case* par [19].
82 *Prince I case* par [19].
83 *Prince I case par* [19].
84 *Prince I case par* [20].
85 *Prince I case par* [15].
86 *Prince I case par* [144].
87 *Prince I case par* [139].

and similar maladies."[88] Similarly, the French physician and writer, François Rabelais noted "the root of this herb, boiled in water, soothes muscles, stiff joints, gout pains, and rheumatism."[89] In 1613, the Polish botanist Szymon Syrenski, archived the uses of hemp root that was brewed in water for "curved and shrunken body parts."[90]

The very first compound isolated in its pure form from the cannabis plant was cannabinol (CBD).[91] In 1940 CBD was discovered by Adams, Hunt and Clark [92] and its structure was illuminated in 1963 by Mechoulam and Shvo.[93] In 1964 Gaoni and Mechoulam isolated the main active compound, delta-9-tetrahydrocannabinol (THC).[94] THC was declared as the primary psychoactive constituent of cannabis in 2002.[95] The end of the nineteenth century to date marked the initiation of current knowledge on the pharmacological composition of cannabis.[96] Internationally, the usefulness, security and superiority of the medical products have benefited from extensive scientific and evidence based research which has provided a body of evidence that emphasised the beneficial properties of the drug.[97]

However, as with all medications, the advantages and disadvantages need to be assessed before medical practitioners and research scientists make educated and knowledgeable recommendations for the use of cannabis products.[98] Many countries have used evidence based testimonials and trials which become imperative to inform appropriate regulation and prescription of the medical uses of cannabis.[99]

California was the forerunner in the bid to legalise medical cannabis. The Californian Proposition 215 was passed by a vote of 55.8% in 1996. The

88 Pliny *National Histories* 297.
89 Rabelais *et al Norton: New York* 623.
90 Syrenski *Zielnik herbarzem z języka łacińskiego zowią* 371.
91 Wood *Cannabinol Chem* 36.
92 Adams *et al* 1940 *Minnesota Chem Soc* 196.
93 Mechoulam and Shvo *Tetrahedron* 2078.
94 Gaoni and Mechoulam 1964 *Chem Soc* 1646.
95 Howlett *et al* 2002 *Pharmacol Rev* 161.
96 Atakan 2014 *TAP* 241.
97 Grant *et al* 2012 *TONJ* 18.
98 Grant *et al* 2012 *TONJ* 18.
99 Baron 2015 *TJHFP* 885.

Proposition allowed patients to cultivate and use cannabis under the supervision of a licensed medical practitioner. The goal of the proposition was to ensure that seriously ill residents of the State of California had access to cannabis for medical purposes. The Proposition creates an exclusion from criminal action for patients, medical practitioners and primary guardians who possess cannabis for medicinal needs with the recommendation of a medical practitioner.[100] Patients in research trials held in California further describe using cannabis to aid in treating the symptoms associated with deterioration due to AIDS, spasticity from multiple sclerosis, depression, chronic pain and chemotherapy.[101]

In 1999 The American Institute of Medicine (AIM) released a study on cannabis and medicine, in response to growing pressure received from the public to permit the use of cannabis for medical purposes. The study evaluated the scientific evidence for advantages and risks of cannabis use as a medicine. The report used scientific reviews, reports, and public hearings which were evaluated by advisors and reviewers. The study recommends against the use of smoked cannabis in medicine and proposes the development of a medical cannabinoid inhaler. The AIM report further suggests that cannabis for medical use be considered under stringently reviewed protocols. The study concluded that active cannabinoids present in cannabis, aid in the treatment of various medical conditions and the alleviation of associated symptoms.[102]

A 2006 study conducted by Chong and his peers on the use of cannabis in patients with multiple sclerosis revealed that pain and spasms were among the main reasons patients used cannabis.[103] The study was conducted amongst multiple sclerosis patients attending neurology outpatient clinics at two hospitals, one in London and the other in Kent in the United Kingdom. Many of the patients reported using cannabis for symptom control. The study concluded that there is an increased probability that cannabinoids aid in the

100 Proposition 215 Section 11362.5.
101 Mack and Joy *Marijuana as medicine* 20.
102 Institute of Medicine 1999 *Marijuana and medicine* 1.
103 Chong *et al* 2006 *Mult Scler* 646.

administration of neuropathic pain and muscular spasms that are experienced by individuals with multiple sclerosis.[104]

The American Medical Association initiated a resolution in 2009 advising the Federal government to once again consider the rescheduling of cannabis. The American Medical Association highlighted that by rescheduling cannabis the Federal government would be facilitating research and aiding in the development of cannabinoid-based medicine.[105]

There have been numerous studies conducted on differential populations that have identified the therapeutic effects of CBD. The study conducted by scientists Solowiji and his peers in 2018 on the therapeutic effects of prolonged cannabis treatment on psychological symptoms and cognitive function in regular cannabis users was carried out on 20 frequent cannabis users.[106] The findings were synonymous with enhanced cognitive performance, fewer psychotic symptoms, and increased gray matter discovered in the hippocampus.[107] The study further discovered that CBD demonstrates superior therapeutic effects in a diseased or compromised brain as opposed to a healthy individual with a fully functioning brain and those patients that used cannabis consistently showed a greater decrease in symptoms and enhanced cognition than that of nondependent users. [108]

The National Academies Committee on the Health Effects of Marijuana has released a concise report, in which various authors conclude that substantial evidence exists that cannabis is effective for the treatment of chronic pain in adults who actively use it.[109]

The University of the Free State in South Africa initiated a study in 2018 in which the research group is studying the immune-biological and validation

104 Chong *et al* 2006 *Mult Scler* 646.
105 Fischedick *et al* 2010 Phytochem 2058.
106 Solowij *et al* 2018 *CCR* 22.
107 Solowij *et al* 2018 *CCR* 22.
108 Solowij *et al* 2018 *CCR* 32.
109 National Academies of Sciences, Engineering, and Medicine *The health effects of cannabis and cannabinoids* 7.

effects of cannabis on breast cancer cells.[110] South Africa is renowned for its enriched CBD assortment of cannabis and this may propose future encouragement for the regulation of "insulin action on MAO-A- and IL-6/IL6 R regulated metastasis and angiogenesis in breast cancer of patients with diabetes."[111] The hindering effects of cannabis on breast cancer cell development and movement will sustain its medicinal application and will lead to manufacturing on an industrial level, thereby contributing to South Africa's future bio-based economy.[112]

The scientific importance of cannabis cannot be underestimated. The medical contribution that cannabis makes is not only based on subjective testimonials by patients using the narcotic, but is further supported by the medical and scientific studies conducted worldwide. These studies, some of which have been referred to above, add value to the claims that cannabis has medicinal value. It is however pertinent that scientists and researchers carefully study the properties that make cannabis valuable and enhance those properties in a safe, easily, accessible and legal manner. In order to obtain an objective perspective and to assess the value of cannabis in its entirety, the disadvantages of cannabis need to be considered in order to improve its medical and legal standing. The medical disadvantages of the use of cannabis have not gone unnoticed.

The Swedish scientist Andreasson and his colleagues conducted a study, commencing in 1987, on the association between level of cannabis consumption and the development of schizophrenia during a 15 year period.[113] The results of the study revealed that a relative risk for schizophrenia among high consumers of cannabis indicated a 95% confidence interval in comparison with cannabis non-users. The results therefore determined that a relationship existed between the level of cannabis consumption and schizophrenia after consideration of other psychiatric illness and

110 Bala and Matsabisa 2018 *South African JOS* 1.
111 Bala and Matsabisa 2018 *South African JOS* 1.
112 Bala and Matsabisa 2018 *South African JOS* 1.
113 Andreasson *et al* 1987 *Lancet* 1483.

environmental behaviours indicating that cannabis is an independent risk factor for schizophrenia.[114]

Prolonged regular use of high potency cannabis, as indicated in the study has been associated with deleterious effects on psychological function, including increased risk of developing psychosis, impaired cognition, and alterations to brain structure and function. [115] These adverse outcomes have been associated with the action of THC, the primary psychoactive constituent of cannabis. [116]

A study conducted by Asbridge in 2012 on acute cannabis consumption and motor vehicle collision risk used a systematic review of observational studies and meta-analysis to determine if a correlation existed between cannabis consumption and the risk of motor vehicle collisions.[117] The study findings confirmed that acute cannabis consumption correlated with an increased risk of motor vehicle collisions particularly those that had resulted in the death of individuals.[118]

In February 2017 the South African Medical Research Council brought together 19 key South African researchers to identify the priority areas for cannabis and cannabinoid products in South Africa. One of the aims of the workshop was to aid in providing information to local policy makers so that informed decisions could be made.[119] The workshop identified three major research priorities:

> Conduct a national, multi-site clinical trial of cannabinoids following identification of the optimal formulations, dosage and relevant clinical indications from the current evidence base to inform trial protocol development. Support exploratory research to quantify the prevalence and qualify the current use of extracts (e.g. oils) in the community to alleviate pain and other symptoms; methods to include are as follows,

114 Andreasson *et al* 1987 *Lancet* 1483.
115 Solowij *et al* 2018 *CCR* 21.
116 Solowij *et al* 2018 *CCR* 21.
117 Asbridge 2012 *BMJ* 344.
118 Asbridge 2012 *BMJ* 344.
119 Augustine *et al* 2018 *Afr J PHCFM 1.*

> (1) community- or clinic-based cross-sectional surveys or online surveys of the general public, (2) cross-sectional surveys of practising general practitioners and/or specialists in pain clinics with respect to their knowledge of patient use of cannabis extracts through patient disclosure. Conduct qualitative evaluation(s) of possible barriers and facilitators to medical practitioners prescribing cannabis or cannabinoids for medicinal purposes, should it be legalised in the future.[120]

A 2018 study headed by Sebastião and her team in partnership with research scholars from the University of Lancaster showed that the continuous use of cannabis or cannabis-based narcotics impairs memory.[121] Scientific research experiments found that long term exposure to cannabis in mice impaired their long term memory. The study used brain imaging which revealed that regions of the brain involved in learning and memory were effected as a lack of communication between the regions were identified.[122] The data provides critical information into the methodology by which continual cannabinoid exposure has on performance and thinking, and outlines the value of cannabinoid actions and the effects it has on various connected systems within the brain.[123]

Cannabis possesses many advantageous, dangerous and unknown qualities. It is therefore necessary to balance the benefits and harms in light of all documented research in order to assess the potential effects of cannabis. The medical uses of cannabis seem promising in light of creating a safe and effective way of extracting the beneficial properties. The uncontrolled recreational use however, appears to be hazardous and may cause more harm to individuals seeking to obtain a “high” or an elevated, altered state. In my opinion, it would be in the best interest of the public if the State regulated both the medical and recreational use of cannabis.

The State in the Prince II case placed significant importance on the information presented by Dr Gouws and Dr Naidoo as a response to the Shaw

120 Augustine *et al* 2018 *Afr J PHCFM 1.*
121 Mouro *et al* 2018 *JNC* 80.
122 Mouro *et al* 2018 *JNC* 80.
123 Mouro *et al* 2018 *JNC* 80.

report.[124] In the answering affidavit by Dr Gouws, she stated that "based on the uncontroverted evidence of the harmful effects of cannabis, the Department of Health supports the position taken by the government to continue to regulate the use of cannabis".[125] Dr Gouws further stated that the prevention seeks to avoid the damaging effects of cannabis which has the probability of producing psychological addiction in acute users.[126] The contributions of Dr. Gouws and Dr. Naidoo are outlined in detail in Chapter 3.

2.2.1 Cannabis consumption levels

Cannabis contains THC, a psychoactive complex that impairs thinking and motor skills. THC effects individuals in a dose related method. After a single does (for example, a single cigarette) THC present in the blood peaks within minutes, followed by the rapid decline in TGC blood levels. THC in chronic users accumulates in fat tissue, where it is slowly redistributed into the blood. A study conducted by Balikova and peers documented a 24 hour observational period initiated after the single dose of cannabis was consumed.[127] Results showed that the THC levels in occasional users are not detectable 4 hours after smoking a single dose of cannabis. Chronic users however, observed a measurable THC concentration for a greater period of time.[128]

Chronic cannabis use can result in concentrations of THC lower than 100pg/mg. [129] Whether or not such an accumulation has a long term significance is unknown.[130] Studies in India involving 265 chronic cannabis users over a duration of 6.7 years of use, with an average daily intake of 150mg of THC were compared with matched controls. Chronic users reacted

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124 *Prince II vs Constitution* par [67].

125 *Prince v Minister of Justice and Constitutional Development and Others: Answering Affidavit of the Minister of Health 2017 ZAWCHC [22] hereinafter referred to as the Prince II Answering affidavit of the Minister of Health*.

126 *Prince II Answering affidavit of the Minister of Health* par [23].

127 Balikova *et al* 2014 *Soud Lek* 2-3.

128 Balikova *et al* 2014 *Soud Lek* 2-3.

129 Holliste NeuroP 75.

130 Holliste NeuroP 75.

more slowly to visual motor tasks but did not differ in intelligence or memory tests.[131]

A study in Costa Rica involving 27 chronic users of cannabis was compared to 30 non users. The psychometric studies of learning and memory were lower in chronic users. However, the results were not significant.[132] These studies indicate that chronic users may suffer differential degrees of cognitive damage which may be long lasting. However, the impairment is slight and not easily detectable.

2.2.2 Medical innovation bill

The Medical Innovation Bill was introduced by a Member of Parliament, Mario G R Oriani-Ambrosini in 2014. The aim of the bill was to aid advancements in medical treatments making the use of cannabinoids for medical purposes legal and benefiting towards the South African economy.[133] The memorandum on objectives of the Medical Innovation Bill of 2014 discussed the establishment of research hospitals where medical innovation, specifically in cancer treatments, would be established. This would allow legal dispensation with consent by patents[134] and at the discretion of the medical practitioner[135] in these specialised hospitals.[136] The bill was however rejected on the 22 of November 2017.[137] This was due to the fact that the bill had already initiated development and as a result the Department of Health had amended the scheduling status of cannabis related products. On the 5 November 2017 the Medical Control Council published licence application procedures to plant, produce or trade in cannabis for medicinal and educational intentions.[138] In my opinion, the Medical Innovation Bill should have been granted as research hospitals studying and experimenting with doses of cannabis would have

131 Varma *et al* DAD 147.
132 Page *et al* JPD 58.
133 Medical Innovation Bill 2014 (Rejected).
134 Medical Innovation Bill 2014 par [6] (Rejected).
135 Medical Innovation Bill 2014 par [5] (Rejected).
136 Medical Innovation Bill 2014 (Rejected).
137 Mahlalela https://pmg.org.za/committee-meeting/25567/(Date of use: 6 January 2019).
138 Mahlalela https://pmg.org.za/committee-meeting/25567/(Date of use: 6 January 2019).

aided in creating legislation that would be in the best interest of South African citizens.

2.2.3 The proposed use of cannabis for industrialisation

Cannabis is an agricultural commodity that is grown for use in the manufacturing of a broad range of products in foreign countries, including products that can be consumed, beauty and hygiene products, medical supplements, textiles, paper, construction and insulation materials, and various other manufactured items.[139] The Hemp Industries Association reported a 700 million dollar total in retail sales of cannabis products in the United States in 2016.[140] The Hemp Industries Association claims that there has been an increase in cannabis retail sales. This is attributed to the sales of cannabis body products, herbal supplements, and cannabis based edibles.[141] There exists a profitability margin for industrial cannabis. However, there also exist potential obstacles to its development. Obstacles faced by the cannabis manufacturing industry include the need to establish an agricultural supply, provide quality strains of cannabis with modified attributes, upgrade production equipment and identify innovative industrial prospects.[142]

South Africa is in a position to benefit from the monetary potential that the cultivation of cannabis would have if cannabis was legal for industrialisation purposes. South Africa has the ideal climatic conditions for cannabis agriculture.[143] It is hypothesised that if cannabis was completely legalized in South Africa, there could be two feasible pricing outcomes. The first outcome would enable the South African government to impose excessive taxes on cannabis products. This would result in the price increase of cannabis and the government would obtain the revenue. The second pricing outcome would most likely result in a decrease in the price of cannabis. This would be due to

139 Johnson 2018 *NALPR* 2.
140 Cornell University http://allegany.cce.cornell.edu/resources/industrial-hempfrom-seed-to-market (Date of use: 30 June 2019).
141 Johnson 2018 *NALPR* 2.
142 Johnson 2018 *NALPR* 2.
143 Botha 2019 *Africa Farmer's Weekly* 34.

the legalization as a result in eliminating the risk associated with buying and selling cannabis. Price is a considerable determinant of cannabis consumption. An increase in prices results in a decline in the quantity of cannabis produced.[144]

In November 2017, the South African Health Products Regulatory Authority (SAHPRA) issued guidelines for the farming of cannabis for medical use. The guidelines provide a legislative framework for the farming and handling of cannabis for manufacture of scheduled medication. Since the legalisation of cannabis use by an adult in private in 2018, there have been numerous misunderstandings over the legal requirements for farming and retail in cannabis and cannabis related products. SAHPRA received applications in 2018 for the cultivation of cannabis for medicinal use. The licences issued for the cultivation of medicinal cannabis will be valid for a period of five years.[145] There are currently three sites that have been approved by SAHPRA. None of the three sites have been licensed for the cultivation of the herbal material. None have applied for the manufacture of medicinal products containing cannabis such as oil extracts. Nonetheless, all of the sites will need to comply with the standards as laid down in "Guide to Good Manufacturing Practices for Medicines in South Africa". No cannabis-containing medicines have as yet been registered by SAHPRA. Access to such products, therefore, still relies on the section 21 approval processes. The control over cannabis-containing products is also subjected to the Schedules of the Medicines and Related Substances Act, 1965 as amended. When intended for therapeutic purposes, tetrahydrocannabinol is listed in Schedule 6. Cannabidiol is listed in Schedule 4 medicines containing either or both of these cannabinoids, therefore, require a prescription from an authorised prescriber.[146]

144 Riley *et al* SA Drugs: EPP 1.

145 Nkambule https://www.sahpra.org.za/documents/773202cd10.23_Media_Release_Cultivation_Licences_for_Medicinal_Cannabis_Apr19_v1.pdf (Date of use: 12 June 2019).

146 Nkambule https://www.sahpra.org.za/documents/773202cd10.23_Media_Release_Cultivation_Licences_for_Medicinal_Cannabis_Apr19_v1.pdf (Date of use: 12 June 2019).

3. History leading to the criminalisation of cannabis in South Africa

South Africa signed the Treaty of Versailles in 1919[147] that required processes to be established to repress the illicit drug trade. This placed immense legal pressure to include cannabis as a criminalised drug in national legislation.[148] The ban on cannabis was fully instituted in South Africa in 1921 as the effects, use and control of cannabis among the indigenous people in South Africa were becoming a great cause for concern, mainly in the Western Cape,[149] where cannabis was said to be the cause of "criminality".[150] The resolution was made that full criminalisation of the entire cannabis plant and the use thereof would be proposed in legislation. However, the Native Affairs Department was sceptical that the law would be enforceable in rural areas where cannabis use, possession, cultivation and distribution have very few consequence from the perspective of public order and wellbeing.[151]

After 1922, commissions and institutions applied to government to set prohibitive measures. However, it became apparent that the government was prohibiting the use and trade without being able to legally justify the prohibitive limitation measures.[152] In June 1922 the Customs and Excise Duties Amendment Act outlawed the cultivation, sale, possession and use of cannabis, cocaine and a number of dangerous opiates in South Africa.[153] In 1923 South Africa addressed the Advisory Committee for the Council of the League of Nations to add cannabis to the list of habit forming drugs.[154] South Africa required more rigorous measures against the use of cannabis and requested the Advisory Committee to add cannabis to the list of restricted drugs. The request was accepted at the Second Opium Conference of 1924,

147 Nice and Emmett *What you need to know about cannabis: understanding the facts* 102.
148 Nice and Emmett *What you need to know about cannabis: understanding the facts* 102.
149 Kowalski *Decriminalization of Cannabis* 11.
150 Chanock *The Making of South African Legal Culture* 47.
151 Paterson Prohibition & Resistance 52.
152 Kowalski *Decriminalization of Cannabis* 11.
153 Kowalski *Decriminalization of Cannabis* 11.
154 *Flatau History of dagga in the South African archaeological record*. *https://sites.google.com/site/witsgeoghonours/history-of-dagga-in-the-south-african-archaeological-record* 3 *(Date of use: 02 June 2018).*

and became a part of international law in 1925.[155] The use of cannabis was completely criminalised in South Africa in 1928 under the Medical, Dental, and Pharmacy Act, 1928.[156]

The Weeds Act was passed in 1937 which established cannabis prohibition to a greater extent in South Africa,[157] and further entrenched cannabis laws in South Africa.[158] The Weeds Act of 1937 declared the property owner or the inhabitant of the said property responsible for the cultivation of cannabis, or any other plant declared as cannabis in South Africa on the said property.[159] If the inhabitant or owner failed to prevent the growth or cultivation of cannabis on the said property then the owner or inhabitants were guilty of an offence and it would be legal for authorities to remove the plant from their land at the expenditure of the inhabitant or owner of the said property.[160] Defaulters would be imprisoned for a second offence concerning the same weed species, and it was required that the identified weed was destroyed on examination. It was further stated that the movement and trade of seeds of cannabis be made illegal.[161]

South Africa is a signatory to the 1961 United Nations Single Convention on Narcotic Drugs, which aimed at combating drug abuse and trafficking focused on limiting the possession, use, trade, distribution, import, export, manufacture and production of cannabis exclusively for medical and scientific purposes.[162] As a signatory to the Single Convention, South Africa is committed to complying with its obligations by controlling medicinal cannabis cultivation and reporting to the International Narcotics Drug Control Board.[163]

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155 *Flatau History of dagga in the South African archaeological record*. *https://sites.google.com/site/witsgeoghonours/history-of-dagga-in-the-south-african-archaeological-record* 3 *(Date of use: 02 June 2018).*

156 Medical, Dental and Pharmacy Act 13 of 1928.

157 Kowalski *Decriminalization of Cannabis* 11.

158 *Flatau History of dagga in the South African archaeological record*. *https://sites.google.com/site/witsgeoghonours/history-of-dagga-in-the-south-african-archaeological-record 3 (Date of use: 02 June 2018).*

159 Weeds Act 42 of 1937 section 5.

160 Weeds Act 42 of 1937 Section 5.

161 Weeds Act 42 of 1937 Section 23.

162 United Nations 1961 Single Convention on Narcotics Drugs 14.

163 Kahn https://www.businesslive.co.za/bd/national/health/2017-09-14-medicinal-cannabis-how-the-medicines-control-council-is-easing-access/ (Date of use: 15 July 2018)

Under section 22A 9a(i) of the Medicines and Related Substances Act 101 of 1965, as a controlled substance, it is illegal to cultivate, analyse, research, possess, use, sell or supply cannabis without permission from the Director General.[164] Section 22A (9) further states that under the Medicines and Related Substances Act medical practitioners can apply to the Council for permission to access and prescribe unregistered medicines for their patients in certain exceptional circumstances.[165]

The South African Criminal Procedure Act[166] further allowed for searches and seizures which were used to enforce new drug laws. Authorities were further allowed to seize related drug paraphernalia.[167] Section 23 of the Criminal Procedure Act provides for the search of arrested persons and the seizure of articles on the accused by police officers or peace officers with or without a warrant.[168] Section 24 of the Criminal Procedure Act provides for the search of premises, by the inhabitant or owner who reasonably suspects that dependence-producing drugs are on the premises. If a police official is not readily available, then the owner or inhabitant may enter the premises with the purpose of searching such premises and any such person thereon.[169] Section 24 of the Criminal Procedure Act, further states that if any such produce is found by the inhabitant or owner of a property they shall take possession thereof and forthwith deliver it to a police official.[170]

Under the Drugs and Drug Trafficking Act 1992[171], people found in possession of more than 115 grams of cannabis were presumed to be guilty of dealing in the narcotic.[172] However, following the adoption of the Interim Constitution of South Africa, courts ruled that this presumption unjustifiably infringed the constitutionally enshrined presumption of innocence, and consequently

164 Medicines and Related Substances Act 101 of 1965 section 22A 9a(i).
165 Medicines and Related Substances Act 101 of 1965 section 22A 9a(i).
166 Criminal Procedure Act 51 of 1977, hereinafter referred to as the Criminal Procedure Act.
167 Criminal Procedure Act 51 of 1977.
168 Section 23 of the Criminal Procedure Act
169 Section 24 of the Criminal Procedure Act.
170 Section 24 of the Criminal Procedure Act.
171 Drugs and Trafficking Act 140 of 1992.
172 Drugs and Trafficking Act 140 of 1992 Section 21(1)(a)(i).

invalidated those parts of the Act.[173] This was established in the cases of *S v. Bhulwana* and *S v. Gwadiso* where the Constitutional Court in terms of section 98(6) of the Constitution, invalidated section 21(1)(a)(i) of the Drugs and Drug Trafficking Act.[174]

Cannabis is classified as a Schedule 7 substance in South Africa. It is therefore subject to special restrictions and controls.[175] The Drugs and Drugs Trafficking Act[176] Schedule 2 part III enlists Cannabis under the Undesirable Dependence-Producing Substances,[177] the possession or use of which is prohibited by the law, subject to very few exceptions.[178]

4. The current law relating to the decriminalisation of the use of cannabis in South Africa

The first Prince case initiated the fight for the legalisation of cannabis in South Africa. The appellant; Garreth Prince, was refused admission by the law society due to his two previous convictions for possession of cannabis and his expressed intention to continue with the practice as a result of his religious beliefs.[179] Prince challenged the decision of the Law Society stating that the constitutional validity of the prohibition of the use or possession of cannabis was unjustified when its use or possession is motivated by his Rastafarian religion.[180] Prince alleged that the above provisions were "overboard"[181] as they "infringed on his rights to freedom of religion, to dignity, to pursue the profession of his choice, and not to be subjected to unfair discrimination."[182]

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173 Burchell *Criminal Law* 4.
174 *S v Bhulwana, S v Gwadiso (CCT12/95, CCT11/95) 1995 ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 [1].*
175 Schedule 7 of GN R509 of 2003.
176 Drugs and Drugs Trafficking Act No. 140 of 1993.
177 Drugs and Drugs Trafficking Act No.140 of 1993.
178 *Prince I case* par [3].
179 *Prince I case* par [1].
180 *Prince I case* par [4].
181 *Prince I case par* [27].
182 *Prince I case par* [6].

By the time the issue had arrived at the Constitutional Court, Prince had expanded his constitutional challenge to dispute section 4(b) of the Drug and Drug trafficking Act[183] and section 22A(10) of the Medicines and Related Substances Control Act.[184] The constitutional challenge was however dismissed by the Constitutional Court as "granting of a limited exemption for the non-invasive religious use of cannabis under the control of priests was not a competent remedy."[185] The Constitutional Court further stated that Prince only represented himself and that no other members of the Rastafarian community were parties to the litigation.[186] The Constitutional Court ruled that the claim by Prince was not for the limited use for ceremonial purposes on special occasions nor would a more general exemption for the non-invasive drug fulfil the use of cannabis for the religious purposes.[187] The Constitutional Court declared that by granting the order all it would do is lead to the free use of cannabis and policing in such circumstances would be difficult to enforce.[188] The State was not called upon to justify methods of controlling the use of harmful drugs.[189] The Constitutional Court stated that they were not called upon to decide whether the legislation's general prohibition on the use and possession of cannabis is consistent with the Constitution or not, further that they were not called upon to decide whether the use and possession of cannabis should be legalised. The Constitutional Court stated that they were required to decide if the impugned provisions were "overboard".[190] The appeal by Prince was dismissed by the Constitutional Court.[191]

In March 2017 Prince again took the fight to legalise cannabis to the Western Cape High Court which ruled in the Prince II case that the blanket prohibition of the use of cannabis is unconstitutional as it impedes on the basic human

183 Drug and Drug Trafficking Act No. 140 of 1992.
184 Medicines and Related Substances Control Act No. 101 of 1965.
185 *Prince I case par* [142].
186 *Prince I case par* [142].
187 *Prince I case* par [142].
188 *Prince I case* par [142].
189 *Prince I case par* [117].
190 *Prince I case par* [31].
191 *Prince I case* par [144].

right of privacy.[192] The applications brought by three individuals were based on the argument that the criminalisation of cannabis use and possession in their own homes and "properly designated places" was a violation of the right to equality, dignity, freedom of religion and most importantly, the right to dignity.[193] The High Court ruled that laws prohibiting the use of cannabis and the possession, purchase and or cultivation of it in private homes and for personal consumption by adults were inconsistent with the Constitution and therefore declared them invalid.[194]

The Constitutional Court passed judgment on the 18 of September 2018, confirming the order by the High Court.[195] The Constitutional Court ruled that the use or possession of cannabis by an adult person in private for his or her personal consumption is legal. It is protected by the right to privacy entrenched in section 14 of our Constitution. [196]

Therefore the use or possession of cannabis was not confined to an individual's private dwelling. The applicants in the Prince II case cross appealed against the High Court's decisions to confine the use of cannabis to the user's home or dwelling.[197] The term "private dwelling" restricted personal autonomy, as it failed to take into account the right to human dignity and the right to freedom of movement.[198]. On cross- appeal it was upheld that the reference in the order by the High Court to "private dwelling" was replaced with "in private" or in the case of cultivation "in a private place" by the Constitutional Court.[199] The Constitutional Court ruled that as long as the use of cannabis was in private and not in public and the use or possession is for personal consumption by an adult, then it is protected by the right to privacy.[200]

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192 *Prince II case* par [132(1)].
193 *Prince II case* par [11].
194 *Prince II case* par [132].
195 *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) 2018 ZACC [30] hereinafter referred to as *Prince II vs Constitution.*
196 *Prince II vs Constitution* par [100].
197 *Prince II vs Constitution* par [99].
198 *Prince II vs Constitution* par [99].
199 *Prince II vs Constitution* par [129(6)].
200 *Prince II vs Constitution* par [100].

The Constitutional Court ruling is justifiable in that the privacy of an individual should not be limited to a private dwelling. The word "private" however, is not defined in terms of the Criminal Procedure Act or the Interpretations Act, which creates much confusion and ambiguity. Which leads to some of the following questions; what qualifies as being private? What proximity qualifies as being private? Does private mean that cannabis has to be on my person or could it be placed in material possessions that I own? What amount of cannabis, if found in my possession qualifies as being for private use?

In *Sars v Executor Frith's Estate* the Supreme Court of Appeal reiterated that the word under consideration must be defined by their ordinary grammatical meaning in order to ascertain the intention of the legislator.[201] The definition of private in accordance with the Oxford dictionary is:

> pertaining or relating to, or affecting a person, of a small intimate body or group of persons apart from the general community; individual, personal.[202]

It would therefore be increasingly difficult to prove that cannabis pertaining to or related to any individual would not be for private use and would therefore only be a crime if used in public.

The Constitutional Court stated further that dealing in cannabis is a justifiable limitation on the right to privacy.[203] However the phrase "deal in" in section 1 of the Drugs Act is the reason why section 5(b) of the Drug act was ruled constitutionally invalid. The words "deal in" are connected with the cultivation of cannabis. Therefore the Constitutional Court ruled that to that extent, section 5(b) read with the definition of the phrase "deal in" in section 1 of the Drugs Act, were constitutionally invalid.[204] The Constitutional Court order also provides that until Parliament has made the amendments, all prosecutions

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201 *CSARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) [273].
202 Oxford dictionary 7A 518.
203 *Prince II vs Constitution* par [88].
204 *Prince II vs Constitution* par [86].

falling within the invalidated provisions must be stayed.[205] This, however, does not apply to charges of possession in public or buying and dealing in cannabis, which the Constitutional Court has no intention of legalising.[206]

The Prince II case orders will be summarised further in Chapter 3.

5. Conclusion

It is a crucial period in the world for cannabis policy and research. Shifting public sentiment, conflicting and impeded scientific research and legislation have fuelled the debate about what the harms or benefits attributed to the use of cannabis or its derivatives are. It cannot be denied that cannabis has medicinal properties and religious value and therefore should be a suitable candidate for policy reform and in-depth scientific research studies. Cannabis use has a rich medical and recreational history that dates back centuries and although there are obvious dangers with dosage and prolonged use of cannabis in users, these are factors that can be controlled if researchers can develop safer alternatives. The progress that South Africa has made however, has little to do with research advancements and policy changes with regard to cannabis, but more to do with a loop hole in legislation on the right to privacy. Irrespective of how slow the process has been, policy reform and research initiative need to occur in order to effectively understand cannabis even though it has been legalised for private adult consumption and possession.

205 *Prince II case* par [131].
206 *Prince II vs Constitution* par [88].

CHAPTER THREE

1. Introduction

This chapter will consider the arguments and theories used to support the constitutionally-protected right to privacy as a ground to change the law relating to the use and cultivation of cannabis in private, with reference to the Prince II case. The chapter will further examine the interpretation of the Prince II case as well as the interpretation of the judgment passed in the Prince II case and orders made by the Constitutional Court of South Africa.

2. The Prince I case

Prince brought an application to the Constitutional Court on appeal concerning the constitutional validity of the prohibition on the use and possession of cannabis motivated by the right to freedom of religion.[207] Prince alleged that the impact of section 4(b) of the Drugs Act was intended to limit the appellant's freedom to practise the Rastafarian religion, limit his right to be treated with dignity, limit his right to pursue the profession of his choice, and infringed on his right not to be subjected to unfair discrimination.[208]
However the High Court found:

> That a religious exemption for the Rastafarian religion would place an additional burden on the police and the courts, both of which are operating under heavy pressure because of the general crime situation in this country.[209]

Medical evidence showed that cannabis did propose a danger if consumed in large amounts.[210] Further research indicated that there

207 *Prince I case par* [4].
208 *Prince I case* par [6].
209 *Prince I case* par [29].
210 *Prince I case par* [61].

are levels of consumption that are safe, these levels were however not stated, nor was evidence produced that would suggest that it was impossible to regulate consumption to a restricted level.[211]

With the permission of the High Court, the appellant appealed to the Supreme Court of Appeal (SCA) which ruled that the harmful effects of cannabis used in large doses and the general ban were necessary to prevent the abuse of cannabis by Rastafarian followers. They further ruled that the exemption sought would be impossible to enforce as it would be difficult to ascertain if an individual was a Rastafarian follower.[212]

On appeal to the Constitutional Court it was concluded that section 4(b) of the Drugs Act with the equivalent notion applying to section 22A(10) of the Medicines Act, were created primarily to prevent potential harm caused by the psychological dependence producing drug when consumed regularly and in large quantities.[213] The Constitutional Court dismissed the case.

The appellant then approached the High Court with his second case in 2017. When initiated, the court had to then consider if the Prince II case could be legally heard given the ruling made by the Constitutional Court as well as the SCA ruling in the first Prince case.[214] As both cases dealt with the constitutionality of provisions in the Drugs Act it was left to the court's discretion to differentiate between the Prince I case and the Prince II case. The High Court ruled that the Constitutional Court had only considered the narrow issue of a religious exemption, not whether the general prohibition was unconstitutional or not, in that Prince I did not decide the dispute presented in Prince II

211 *Prince I case par* [61].
212 *Prince I case par* [30].
213 *Prince I case* par [24].
214 *Prince v Minister of Justice and Constitutional Development and Others; Rubin v National Director of Public Prosecutions and Others; Acton and Others v National Director of Public Prosecutions and Others* (4153/2012) 2017 ZAWCHC 30; 2017 2 All SA 864 (WCC); 2017 (4) SA 299 (WCC) [12] hereinafter referred to as the *Prince II case*.

before court.[215] In this regard the court found that the doctrine of *res judicata*[216] did not apply. Consequently the High Court permitted the Prince II case.[217]

3. Arguments in the Prince II case to support the constitutional justification of the use of cannabis

The applicants in the Prince II case claimed that it was their justifiable right to use cannabis for an assortment of justifiable reasons including religious, spiritual, recreational, medical, economic, transport and trade without such use being regarded as a criminal activity.[218] They sought to decriminalise cannabis in order to allow for its unconstrained possession, use, cultivation, transportation and trade.[219] The applicants challenged the constitutional validity of sections 4(a) and 4(b) as well as section 5(b) of the Drugs and Drug Trafficking Act,[220] and section 22A(10) of the Medicines and Related Substances Act.[221] The appellants argued that the attributed provisions were irrational and unlawful.[222] Not only did they infringe on their right to human dignity, but their right to privacy, their right to equality, their right to freedom and security of the person, their socio-economic rights, their right to a healthy and sustainable environment, their right to freedom of religion and their right to culture and the right to cannabis as a plant.[223] The Prince II case thus sought to determine whether the relevant legislative framework was unconstitutional.[224]

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215 *Prince II case* par [20].

216 Ali *Mediation* 46. A matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.

217 *Prince II case* par [20].

218 *Prince II case* par [4].

219 *Prince v Minister of Justice* and Constitutional Development and Others *2017* [1] hereinafter referred to as *Prince Heads of Argument*.

220 Drugs and Drug Trafficking Act, 140 of 1992 hereinafter referred to as the " The Drug Act".

221 Medicines and Related Substances Act, 101 of 1965 referred to as "The Medicines Act".

222 *Prince Heads of Argument* par [2].

223 *Prince Heads of Argument* par [3].

224 *Prince II case* par [2].

The appellants further argued that the criminal prohibitions of the use and possession of cannabis in their own homes and in "properly designated places"[225] were an unconstitutional infringement on their human rights. The main premise of the Prince II case, and thus the main challenge against the legislation, was therefore to establish the right to privacy, which will exclusively be discussed in this dissertation.[226]

3.1 The Drugs Act

The Applicants challenged the constitutional validity of sections 4(a) and 4(b) as well as section 5(b) of the Drugs and Drug Trafficking Act.[227] The state was challenged by the applicants as the logic that they used when setting the framework for the legislation banning the use of cannabis in the privacy of one's own homes was seen as an unjustifiable invasion of privacy, human dignity and freedom.[228] The applicants argued that it was not the State's right to dictate what people eat, drink and smoke in the privacy of their own homes.[229] The current legislative framework defines cannabis as illegal to use, possess, to deal in and to manufacture or supply.[230] In terms of the Drugs and Drug Trafficking Act, the whole cannabis plant or any portion, except for dronabinol or transdelta-9 tetrahydrocannabinol (THC), is listed as an undesirable dependence producing substance.[231] An undesirable dependence producing substance is defined by the Drugs Act as any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2 of the Drug Act.[232]

3.2 The Medicines Act

Prince II further challenged section 22A (10)[233] of the Medicines Act on the same premise as the Drugs Act.[234] The Medicines Act grants the registration,

225 *Prince II case* par [11].
226 *Prince II case* par [11].
227 The Drug Act.
228 *Prince Heads of Argument* par[3].
229 *Prince Heads of Argument* par[3].
230 Drugs and Drug Trafficking Act no. 140 of 1992.
231 *Prince Heads of Arguments* par [14].
232 Drugs and Drug Trafficking Act no. 140 of 1992.
233 Notwithstanding anything to the contrary contained in this section, no person shall sell or administer any Scheduled substance or medicine for other than medicinal purposes:

control and conditional use of medication and related substances proposed for human and animal utilization.[235] Cannabis is classified as a Schedule 7 Drug under the Medicines Control Council Schedules.[236] Currently, the Medicines Act permits the use of prescription cannabis for medicinal uses subject to the management of medical professionals. The act further allows a legal framework for the use of cannabis for medical and research purposes.[237] However the Medicines Control Council has not yet approved medications that contain THC, various other cannabinoids or even synthetic cannabinoids.[238]

3.3 Infringement on the right to privacy [239]

As a citizen of South Africa, the privacy of every individual has to be respected as part of our enshrined constitutional right as human beings. The right to privacy is regarded as a fundamental right by social scientists and one that is necessary for the conservation of an individual's human dignity, physical, psychological and spiritual welfare.[240]

In South Africa, the right to privacy is protected by South African Common law, the Bill of Rights[241] and the Constitution[242] whilst section 14(d) encompasses a broader protection of privacy, similar to the common law ***actio iniuriarum***[243] of South African law.[244] "Privacy, dignity, identity and reputation are facets of personality."[245] There is no definition of privacy or dignity in the South African

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provided that the Minister may, subject to the conditions or requirements stated in such authority, authorise the administration outside any hospital of any Scheduled substance or medicine for the satisfaction or relief of a habit or craving to the person referred to in such authority.

234 *Prince Heads of Argument* par [2].

235 *Particulars of Claim (7295/13)* referred to as Particulars of Claim Prince II par [15].

236 *Prince II case* par [10].

237 Medicines Act of 1956 Section 22.

238 Parry and Myers 2014 *SAMJ* 399.

239 Constitution Section 14.

240 Van der Bank 2012 *EJBSS* 77.

241 Bill of Rights, Section 2.

242 Constitution Sections 14 (a), (b) and (c).

243 Neetlings *et al Law of Personality* 84. The *actio iniuriarum* is an action used to bring delictual claims for violations of personality rights.

244 Van der Bank 2012 *EJBSS* 78.

245 Burchell 2009 *EJCL* 2.

legislation. It is therefore important to evaluate the right to privacy in the light of both the common law and the Constitution.[246]

The main premise in the Prince II case was defined as the infringement on the right to privacy as a constitutional right of South African citizens. The applicant's argued that the criminalisation of cannabis infringed on section 14 of the Constitution. Section 14 of the Constitution states:

> That everyone has the right to privacy, which includes the right not to have-
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed.[247]

The applicants in the Prince II case criticised the High Court as they focused solely on the right to privacy. The applicants urged the High Court to base their findings on the violation of the right to equality, dignity and freedom of religion which the court disregarded.[248]

The applicants went on to argue that there was in fact a connection between the right to privacy and the right to dignity which is protected in terms of section 10 of the Constitution.[249] An example of this was the *Teddy Bear Clinic* case which was discussed in the Prince II case.[250] The Court recognised the inescapable link between the right to privacy and the right to human dignity. 'Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy'.[251] Human dignity was described as:

> An important constitutional value that not only informs the interpretation of most, if not all other constitutional rights but is also central in the limitations analysis.[252]

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246 Van der Bank *EJBSS* 78.
247 Constitution Section 14.
248 *Prince II case* par [20].
249 *Prince II case* par [23].
250 *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* [64] referred to as the *Teddy Bear Clinic*.
251 *Teddy Bear Clinic* par [64].
252 *Prince Answering affidavit* par [170].

The Prince II case further identified the link between the right to privacy and the right to freedom, as the applicants discussed how privacy fosters and encourages moral autonomy.[253] The Prince II case argued that if privacy was to be considered as a range of rights, it would therefore entail that individuals that choose to use small quantities of cannabis in the isolation of their private dwellings are implementing a right of autonomy which, does not require interference from society or the State.[254] The applicants argued that if the right to autonomy is practiced, a similar right of entitlement as that to the cultivation of a plant on ones premises solely for personal utilization should be legalized.[255]

However, Judge Davis chose to focus the Constitutional challenge solely within the context of the right to privacy. Thus the premise of the case remained the right to privacy. The defining question in the Prince II case was therefore whether the legislative framework, placed limitations on the right to privacy.[256] The Prince II case highlighted the legal right to privacy and the need for additional protection by making reference to the case of *Bernstein v Bester*.[257] In the case of *Bernstein v Bester* it was stated:

> A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions 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. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individuals' activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation. [258]

253 *Prince II case* par [24].
254 *Prince II case* par [25].
255 *Prince II case*par [26].
256 *Prince II case* par [20].
257 *Prince II case* par [22].
258 *Bernstein and others v Bester and others NNO* 1996 ZACC 2; 1996 (2) SA 751 (CC) [77].

The limitation on the right to privacy was used as an argument by the applicants discussing that the distinction between cannabis, tobacco and alcohol is unreasonable and therefore the restriction of the right to privacy was unjustifiable in terms of s 36(1) of the Republic of South Africa Constitution Act 108 of 1996. [259]

3.4 Limiting the right to privacy

Constitutional rights and freedoms are not absolute in the South African Constitution.[260] A limitation of a fundamental right must be constitutionally justified in terms of the requirements of the limitation clause in section 36(1) of the Constitution. The applicant must first demonstrate that the exercise of the right to privacy has been limited and the respondent must then establish that the infringement was justifiable.[261] According to 36(1) of the Constitution:

> The right to privacy may only be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.[262]

The High Court heavily relied on the information ascertained from Professor Shaw and colleagues with regard to the rationalization that placed limitations on the right to privacy.[263] State Counsel disputed that the purpose of the Drug and Medicines Act was to protect "the health, safety and psychological well-being of persons affected by the use of cannabis".[264] Counsel for the State also pointed out:

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259 *Prince II case par* [20].
260 Van Vollenhoven http://dx.doi.org/10.4314/pelj.v18i6.08 (Date of use: 5 October 2018).
261 Steiner Justifying limitations on privacy 19.
262 *Prince II case* par [28].
263 *Prince II vs Constitution* par [61].
264 *Prince II vs Constitution* par [63].

The prohibition against the possession and use of cannabis was part of a worldwide attempt to curb its distribution of which the present government is fully supportive.[265] The general prohibition seeks to address the harm caused by the drug problem by denying all possession of prohibited substances (other than for medical and research purposes) and not by seeking to penalise only the harmful use of such substances.[266]

4. The evidence of the State justifying the limitations on the right to privacy

4.1 Medical grounds that the state used to justify limitations

The State used various medical experts to bring forth crucial evidence that would justify the limitations on the right to privacy. Medical expert, Dr Gouws, provided evidence that the use of cannabis did have harmful effects on the neural and systemic systems. She described cannabis as a hallucinogen that alters an individual's current state causing user dependent side effects of intense relaxation or hyper activity. She explained that cannabis had harmful effects in pregnancy and leads to learning impairments.[267] She hypothesized that chronic smoking of cannabis would result in predisposition to lung infections, cancer and schizophrenia.[268]

Another medical expert, Dr Naidoo, proclaimed that the transition from cannabis to cocaine use and possible addiction occurs significantly more swiftly than the transition to nicotine or alcohol addiction and therefore the limitation is not irrational; however, there was no scientific research to substantiate these facts.[269] Dr Naidoo stated that the most disturbing impacts

265 *Prince II vs Constitution* par [63].
266 *Prince II vs Constitution* par [64].
267 *Prince II case* par [36].
268 *Prince II case* par [38].
269 *Prince II case* par [43].

of cannabis use is to be found in the effects on the human brain, recollection loss and the inability to perform complex tasks.[270]

Professor Dan Stein, Head of the Department of Psychiatry and Mental Health, at the University of Cape Town and author of the Central Drug Authority of South Africa stated that in his view the decriminalisation of cannabis is required. His view was contradictory to both statements provided by state medical professionals. Professor Stein submitted that decriminalisation is required to ensure that a more dynamic approach may be implemented when dealing with cannabis as a drug and its restrictions.[271]

The medical facts recorded in the Prince II case were however inconclusive. There is no doubt that when consumed in high doses that there would be greater risk, as cannabis is dose related and has cumulative effects.[272] It was however noted that there was a defined level at which consumption would be safer. However, this level was not placed on evidence. Further there was no evidence presented that suggested that it would be impossible to regulate the dosage of cannabis used.[273]

The State relied heavily on affidavits and answering affidavits from Dr Gouws' on behalf of the Minister of Health, in order to justify the limitation as the evidence produced thus far was not adequate. Dr Gouws stated that the neurological effects of cannabis were subjective and dependent on the individual and manner of use.[274] Cannabis users may experience exhilaration, perceptual adjustments, relaxation, period alteration and the amplification of sensory perceptions.[275] Many users experience short term memory loss, display a short attention span and experience difficulty with motor skills and reaction times. The most reported common side effects have been nervousness and fright reactions.

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270 *Prince II case* par [43].
271 *Prince II case* par [60].
272 *Prince I case* par [25].
273 *Prince I case* par [61].
274 *Prince answering affidavit* par [52].
275 *Prince answering affidavit* par [52].

Dr Gouws stated that persistent intense smoking of cannabis was linked with an increase in symptoms of chronic bronchitis and impaired lung function.[276] The short term age related properties of cannabis use on the cardiovascular system showed an increase in heart rate, dilation of blood vessels and changes in blood pressure. It was also recorded that the use of cannabis during pregnancy was connected with limitations in the development of the unborn child, miscarriages and cognitive discrepancies in progeny.[277] Dr Gouws disputed that tobacco, alcohol and prescription drugs were in the same league as cannabis. Dr Gouws admitted that they have harmful effects associated with the use and abuse of these substances. However, research has proven that the effects of tobacco, alcohol and prescription drugs are less severe than those effects seen in cannabis users.[278] Dr Gouws explained that cannabinoids remained in the body and therefore had a cumulative effect. The applicants however, disputed this statement saying that they are of good and sound health and have been smoking for over 30 years.[279]

4.2 South African Police Services (SAPS)

Police Captain Johan Smit discussed, in an affidavit on behalf of the South African Police Service, that criminals used various types of drugs and that it was not only limited to cannabis. His report showed that a large number of drug abusers were criminals committing robbery, house breaking, armed robbery, assault, domestic violence and possibly murder as a means to finance their drug addictions.[280] He hypothesised that the legalisation of cannabis would not result in the decrease of brutal crimes as recommended by Professor Shaw and his colleagues in the Shaw report.

4.3 The Shaw report

276 *Prince answering affidavit* par [52].
277 *Prince answering affidavit* par [52].
278 *Prince answering affidavit* par [52].
279 *Prince answering affidavit* par [52].
280 *Prince II case* par [40].

Professor Mark Shaw of the University of Cape Town co-authored, “Balancing Harms in Cannabis policy for South Africa” which showed that disciplinary drug policies do not aid in reducing the rates of drug use.[281] Using statistics provided by the SAPS, Professor Shaw noted that 15% of arrests in the country were related to crimes committed when individuals were under the influence of narcotics. [282] Professor Shaw presumed that the SAPS could make better use of valuable resources if cannabis associated offences were not made priority.[283] In the views documented in the report on the balancing of harms, Professor Shaw, suggested a policy that would track individuals that use cannabis and therefore allow the limited SAPS resources to be used more effectively.[284] A number of other studies and reports have also indicated that decriminalisation is a better way to address the harms that result from drug use.[285]

4.4 The National Prosecuting Authority (NPA) affidavit

An affidavit written by Mr Hofmeyr on behalf of the National Prosecuting Authority of South Africa (NPA) was in support of the limitation of the right to privacy. The affidavit stated that the NPA proposed a policy division as they could not adequately find significant evidence without a doubt that the limitation is justifiable.[286]

5. High Court ruling

On 31 March 2017, the High Court in Cape Town delivered a seminal judgment in the Prince II case. The High Court dealt with the matter on the basis that:

281 Shaw *et al* Balancing Harms 29.
282 Shaw *et al* Balancing Harms 22.
283 Shaw *et al* Balancing Harms 30.
284 *Prince II case* par [58].
285 Shaw *et al* Balancing Harms 20.
286 *Prince II case par* [101].

> The core of the case was whether the infringement of the right to privacy caused by the impugned legislation could be justified in terms of section 36 of the Constitution.[287]

After extensive examination of expert reports, affidavits and testimonies and further comparative research on international laws, the High Court pointed out that the State bore the burden of proof. The High Court came to the conclusion that there was "very little further evidence of persuasion and weight to counter the report by Professor Shaw and others."[288] It was pointed out by the High Court that the state's evidence was "singularly unimpressive."[289] The High Court drew attention to the evidence produced by the State. Evidence stating that:

> The approach adopted by the Central Drug Authority of South Africa together with the comparative medical evidence set out above have to be taken into account in formulating a conclusion as to whether [the State] [has] discharged the burden placed upon them.[290]

The High Court made reference to the reality that a substantial amount of South African history with regard to the use of cannabis is bound to racialism.[291]

International development shows a concise change to what can be regarded as an open and democratic society in which criminalisation and possession of cannabis for personal use does not prevent harm.[292] The High Court took into consideration the decisions from international jurisdictions such as Alaska, Canada and Mexico (which will be dealt with in more detail in Chapter 4). The High Court ruled that the current legislation inhibiting the personal use and

287 *Prince II vs Constitution* par [27].
288 *Prince II vs Constitution* par [29].
289 *Prince II vs Constitution* par [30].
290 *Prince II vs Constitution* par [29].
291 *Prince II case* par [34].
292 *Prince II case* par [90].

consumption of cannabis was an infringement of the right to privacy.[293] The High Court declared sections of the Drug Act and the Medicines Act invalid and therefore unconstitutional.[294] The High Court stated that it was the responsibility of Parliament to determine what would constitute small quantities in private dwellings.[295] The High Court made an order that until Parliament makes the requested amendments, all prosecutions falling within the invalidated provisions must be stayed.[296]

The High Court order therefore creates a defence for anyone charged with a crime under the invalid sections. If one is charged for cultivating or being in possession of cannabis in a private dwelling, and this possession or cultivation was for personal consumption, one can use the right to privacy defence.[297] The Constitutional Court is required to confirm the order by the High Court before it is addressed by Parliament.

6. Constitutional Court ruling

On the 18 of September 2018 on an application for confirmation of the order of constitutional invalidity handed down by the Western Cape High Court, the Constitutional Court addressed the matter as to whether the provisions called into question limit the right to privacy and if so, whether the limitation was reasonable and justifiable in terms of section 36(1) of the Constitution.

Cannabis (the whole plant or any segment or product thereof, except dronabinol) is listed as an undesirable dependence producing drug.[298] Section 5(b) of the Drugs Act read with Part III of Schedule 2 of that Act, were regarded as unconstitutional by the Constitutional Court.[299] Section 5(b) with

293 *Prince II case* par [132].
294 *Prince II case* par [132].
295 *Prince II vs Constitution* par [32].
296 *Prince II case* par [131].
297 *Prince II case* par [132].
298 Drugs and Drug Trafficking Act no 140 of 1992, Schedule 2.
299 Schedule 2 part III lists cannabis as an undesirable dependence producing drug.

the phrase “deal in” which appeared in section 1 of the Drugs Act, impacted on the cultivation of cannabis by an adult in a private place for his or her personal consumption in private. Therefore, to that extent, section 5(b) read with the phrase “deal in” is constitutionally invalid.[300]

The Constitutional Court initially dealt with the matter of the purchasing of cannabis. The court concluded that purchasing of cannabis would be procured from a dealer. The court could therefore not condone the dealing of cannabis. As the dealing of dependence- producing drugs has a justifiable limitation on the right to privacy and is a criminal offence in terms of section 5 of the Drug Trafficking Act.[301]

In order to establish if an individual is in possession of cannabis for reasons other than personal consumption, the amount of cannabis found must be taken into account.[302] This means that if a SAPS officer stumbles on an individual in possession of cannabis in public with reasonable suspicion, including the quantity found on such person possession, that this individual may be arrested for an offence under section 40(1) or (h) of the Criminal Procedure Act.[303]

Section 21 of the Drugs Act however, deals with presumptions relating to dealing in drugs.[304] Section 21 states that if you are found in possession of cannabis exceeding 115 grams it is presumed that you are dealing in cannabis, until the contrary is proven by the State. This section has previously been declared unconstitutional in *S v Bhulwana* and *S v Gwadiso,* a 1995 case that declared section 21 (1)(a) invalid and of no force and effect.[305] The High Court ruled that whether the existing prescribed quantity should remain relevant is for the legislature to determine.[306] Section 21(1)(a) to date has not been amended by legislature.

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300 *Prince II vs Constitution* par [84].
301 *Prince II vs Constitution* par [88].
302 *Prince II vs Constitution* par [110].
303 *Prince II vs Constitution* par [111].
304 Drugs and Drug Trafficking Act no 140 of 1992.
305 *S v Bhulwana; S v Gwadiso (CCT12/95,CCT11/95) 1995 ZACC11;1996 (1)SA388; 1995 (12) BCLR (1579) 1995* par [34].
306 *Prince II case* par [109].

The Constitutional Court pointed out that reference to the terms "for personal use" and "for personal consumption" aid in guarantying that an amount of cannabis in an individual's possession need not be specified.[307] This however does not provide an SAPS officer a guideline as to how to determine when private possession crosses over into dealing.[308]

The National Commissioner of SAPS has issued a directive which sets out considerations when found in possession of cannabis. The member of the SAPS will have to take the relevant circumstances into account including the amount of cannabis when making an arrest. If there is reasonable suspicion and the individual has committed a crime and is a flight threat, then an arrest must be made. The commissioner went on to say:

> Should a member of the SAPS doubt as to whether the use, possession or cultivation of cannabis is for personal consumption, such member should not arrest a suspect (unless there are other reasons for an arrest, such as the possession of types of drugs or weapons, ect.), but should rather register a criminal case docket and ensure that the suspect is brought to court by means of a summons or written notice. In all cases of doubt, Legal Services of the SAPS must immediately be approached for assistance.[309]

The Constitutional Court further ruled that section 22A(10) does not make reference to the use, purchase, possession or cultivation of cannabis. [310] Section 22A(10) "prohibits the sale and administration of cannabis for any intention other than medicinal reasons unless an exception in terms of the provisions in the act applies".[311] The Constitutional Court could therefore not confirm that aspect of the order.[312]

The Constitutional Court agreed with the applicants in the cross appeal that the High Court incorrectly permitted the possession of cannabis by adults in a

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307 *Prince II vs Constitution* par [111].
308 *Prince II vs Constitution* par [115].
309 Sitole "Constitutional Court" 3.
310 *Prince II vs Constitution* par [89].
311 The Medicines and Related Substance Act No. 101 of 1965 section 22A(9)(a)(1).
312 *Prince II vs Constitution* par [90].

"private dwelling" which left individuals using cannabis open to continual prosecution without logically valid reasoning.[313] The applicants supported their argument in that the High Court failed to take into account the right to human dignity and the right to freedom of movement.[314] The Constitutional Court therefore found no substantive reason to limit the use and or possession of cannabis to the private dwelling. The court therefore permitted private and not public use of cannabis for consumption by adults.[315]

The Constitutional Court ruled that the order will operate prospectively,[316] and that interim relief should be granted. [317]

The 24 months allocated to Parliament to rectify legislation may be adequate to address pitfalls in legislation. However the interim period falls short of means in which to control the use of cannabis in the best interest of the public as enshrined in the Bill of Rights. As highlighted in the first Prince case which stated that the government has a clear interest in prohibiting the abuse of harmful drugs and an international obligation to fight the war against drugs. [318]

Although it has been proved that there is a legitimate constitutional ground on the right to privacy to decriminalise the use of cannabis, is it in the best interest of the public to allow a 24 month interim period in which the uncontrolled private use of cannabis is permitted? Given that no safe level of consumption of cannabis has been determined by the South African government.

6.1 The revised Drugs Act section 4(b):

> No person shall use or have in his possession—
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless

313 *Prince II vs Constitution* par [99].
314 *Prince II vs Constitution* par [99].
315 *Prince II vs Constitution* par [100].
316 *Prince II vs Constitution* par [102].
317 *Prince II vs Constitution* par [104].
318 *Prince I case* par [52].

(vii) ,in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private. [319]

6.2 Revised section 22A(9)(a)(i) of the Medicines Act:

(9)(a) No person shall—
(i) acquire, use, possess, manufacture or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance unless, in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case, he or she has been issued with a permit by the Director-General for such acquisition, use, possession, manufacture, or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7 or Schedule 8 substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research.[320]

The effects of the orders by the Constitutional Court permit adults to use, possess and cultivate cannabis in private for personal consumption. Smoking is however restricted in public places and in the presence of children and non-consenting adults.[321] The order was further suspended on the 18th of September 2018 for a 24 months period to allow Parliament to correct the constitutional defect.[322]

7. Conclusion

Applicants in the second Prince case argued that legislation criminalising cannabis infringes on various constitutional rights and lacked justification. No Constitutional right is absolute; therefore a limit on a constitutional right needs to be justified. The State called upon numerous professionals to provide testimonies. However, the High Court relied upon the documentation produced by Dr Gouws' as the evidence produced by various other State experts were far

319 *Prince II vs Constitution* par [105].
320 *Prince II vs Constitution* par [107].
321 *Prince II vs Constitution* par [109].
322 *Prince II vs Constitution* par [103].

from adequate. The evidence suggested that we have the right to security of the person as well as the right to an environment that is not harmful to our health or well-being. The state argued that they needed to protect citizens against the harm and that the prohibition of cannabis was the way in which this objective could be achieved. The state also argued that the amount of cannabis used could not be controlled.

The Constitutional Court ruled that the amount of cannabis found on a person for private use required the legislature to determine the amount. Therefore the amount of cannabis found on an individual for private use or for illicit distribution, was left to the discretion of the presiding police officer. This creates confusion as no set amount is used as a guiding standard and creates a play ground for misinterpretation, manipulation and corruption, which regularly occurs in South Africa.

The Prince II case thus sought to determine whether the relevant legislative framework was invalid. The Constitutional Court concurred with the High Court ruling that cannabis possession and use were no longer criminalised. The Constitutional Court stated that the High Court did err when using the term “private dwelling” and reverted to the term “private” with regard to the use and possession of cannabis. The ruling of the Constitutional Court has now legalised the possession, use and cultivation of cannabis for private use by adults. However the 24 month interim period allows for the uncontrolled use of cannabis by individuals that could be harmful depending on the quantity consumed.

CHAPTER FOUR

1. Introduction

This chapter comprises a legal comparison of the possession of cannabis in Canada, Mexico and Alaska where cannabis use has been decriminalised on constitutional grounds. This chapter will also examine the case of Malawi, an African country with a similar Constitution and Bill of Rights to that of South Africa that has not legalised recreational cannabis but has proposed developments in legalising industrial hemp with the aim of initiating medicinal cannabis programmes. The legal comparison will include a discussion of the existing laws in Canada, Mexico, Alaska and Malawi.

2. Constitutional grounds on which South Africa has decriminalised cannabis.

South Africa has faced two constitutional challenges in a bid to legalise the use, possession and cultivation of cannabis. The first constitutional challenge was in 2002 on the grounds of freedom of religion. It was agreed by both the High Court and Constitutional Court that legislation which criminalised the use and possession of cannabis, limits the religious rights of Rastafarians under the Constitution. However, the Constitutional Court ruled that it is not incumbent on the state to develop an exception to the universal restriction against possession or use of cannabis in order to protect the rights of a minority religious group.[323] The Constitutional Court stated that:

[323] *Prince I case par* [111].

> The fact that they are a very small group within a larger South African community is no reason to deprive them of the protection to which they are entitled under the Bill of Rights.[324]

The Constitutional Court ruled that the failure to make exemptions based on the use or possession of cannabis by Rastafarians was therefore reasonable and justifiable in terms of the constitution.[325] The second attempt was in 2017 on the constitutional grounds of the right to privacy, the right to equality, the right to freedom and security of the person, the right to socio-economic freedom, the right to a healthy and sustainable environment, the right to freedom of religion, the right to culture and the right to cannabis as a plant. The High Court chose to focus solely on the right to privacy. The Constitutional Court ruled that the criminalisation of cannabis infringed on the right to privacy. Applicants in the Prince II case used arguments based on foreign law on constitutional grounds to legalise cannabis for private use. This was a step towards South Africa amending current legislation to incorporate the use of cannabis in private by adults.

Constitutional arguments against the decriminalisation of cannabis in South Africa were that citizens have the right to security of the person as well as the right to an environment that is not harmful to their health or well-being. The state argued that they needed to protect citizens against the harmful effects of cannabis and that prohibition of cannabis was the most effective way of doing so.

South Africa however, requires a framework to create a solid legislative infrastructure. Much can be learned from legislation in foreign countries that have faced similar difficulties. Amended legislation on cannabis use allows law makers to assess the current legislation then correctly use feedback in an attempt to control the use.

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324 *Prince I case par* [112].
325 *Prince I case par* [139].

3. Constitutional grounds on which Canada has decriminalised cannabis.

3.1 Background

Located in the continent of North America, Canada is, in terms of geographical area, the second largest nation in the world with a population of 37.28 million.[326] Canada initially prohibited the use of cannabis in 1923 through the Opium and Drug Act.[327] In 1969, Pierre Trudeau, the Prime minister initiated the Commission of Inquiry into the non-medical use of drugs widely known as the Le Dain Commission.[328] The Le Dain Interim Report drafted by the Commission was published in April 1970. This report sparked the official revolution in North America discussing psychoactive drugs and cannabis in particular.[329] During the 20th century cannabis was subjected to three federal criminal statutory regimes in Canada: the Opium and Narcotic Drugs Act[330], the Narcotic Control Act[331], and the Controlled Drugs and Substances Act.[332]

The Narcotic Control Act primarily sets out cannabis possession as an indictable[333] offence.[334] Section 3 of the Narcotic Control Act sets the maximum penalty of 7 years imprisonment for the possession of cannabis.[335] Section 2 of the Narcotic Control Act states that the maximum penalty of 25 years imprisonment is imposed for the offence of trafficking cannabis.[336] Section 5 of the Narcotic Control Act prohibits importing or exporting cannabis and imposes a penalty of 7 years imprisonment for the offence.[337] The 1969 amendment

326 Mugani http://worldpopulationreview.com/countries/canada-population/ (Date of use: 09 May 2019).
327 Opium and Drug Act of 1923.
328 Le Dain Final report of the commission of enquiry into non-medical use of drugs 1.
329 Bennett *Canadian Med Ass* 105.
330 Opium and Narcotic Drugs Act of 1929.
331 Narcotics Control Act 386 of 1961.
332 Controlled Drugs and Substances Act of 1996.
333 Rossini *Legal language* 96. Individuals committing the crime are liable to be charged with a serious crime that warrants a trial by jury.
334 Narcotics Control Act 386 of 1961 section 3.
335 Narcotics Control Act 386 of 1961 section 3.
336 Narcotics Control Act 386 of 1961 section 2.
337 Narcotics Control Act 386 of 1961 section 5.

however, legalized possession to be tried on summary conviction or indictment.[338]

3.2 The legalised medical use of cannabis

In 1988 on the grounds of a Constitutional challenge in *Wakeford v Canada*[339], Wakeford an individual suffering with AIDS, used cannabis for its medical properties under the supervision of his physician. Wakeford sought medical immunity from the Controlled Drug and Substance Act to permit him to possess, produce, and cultivate cannabis.[340] Wakeford alleged that the Controlled Drug and Substance Act violated his constitutional right to life, liberty, and security by stopping him from accessing a useful medical aid.[341] Further his right to equality was violated[342] by refuting him the equivalent benefits of the law to that of healthy individuals, because of his medical disability.[343] The Canadian Charter rights state that he has a guarantee to life, liberty and security of the person and to not be deprived of them except in accordance with the principles of fundamental justice.[344] Wakeford argued that he did not agree with the principles of fundamental justice, as stated in the Charter. He argued that to charge an individual afflicted by a serious chronic medical disability as a criminal for possessing a significantly helpful material that is not legally available to him in the Canadian State, is an injustice.[345] The first application made for relief by Wakeford was unsuccessful.[346] The Judge ruled that the impugned requirements violated section 7 of the Canadian Constitution; however he ruled that the infringement was in agreement with the doctrine of fundamental justice. His ruling was due to the existing right that allowed people with illness to apply for an exemption under section 56 which

338 Narcotics Control Act 386 of 1961 section 7.
339 *James Wakeford, applicant, and Her Majesty the Queen* 1998 [2] referred to hereinafter as *Wakeford v Canada*.
340 *Wakeford v Canada* par [7].
341 Canada's Constitution Section 7.
342 Canada's Constitution Section 15.
343 *Wakeford v Canada* par [7].
344 Canada's Constitution Section 7.
345 *Wakeford v Canada* par [6].
346 *Wakeford v Canada* par [90].

was an available option to Wakeford.[347] The Controlled Drug and Substance Act therefore remained constitutionally valid.[348]

The 1996 case between *Her Majesty the Queen v Terrance Parker*, a 42-year-old from Toronto,[349] has become one of the most important legal precedents in Canadian history. Parker successfully argued that cannabis laws were unconstitutional and that the Canadian government should make provisions for people to grow their own personal cannabis for medical use.[350] Parker required cannabis to control his medically diagnosed epilepsy.[351] Parker argued [352] that his rights to life, liberty, and security were being violated since he was prevented from the right to use useful medical treatments.[353] The trial judge upheld that Parker had proved the risk of deprivation of his right to life, liberty or security of the person by the cannabis prohibition, and an additional risk of injury or death because he would not have access to cannabis in the prison setting to prevent seizures.[354] The judge ruled that the cultivation and possession charge against Parker be stayed.[355] Further, in order to protect Parker and others like him who require the medicinal use of cannabis, the trial judge translated into the legislation an exemption for persons possessing or cultivating cannabis for their personal medically approved use.[356] The judge saw no constitutional value in forcing Parker to choose between his health and incarceration[357], which violates his right to liberty and security of the person and is not in accordance with his fundamental right to justice.[358] The trial judge ruled that the restriction on cannabis imposed by the Controlled Drugs and

347 Narcotics Control Act 386 of 1961 section 56.
348 *Wakeford v Canada* par [64].
349 *Her Majesty the Queen v Terrance Parker* (C28732) [7] hereinafter referred to as *R. v. Parker*.
350 Ross *Cannabis: The Canadian weed reader* 12.
351 *R. v. Parker* par [7].
352 The argument made by Parker was the same as the argument that was made by Wakeford in 1988.
353 Canadian Constitution Section 7.
354 *R v Parker* par [67].
355 *R. v. Parker* par [7].
356 *Marihuana Medical Access Regulations of 2001 section 24.*
357 *R. v. Parker* par [10].
358 Canadian's Constitution section 7.

Substances Act,[359] were no longer effective.[360] The ruling was suspended for twelve months and Parker was exempted from all charges.[361]

A strong body of opinion based evidence exists that supports the claim that cannabis offers valuable relief from an assortment of incapacitating health related side effects that are associated with serious long term diseases such as AIDS, cancer and epilepsy. In 1999 the Canadian Government began to develop a policy with respect to the use of cannabis for medical purposes.[362] Canada has since made significant progress in the way the courts have viewed the medicinal value of cannabis.

In 2003, the Ontario Court of Appeal made a decision in the case of *Hitzig v Canada*,[363] which established that a different facet of the Marijuana Medical Access Regulations (MMAR)[364] was unconstitutional. Hitzig made a further declaration that the prohibition against possession of cannabis in terms of section 4 of the Controlled Drugs and Substances Act[365] was unconstitutional in accordance with the decision of the court in *R. v. Parker*.[366] Ultimately, the court abolished five requirements of the MMAR, including prohibitions on compensation of Designated Person Production Licence producers and limitations on the number of persons for which a producer could cultivate cannabis.[367] In accordance with the court's holding, state action which restricts the supply of medical cannabis, to the extent that patients who require it cannot reasonably obtain it without resorting to the black market, results in a charter breach which is not justified.[368] The Access to Cannabis for Medical Purposes Regulations (ACMPR) came into effect in 2013.[369]

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359 Controlled Drugs and Substances Act of 1923 Section 4.
360 *R. v. Parker* par [10].
361 *R. v. Parker* par [120].
362 *Hitzig & Ors v Canada* 2003 [8] referred to as *Hitzig v Canada*.
363 *Hitzig v Canada* par [8].
364 Marihuana Medical Access Regulations of 2001.
365 Canadian Controlled Drugs and Substances Act 1996 section 19.
366 *Hitzig v Canada* par [3].
367 *Hitzig v Canada* par [22].
368 *Hitzig v Canada* par [22].
369 Access to Cannabis for Medical Purposes Regulations (ACMPR) of 2013.

In the 2016 case of *Allard v Canada*[370], Allard challenged the Medial Marijuana Purpose Regulations. Four individuals challenged the state on constitutional grounds with regard to the prohibition on private cultivation of medical cannabis.[371] Allard fought for a constitutionally valid exemption to cultivate or produce cannabis. Allard further sort affirmation that the MMPR was unconstitutional in that it unreasonably restricted his right to section 7. The MMPR failed in that it restricted Allard's right to access a secure and permanent supply of cannabis. This failed to permit personal or elected production of cannabis for medical purposes.[372] The plaintiff declared that the limitation on cultivating cannabis in public or in a private dwelling and the 150 gram limit imposed was an irrational limitation not protected by section 1 of the Canadian MMPR.[373] With regard to the concern for cultivation, Allard established that cannabis can be cultivated securely with limited liability, and that the limitation on cultivation constituted prejudice towards the production of cannabis. The court ruled that it was not practical to eliminate definite words or provisions, so as an alternative, confirmed the MMPR as unacceptable and suspended invalidity for 6 months to permit Parliament to endorse a new or equivalent system.[374]

The decision in *Allard v Canada* resulted in the Access to Cannabis for Medical Purposes Regulations. The Access to Cannabis for Medical Purpose Regulations came into effect on August 24, 2016. The commencement of the medical cannabis policy has been the focus of frequent constitutional challenges, having undergone various amendments with considerable changes. The current version is still being disputed fifteen years after the first version of medical cannabis rules were implemented.

3.3 The legalised recreational use of cannabis

370 *Neil Allard and others v Her Majesty the Queen* 2016 (FC) 236 [1] referred to as *Allard v Canada.*
371 *Allard v Canada* par [1].
372 *Allard v Canada* par [173].
373 *Allard v Canada* par [118].
374 *Allard v Canada* par [296].

For many years the legalisation of recreational cannabis has been a subject that the Canadian government had been considering. The release of the Canadian Le Dain Commission report suggested steady departure from the use of criminal law against nonmedical uses of all drugs. The Le Dain commission revoked the transgression of possession of cannabis, and suggested a reduction in penalties for all cannabis offences.[375] Bill C-45, also referred to as the Cannabis Act, was passed in 2018. This bill was based on the Canadian government's need to create a legal regime. The aim of the legislation legalizing recreational cannabis is to keep cannabis away from the youth, decrease the weight placed on the criminal justice system, and promote access to controlled supply and profit systems that are out of the hands of criminals.[376]

Bill C-45 created two novel criminal transgressions: providing or trading cannabis to adolescents, and using an adolescent to perform a cannabis-related crime. Bill C-45 imposes a maximum penalty of 14 years imprisonment for either of the above criminal transgressions.[377] Bill C-45 further prohibits the production of merchandise that is attractive to adolescents. This includes wrapping or tagging cannabis in a manner that makes it tempting to adolescents. The Bill further prohibits the trading of cannabis through self-service or vending machines and promoting cannabis, except in narrow circumstances where the promotion cannot be seen by adolescents.

The Canadian Cannabis Act section 8 states:

> (a) for an individual who is 18 years of age or older to possess, in a public place, cannabis of one or more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 30 g of dried cannabis;
> (b) for an individual who is 18 years of age or older to possess any cannabis that they know is illicit cannabis;
> (c) for a young person to possess cannabis of one or more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 5 g of dried cannabis;

375 Le Dain Final report of the Commission of Inquiry into the Non-Medical Use of Drugs 1972.
376 The Canadian Cannabis Act of 2018 section 7.
377 The Canadian Cannabis Act of 2018 section 26.

(d) for an individual to possess, in a public place, one or more cannabis plants that are budding or flowering;
(e) for an individual to possess more than four cannabis plants that are not budding or flowering; or
(f) for an organization to possess cannabis. [378]

The Act further ensures that strict regulation of cannabis is guaranteed and that a Cannabis tracking system is employed.[379] Section 81 of the Cannabis Act of 2018 states that the Minister may, using the information collected under section 82 and any other information to which the Minister has access, establish and maintain a national cannabis tracking system. Section 81 states:

(a) enable the tracking of cannabis;
(b) prevent cannabis from being diverted to an illicit market or activity; and
(c) prevent illicit cannabis from being a source of supply of cannabis in the legal market.[380]

Possession limits are based on dried cannabis.

3.4 The effective use of the Canadian Cannabis Bill and the cannabis tracking system

Canada initiated the cannabis tracking and reporting system on the 17 of October 2018. This was run concurrently with the initiation of the Canadian Cannabis Act.

The Canadian tracking and licensing system applies to both private and public sectors that are licensed to sell cannabis. The system also applies to federal holders that cultivate and process cannabis for medical sales. The tracking system tracks compliance with the Cannabis Act by monitoring the movement of cannabis from cultivator to manufacturer and from manufacturer to seller. This detects and prevents the use of illicit cannabis transactions. There are five classes of cannabis that require licences. These include; dried cannabis,

[378] The Canadian Cannabis Act of 2018, section 8.
[379] The Canadian Cannabis Act of 2018, section 81.
[380] The Canadian Cannabis Act of 2018, section 81.

cannabis oil, fresh cannabis, cannabis plants and cannabis seeds. The Internet based system developed by Health Canada requires reporting entities to track cannabis that is produced, obtained, purchased, returned, sent, sold, destroyed, lost or stolen and report on cannabis that is used in every stage of production.[381]

The Canadian Government[382] has announced changes to the licensing of cannabis as amendments to the cannabis regulations are to be released in October 2019.[383]

New applicants are required to have a completed cannabis cultivation site at the time of application. Existing applicants will have their facilities reviewed and must be in compliance with the requirements set out in section 7.1.1 of the Canadian Cannabis Licensing Application Guide. The changes are in response to feedback due to the waiting times for applications. The Canadian government intends to review the use of cannabis for medical purposes within the next five years. Canadian legislation still makes it illegal to produce, possess and sell cannabis outside the legal systems. Activity that contravenes the act however, is still subject to 14 years imprisonment.[384]

4 Constitutional ground on which Mexico has decriminalised cannabis.

4.1 Background

381 Growling http://www.mondaq.com/canada/x/746176/food+drugs+law/Cannabis+Tracking+System+Under+The+Cannabis+Act (Date of use: 02 July 2019).

382 The Canadian Gazette, Part II published revised cannabis tracking system order to be implemented on the 17th of October 2019 (documents which are currently not loaded on the Canadian Governmental sites).

383 Landry https://stewartmckelvey.com/thought-leadership/changes-to-canadian-cannabis-licensing-application-process/ (Date of use: 02 July 2019).

384 Government of Canada https://www.canada.ca/en/healthcanada/news/2018/06/backgrounder-the-cannabis-act-the-facts.html (Date of use: 02 July 2019).

Mexico is situated in Central America and has an estimated population of 132.33 million people.[385] Provisions within the 1917 Mexican Constitution[386] made it possible for a nationwide campaign against drug abuse to be initiated by the Mexican Department of Public Sanitation. The Mexican Congress passed an amendment in 1920 that prohibited the trade of opium, morphine, ether, cocaine, and cannabis under pressure from the US government.[387] The key reasoning for outlawing the retail of these narcotic substances was that they were deemed toxic to health. However in 1994 the Mexican Federal code was amended and provided a means by which to differentiate between the different types of drugs.[388] The penalties for industrialisation, transport, trafficking and distribution were notably increased to a minimum of 10 years and a maximum of 25 years.

Interestingly article 193 of the Federal code states that:

> No action shall be taken against one who, not being a drug addict, is found in possession of one of the narcotics indicated in, just once and in an amount that one may presume is for personal use, further no penalty whatsoever shall be applied to a drug addict who possesses any of the narcotics indicated in Article 193 strictly for his or her personal use.[389]

In 1996 the Federal Law against Organised Crime established the cautionary detention of suspects caught in drug trafficking syndicates.[390] In 2009 the Mexican parliament amended the General Health Act[391] by removing the penalties imposed on individuals found to be in possession of 5 grams or less of cannabis. Anyone found with more than 5 grams was to be charged with small scale trafficking and any one in possession of 5000 grams was to be

385 Lopez http://worldpopulationreview.com/countries/mexico-population/ (Date of use: 10 May 2019).
386 Mexican Constitution 1971 article 16.
387 Astorga *Drug Trafficking in Mexico* 12.
388 Mexican Federal Code of 1994.
389 Federal Organised Crime Law of 1994 article 193.
390 Federal Organised Crime Law of 1996 article 12.
391 Mexican General Health Act article 478.

prosecuted under the Mexican Federal Organised Criminal Law, which carries a maximum prison sentence of 25 years.[392]

4.2 The legalised recreational use of cannabis

In 2015, the Mexican Supreme Court was faced with a constitutional challenge to the laws which prohibited cannabis.[393] The applicants argued on the basis of the right to engage in recreational activities of their choice without the interference of the State. The court ruled that the right to the free development of a person's personality allowed for any action and activity necessary to materialise this choice, notwithstanding that the right in question can be limited to pursue objectives protected by the Mexican Constitution, such as health or public order. However, the court found that the system of prohibition was not a necessary measure to protect health and public order since there were other alternatives to achieve these objectives. The court stated that alternatives that have less onerous consequences for the right to the free development of a person's personality could be implemented.[394] The court stated that the impugned measure impedes the consumption of cannabis under any circumstances when it could be limited to certain conduct or established more specific factual situations to fulfil these objectives.

The Mexican Constitutional and federal state laws however, differ from that of South Africa regarding the application of *stare decisis*[395] in that Mexico does not recognise this principle in civil law. [396] Article 785 of the Mexican Federal Code of Civil Procedure limits the possibility of creating binding decisions on the Supreme Court, which interprets the Constitution and federal statute laws. Article 786 and 787 of The 1908 Federal Civil Procedure Code state that the Supreme Court of justice decisions passed by majority vote of nine or more of its members form a binding decision, only if what was decided upon was

392 Mexican Federal Organised Criminal Law of 1996 article 45.
393 *Prince II case* par [82].
394 Mexican Constitution 1971, Article 24.
395 The legal principle of determining points in litigation according to precedent.
396 Merryman and Perdom "*The Civil Law Tradition" 47.*

reiterated in five consecutive rulings unbroken by any decision to the contrary.[397] This was the case in 2018 when the Mexican Supreme Court ruled that the criminalisation of cannabis was unconstitutional. The Supreme Court ruled that there were alternative mechanisms that would infringe less on a person's right to independence. The argument hinged on the concept of "the right to the free development of one's personality," which is enshrined in Mexico's bill of rights.[398] The Mexican Constitution[399] places importance on self-determination which entails that the State has no legal limit on an individual right to autonomy as long as it is not harming others.[400] The Constitution protects the notion that an individual is free to use his or her best judgement concerning what is best for their life and body, as long as it does not infringe on the rights of others.[401]

4.3 The legalised medical use of cannabis

The Mexican Supreme Court was challenged again in 2018 when two cases dealt with an "Amparo"[402] application in which the plaintiffs sort to cultivate, harvest, possess, prepare and transport cannabis.[403] Both plaintiffs challenged the constitutionality of Mexico's federal health and penal laws concerning the non- medical use of cannabis. The court ruled that cannabis can be used for recreational, medical and scientific investigations as both cases received a majority ruling.[404] The Mexican Supreme Court is currently

397 The Mexican Federal Civil Procedure code 1908, article 786.
398 United Nations Universal Declaration of Human Rights, article 22.
399 Public access to Mexican Supreme Court cases are limited.
400 Mexico's Constitution of 1917, Article 2(a).
401 Mexico's Constitution of 1917, Article 2(a).
402 Mejorada 1964 *EHR* 107.The "Amparo" application is a separate legal action which may be used when human rights or individual guarantees have been violated by: (1) laws or decrees enacted by the Federal congress, or by the state legislatures; (2) judicial resolutions in civil or criminal suits; or (3) acts of whatever nature, of any other authority.
403 Mejorada 1964 *EHR* 107.
404 Timmons https://www.upi.com/Mexicos-Supreme-Court-legalizes-cannabis-for-recreational-use/9621541024238/#ixzz5dT98Rfse (Date of use: 07 January 2019).

in the process of passing a proposed cannabis bill which will allow state residents who are 21 and older to possess up to 30 grams of cannabis.[405]

5. The Constitutional grounds on which Alaska has decriminalised cannabis

5.1 Background

Alaska is the largest state in the US with an estimated population of 7.36 million.[406] The Alaskan Possession of Marijuana Statute of 1973[407] stated that possession of cannabis was illegal and punishable by incarceration or a fine.[408] Citizens of Alaska may initiate legislation through the process of indirect initiative. In Alaska, successful petitions are first presented to the Alaska State Legislature.[409] If the measures are not adopted, the law is then placed before voters. In Alaska, citizens also have the power to uphold or repeal legislation via *veto referendums*can also place egislaturen state lAlaska The [410]. legislative referrals on the ballot.[411] Article 13 of the Alaska Constitution specifies that a two-thirds vote of the legislature is required to refer an amendment to the ballot.[412]

5.2 The legalised recreational use of cannabis

405 Beadle https://www.analyticalcannabis.com/articles/mexican-lawmaker-introduces-bill-to-legalize-cannabis-311351 (Date of use: 30 June 2019).

406 US census http://worldpopulationreview.com/states/alaska-population/ (Date of use: 14 May 2019).

407 Article 17.12.010 of the Alaska Possession of Marijuana Statute 1973.

408 Article 17.12.010 of the Alaska Possession of Marijuana Statute 1973 states:"Except otherwise provided in this chapter it is unlawful for a person to manufacture, compound, counterfeit, possess, have under his control, sell, prescribe, administer, dispense, give, barter, supply or distribute in any manner, a depressant, hallucinogenic or stimulant drug".

409 Alaskan Statute Article 15.

410 Carrillo *et al* 2019 *SCLR* 299. A veto referendum is a citizen-initiated ballot measure that requires voters to uphold or repeal a law passed by the state legislature.

411 Alaskan Constitution Article 13.

412 Alaskan Constitution Article 13.

In early 1975 the Alaskan State Supreme Court made one of the most controversial rulings on the recreational use of cannabis in the case of *Ravin v. State*.[413] Ravin was charged with violating the Alaskan Possession of Marijuana Statute[414] and was charged for being in possession of cannabis.[415] In *Ravin v. State* the Alaskan Supreme Court was asked to decide the constitutionality of an Alaskan statute proscribing the possession and use of cannabis.[416] Ravin filed a motion to dismiss arguing that his right to privacy, as protected by both the U.S. and Alaska Constitutions, included the right to possess cannabis for personal use. Ravin challenged section 17.12.010 as violating his federal and state rights to privacy.[417] He also argued that the law denied him both state and federal due process and the equal protection of legal provisions by classifying cannabis as a dangerous drug.[418]

Just a year earlier, *in Gray v. State*, [419] the court had already held that the Alaskan Constitution protects a person from legislative intrusion in the home. Therefore, it was a fairly modest step in the case of Ravin for the court to conclude that the citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances, such as cannabis, in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of cannabis in the home is supportable by achievement of a legitimate state interest.[420] The Alaskan Constitution states that the right to privacy includes "the right to be left alone and to do as one pleases as long as the activity does not infringe on the rights of others."[421] The Supreme Court acknowledged that it was certain that the right to privacy did not vanish when one leaves their home.[422] There are certain aspects of personal autonomy which one carries with him or her even

413 *Ravin v. State* par [537].
414 Alaskan Statute Possession of Marijuana Section 17.12.010.
415 *Ravin v. State* par [497].
416 *Ravin v. State* par [497].
417 Mcdonald *ALR* 349.
418 *Ravin v. State* par [537].
419 *Kenneth Elwood Gray v. State of Alaska* 2043 [537].
420 *Ravin v. State* par [537].
421 Alaskan Constitution, Article 1.
422 *Ravin v. State par [*537].

when he or she ventures out of the home, though the claim to privacy diminishes in proportion to the extent that one's person and one's activities impinge upon other persons. But, in order to trace the contours of the right to privacy, it will be necessary to engage in a critical analysis of the facts of each case which presents itself for decision. [423]

However, in 1990, Alaskan voters adopted a Voter Initiative that required the legislature to re-adopt the pre-Ravin flat prohibition on the possession of cannabis, even in a private place. Alaskan voters approved Ballot Initiative 2 to regulate the recreational use of cannabis. Ballot Initiative 2 allows for those aged 21 and over to participate in the recreational use of cannabis, possession of up to one ounce of usable cannabis, and to cultivate a maximum of six plants, with no more than three being mature at any time.[424]

5.3 The legalised medical use of cannabis

Medical cannabis was legalised in Alaska in 1998. This occurred 25 years after the ruling made in *Ravin v. State* legalised the use of recreational cannabis. Ballot Measure 8 was passed by nearly 59% of the vote, allowing Alaskans with a debilitating medical condition and physician recommendation to possess no more than one ounce of usable cannabis and to grow no more than six plants, only three plants being mature at any time.[425] Codified under Alaska Statute Title 17, Chapter 37 "Medical Uses of Marijuana", the law is officially referred to as the Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act.[426]

5.4 Alaska's on-site cannabis consumption rules

423 It is clear that in the Prince case, South Africa has used the arguments for the right to privacy from the Alaskan case. Even the Constitutional Court ruling on personal autonomy can be drawn from the ruling in the Alaskan case.

424 *Ballot Measure No. 2 An Act to Tax and Regulate the Production, Sale, and Use of Marijuana.*

425 *Ballot Measure 8 Bill Allowing Medical Use of Marijuana.*

426 *Alaskan Statute 17.*

The passing of Ballet 2 in 2014 legalised cannabis for adults 21 and over in the state of Alaska. Alaska became the first state in December 2018 to commence with the rules regulating the on-site consumption of cannabis at various legalised locations throughout Alaska. These on-site rules allow Alaskans and tourists to consume cannabis at locations other than in the privacy of their homes.

Licensed cannabis retailers may now apply for on-site consumption rights. The Alaskan government has however set stringent requirements related to security, ventilation; staffing and operational standards that must be adhered to if on-site consumption is permitted. Licensed cannabis retailers may sell raw cannabis or in an edible form containing no more than 10mg of THC for use at that location. The Alaskan government further restricts the sale of concentrates or beverages containing cannabis or alcohol. These products may however, be sold for use in the buyer's private dwelling.[427]

6. Constitutional grounds on which Malawi has not decriminalised cannabis.

6.1 Background

The Republic of Malawi is in Southern Central Africa, and has a population of 12.8 million people.[428] Malawi's economy is primarily agricultural, and approximately 90% of the Malawian population live in rural areas. [429] Malawi became a democratic state in 1994 and signed a new constitution one year after the country held its first democratic elections.[430] The Malawian Constitution was intended to provide an interim constitutional order similar to the Interim Constitution that was in place in 1993 when South Africa became a

427 Marijuana Policy Project https://www.mpp.org/states/alaska/alaska-on-site-cannabis-consumption-rules/ (Date of use: 03 July 2019).
428 UNDP http://hdr.undp.org/en/statistics/ (Date of use: 25 March 2019)
429 Loeb and Eide "*Living Conditions Malawi"* 1.
430 The Constitution of the Republic of Malawi 6 of 1995.

democratic country.[431] One area of remarkable similarity[432] between recent constitutional developments in Malawi and those in South Africa are the structure and content of the bill of rights enshrined in the respective constitutions.[433] The Malawi Bill of rights share similarities with the role of international human rights law that appears in the South African Bill of rights.[434] Malawi is party to numerous drug control and deterrence conventions within Africa and internationally, including the United Nations Drug Control Conventions[435], and the SADC Protocol to fight illicit drug smuggling in the region.[436] The Government of Malawi has established an Inter-Ministerial Committee on Drug Control (IMCDC), led by the Ministry of Home Affairs and Internal Security.[437] The IMCDC committee has attempted to classify and compute the essential areas and quantities of cannabis cultivation in Malawi.[438]

6.2 Cannabis not decriminalised

Although there are similarities in the Constitutions of South Africa and Malawi, Malawi has not decriminalised cannabis as South Africa has. Possession and cultivation of the plant is a crime in accordance with the Malawian Dangerous Drugs Regulation and the Malawian Drug Act.[439] There are currently no documented Malawian Supreme Court cases that have pronounced on the constitutionality of the Malawian statute proscribing the possession and use of cannabis.

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431 Yusuf 1995 *African Yearbook of International Law* 54.

432 One of the main reasons Malawi was chosen for the study was the fact that its Constitution and Bill of Rights are similar to that of South Africa's.

433 Chapter IV of the Malawian Constitution 20 of 1995 and chapter 3 of the South African Constitution 200 of 1993.

434 Yusuf *African Yearbook of International Law* 55.

435 The 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances and the 1998 Convention Against Illicit Trafficking of Narcotic and Psychotropic Substances.

436 Protocol to Combat Illicit Drug Trafficking 1996.

437 National Alcohol Policy 2017.

438 Braathen "Substances use and abuse" 7.

439 Malawian Dangerous Drugs Regulation 4; Malawian Drug Act Cap 35:02 section 19.

Edgar Mtanga and Felix Kamanga were convicted in 1998 by the High Court of Malawi in a case pertaining to illegal possession of Indian hemp.[440] Possession of cannabis is an offence, contrary to regulation 4(a) of The Dangerous Drugs Regulation as read with section 19 (1) of the Dangerous Drugs Act of Malawi.[441] They were sentenced to three years imprisonment with hard labour and appealed their judgment.[442] In the case off *Mtanga v. Republic of Malawi*[443] the case of *Republic of Malawi v. Wilson* was used as a guideline to pass judgment. In the case off *Republic of Malawi v. Wilson* [444] it was held that the "quantities of dangerous drugs from 1 to 50 kilograms should attract a sentence not exceeding 5 years imprisonment with hard labour, quantities from 50 to 250 kilograms should attract a sentence not exceeding 8 years and quantities over 250 kilograms should attract 9 years and over" were used.[445] The Malawian Constitution of 1994 along with the guidelines identified in *Woolmington v. Director of Public Prosecution* [446] outlines that the onus is on the State to prove the case against the defendant beyond reasonable doubt. The judge did not agree and the conviction of both appellants stood.

In the case of the *Republic v. Master Alison* in 1997[447] it was further established that the cultivation of Indian hemp is considered more serious than its possession.

In the case of *Patel v the State of Malawi*, [448] a criminal appeal case was held in 2008 in the High Court of Malawi. Patel was convicted on his own plea of guilty on a charge of being found in possession of Indian hemp contrary to regulation 4(a) of the Dangerous Drugs Regulations as read with section 19(1) of the Dangerous Drugs Act.[449] He was found with 29 kilograms of cannabis and sentenced to 30 months incarceration with hard labour without the option

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440 *Mtanga and another v Republic* MWHC (7)1998 [48] referred to as *Mtanga and another v Republic*.
441 Dangerous Drug Act (Cap. 35:02).
442 *Mtanga and another v Republic par [48]*.
443 *Mtanga and another v Republic par [49].*
444 *Republic v. Wilson* 1994 (C.C) [1236].
445 *Republic v. Wilson* (1994) C.C. No. 1236.
446 *Woolmington v. Director of Public Prosecution*, [1935] A.C. 462.
447 The *Republic v. Master Alison* Criminal 1997 [7].
448 *S v Patel* 2007 MWHC [40] referred to as *S v. Patel.*
449 Malawi Dangerous Drug Act (Cap. 35:02).

of a fine, with the maximum sentence being a fine of 500 thousand Malawian Kwacha and life imprisonment.[450] This maximum level of punishment was prescribed by an amendment enacted in 1995 which raised the maximum general punishment for offences under the Dangerous Drugs Act to beyond 10 years.[451] As outlined in *Patel vs the State* there is no doubt that the legislature intended to reflect that offences under the Dangerous Drugs Act had come to be regarded by the society as among the most serious, calling for the imposition of stiffer punishment as circumstances of the case require in some instances. In view of this recent reform to the law, it would be wrong for the courts to not give the due effect of the law in imposing sentences for the offences under the Act.[452] The Judge ruled that the sentence be set aside and that the sentence of thirty months imprisonment be substituted with a sentence of twelve months imprisonment with hard labour to run with effect from the date of his arrest.

The government of Malawi has, in the past few years, focused increased attention on drug abuse and passed harsh punishment for crimes of possession and cultivation of cannabis. The Centre for Social Research, University of Malawi, conducted a rapid situation assessment (RSA) of drug abuse and HIV/AIDS in Malawi in 2004.[453] The report states that there is a general lack of central systems for collecting data on drug abuse, and there is no up-to-date prevalence data on drug abuse in Malawi. This lack of data means that current policies and programmes related to alcohol and drug abuse have been formulated without a solid basis. Hence, there is a need to develop capacity in Malawi for collecting data on alcohol and drug use and abuse.[454]

Under Malawian law the possession of cannabis is punishable by a fine and imprisonment.[455] The provisions of this law are strictly enforced for Malawian offenders. Malawian law makes no distinction between possession for personal

450 Malawi Dangerous Drug Act 20 of 1995.
451 Malawi Dangerous Drug Amendment Act 20 of 1995.
452 *S v Patel [40]*.
453 Bisika,*et al* Rapid Situation Assessment of Drug Abuse and HIV&AIDS in Malawi, *University of Malawi 1.*
454 Bisika,*et al* Rapid Situation Assessment of Drug Abuse and HIV&AIDS in Malawi, *University of Malawi 2.*
455 Malawi Dangerous Drug Act Ch3502s17.

use and trafficking.[456] Local police have the power to search an individual suspected of being in possession of dangerous drugs.[457] Recent proposed developments have however led to the development of industrial hemp and medicinal cannabis programmes at different levels, however it is still awaiting Cabinet approval.[458] The Special Crops Act 1972[459] is already in place, which makes provision for the development and marketing of special crops and for the establishment of Special Crops.[460] However, authorities need to put regulations in place to govern the growing of industrial hemp and licensing as soon as regulations are passed.

The most frequently abused drug in Malawi is reported to be cannabis. The use, possession and cultivation of cannabis has increased from 107 thousand hectares in 1999 to 175 thousand hectares in 2000. This is largely due to the use of cannabis being encouraged by traditions and personal beliefs. An increase in drug abuse cases in Malawi has been reported from 15% in 1995 to 21% in 1999. There has also been an increase in cannabis abuse among the youth of Malawi.[461]

7. Conclusion

Laws which prohibited cannabis in Canada, Mexico, Alaska and South Africa have been the subject of constitutional challenges. South Africa legalised the private use of cannabis by adults on the constitutional grounds of the right to privacy. In Canada it was alleged that the Controlled Drug and Substance Act violated the right to life, liberty, and security by preventing access to helpful medical treatment. The court found that the act was unconstitutional. In Mexico the court ruled that the right to the freedom of development of a person's

456 United States Decriminalisation of marihuana 35.
457 Malawi Dangerous Drug Act Ch3502s17.
458 *Malawi Investment and Trade Centre https://www.mitc.mw/index.php/media-centre/latest-news/107-industrial-hemp.html (Date of use: 26 March 2019).*
459 Malawi Special Crops (Amendment) Act 9 of 1972.
460 Malawi Special Crops Act 9 of 1972 [65:01].
461 Bisika 2008 *AJDA*S 82.

personality was being infringed upon by the federal health and penal laws concerning the non- medical use of cannabis. The Mexican Supreme Court therefore ruled in favour of legalisation of cannabis for recreational use. Alaskans argued that their right to privacy was being infringed upon by proving that the Alaskan Possession of Marijuana Statute was unconstitutional. Alaska has initiated an on-site regulation system that allows licensed cannabis retailers to permit on-site cannabis consumption, if the location meets state standards. This controlled use of cannabis reduces the stigma associated with the use of cannabis.

South Africa has since followed suit using the constitutional right to privacy and personal autonomy as was the case in Alaska to legalise the recreational use and possession of cannabis in private on.

Malawian law on the other hand has placed serious fines and imprisonment penalties for the possession and cultivation of cannabis. Malawian case law shows that imprisonment due to possession is circumstantial. The Malawian law unlike Canadian, Mexican, Alaskan and South African law does not make a distinction between possession of cannabis and drug trafficking. They further impose harsh labour and lengthy sentences to deter offenders. From a statistical point of view this has not been successful as there is a reported increase in the illegal use of cannabis by the youth. With a Constitution and Bill of Rights that is very similar to that of South Africa, Malawians have an opportunity to use the same arguments that were presented in the Prince II case to substantiate a case that could possibly legalise cannabis use in their country. Malawi has however, proposed change in developing regulations that could possibly allow industrial hemp and medicinal cannabis programmes to be implemented in the near future. This could prove to be a strategic economic advancement but could also create a gateway to higher levels of illegal possession and trafficking if not regulated correctly.

CHAPTER FIVE

1. Conclusion

Cannabis has been cultivated worldwide for centuries. It has been referred to in religious scriptures and used in traditional ceremonies. There have been many archaeological discoveries which have pointed to its use in ancient times. It has been documented as one of the first crops to be cultivated by humans. Ancient Hindu scriptures have recorded its use by Lord Shiva. Cannabis is therefore a narcotic that has a long, rich history and various diverse uses throughout the world. It was used by a majority of our predecessors, but was prohibited for its potential to predispose individuals to mental health problems. The legalisation of cannabis has been a very controversial topic.

The use of Cannabis in South Africa has a legacy that dates back hundreds of years. It was used by indigenous Southern African peoples and traditional healers for its recreational and medicinal properties. It was however, banned in 1920 when South Africa implemented legislation that made it illegal to use, possess or cultivate cannabis. Many foreign countries have started to reconsider their policies and legislation on cannabis. The fact that cannabis may cause harm is insufficient to justify criminal prohibition. Evidence of the harm that certain substances cause has never been sufficient to lead to the criminal prohibition of such substances. For example, alcohol, nicotine and sugar are some of these substances which are addictive and possibly, deadly. However, all these substances are legal and personal use cannot be controlled. These substances however, are regulated and all these substances have daily consumption recommendations. The case that needs to be made is whether criminal prohibition is effective, proportionate, and the least invasive way to address those harms or eliminate them. The uncontrolled use of cannabis in the 24 month interim period is in my opinion a violation of the best interest of the public as enshrined in the Constitution. The levels of THC are not regulated nor are the strains used in cultivation for private use. These are

important factors that Parliament needs to consider in ensuring the safe use of cannabis.

Several countries have legalised cannabis for either medical or recreational purposes, or both. Many of these countries did so, on constitutional grounds. South Africa is among many countries facing challenges to their drug control policies and legislative frameworks. Garreth Prince was the first South African to challenge the prohibition on the use, cultivation and possession of cannabis on constitutional grounds. In 2002 he argued that his right to religious freedom was being violated by the prohibition of cannabis. As a practicing Rastafarian, Prince used and possessed cannabis for religious reasons. The court ruled that the prohibition limited his right to religious freedom and those of fellow Rastafarians. Nevertheless it was contended that such prohibition was justifiable in terms of section 36 of the constitution.[462] The initial Prince case sought not just an exemption based on religious freedom, but challenged the prohibition of cannabis. This included the irrational distinction of cannabis use from alcohol and tobacco use. Prince failed in his initial attempt as the Constitutional Court could not decriminalise the use, possession, cultivation and trade of cannabis as the court was of the view that it had to determine whether the impugned provisions are overboard. It was further submitted that the prohibition was essential to the war on drugs and was required to fulfil international obligations.

It was suggested that Rastafarian priests grow or control the use of cannabis for it to be used at certain ceremonial events.[463] However, the Constitutional Court was unable to agree that the granting of a limited exemption for the non-invasive religious use of cannabis under the control of priests was a competent remedy, on the evidence placed before the court. The Constitutional Court stated that these remedies would not accord Prince the religious right that he claimed and would further lead to the uncontrolled use of cannabis by Rastafarians. Therefore enforcing such restrictions would be impossible. The

462 *Prince I case par* [28].
463 *Prince I case par* [142].

Constitutional Court further stated that Parliament has the obligation to create a workable exemption if the order were to be granted. It was therefore not the duty of the Constitutional Court to do so.

Prince persisted and challenged the Constitution for a second time on the basis of the rights to privacy, dignity and equality. The Prince II case in 2017 was successfully proved. The court found that the right to privacy was being violated. The case was a landmark win for cannabis users. The High Court stated that the prohibition was unconstitutional and that the limit on the right to privacy was unjustified. The court relied on evidence by the Sate. The evidence provided was however unsatisfactory in justifying the limitations on the right to privacy. The medical evidence provided by medical experts, Dr Gouws, Dr Naidoo and Professor Stein highlighted the negative effects that cannabis has. Dr Naidoo stated that cannabis is a gateway drug, potentially leading to many other illicit drug addictions. However, the medical evidence provided by the State experts was deemed inconclusive. Scientific research literature has proved that cannabis has medicinal benefits. The recreational use of cannabis however, requires legislation that outlines limitations which permits the safe use of cannabis in private, as the harmful effects of cannabis need to be regulated, which would be in the best interest of the public. Behavioural studies have documented its value with regard to effective pain alleviation caused by chronic diseases. Scientists have further broken down the chemical composition so that it may be better understood and utilised. However bills such as the Medical Innovation Bill that would have allowed for research hospitals to practice the safe, monitored and guided use of cannabis, have been rejected.

The medical and recreational beneficial properties of cannabis have been supported by centuries of successful use. However, it is only recently that scientists have begun to experiment and further research the medical benefits of cannabis. South African research is currently investigating the immuno-biological and validation effects of cannabis on breast cancer cells. Cannabis use has further been reported by a large body of consumers to aid in the

alleviation of pain associated with chronic illness. In my opinion, if scientists and researchers had the proper access to cannabis and were allowed to test and conduct trials, without possibly facing criminal charges, then the body of available knowledge would be larger than it is today.

A report by Shaw and his colleges, utilised in the Prince II case, stated that drug policies that make cannabis use illegal, do not aid in reducing the rates of drug use. Shaw suggested a policy that would track the use of cannabis would be more effective. A number of other studies and reports have also indicated this. South Africa could use Canadian legislation on which to base future policies and procedures, as Canada has implemented a cannabis tracking and reporting system as a procedure to control the use of cannabis. Canada has also implemented a cannabis bill that regulates the use of cannabis.

The current research study was carried out with a view to determine whether the constitutional grounds to decriminalise cannabis for medical and recreational purposes are valid. The answer to that would be that the blanket prohibition on the use of cannabis is constitutionally invalid. The argument in the Prince II case proved that the limitation on privacy was unjustifiable and that the State could not prove otherwise.

The Constitutional Court agreed, but pointed out that the High Court did err by allowing the use, possession and cultivation of cannabis by adults in a “private dwelling”. The Constitutional Court stated that the High Court failed to take into account the right to human dignity and the right to freedom of movement. The Constitutional Court therefore found no substantive reason to limit the use and or possession of cannabis to the private dwelling. The applicants further argued that if the right to autonomy is practiced, then a similar right to cultivate cannabis in private for personal consumption should be legal.

Interestingly the word “private” and the word “dignity” are not defined in South African legislation. This creates ambiguity as to the meaning of “private”. For example, can I smoke cannabis in my vehicle in a public parking? Is that “in

private" as I am in my own vehicle or is it public due to my location? Similarly if I possess cannabis and keep it in a backpack as I am transporting it from one private location to another walking through a public area to achieve my objective, am I then guilty of a crime? Which leads to other questions such as how much cannabis is too much for private use? At what point will you be arrested or be accused of trafficking or selling and distributing? South Africa needs to release a protocol on the quantity of cannabis that is legally allowed for private use. The previous amount of 115 grams was held to be unconstitutional. A framework therefore needs to be created, so that individuals are not charged with criminal offences that are dependent on presumptions made by the SAPS and the judicial system. Decisions should rather be based on legitimate legislation that identifies the amounts and crimes accordingly free of any presumption.

The right to privacy is protected by common law, the Bill of Rights and the Constitution. Therefore any law that infringes on the right to privacy is deemed to be unconstitutional. Section 4 of the Drug Act and section 22 (9)(a)(i) of the Medical Act were therefore found to be unconstitutional. These sections were amended to allow for the use, possession and cultivation of cannabis by an adult in private. The Constitutional Court has reformed section 4(b)(vii) of the Drugs Act which states that cannabis can be used and possessed by an adult for personal use in private. The Constitutional Court has further reformed section 22A(9)(a)(i)m of the Medicines Act which now states that cannabis can be acquired, used, possessed, manufactured or supplied.

The applicants in the Prince II case used international comparisons on which to base their arguments. The Alaskan case of *Ravin v. State* was of particular interest in the Prince II case. It can be seen that Prince used the same arguments that Ravin used in 1975 to decriminalise the recreational use of cannabis. The South African Constitutional Court made a similar ruling to the ruling passed by the Alaskan Supreme Court in the *Ravin* case. The High Court of South Africa took into account expert reports, affidavits and testimonies and further comparative research on international laws. Alaska,

Canada and Mexico were the countries used to support the decriminalisation of cannabis based on constitutional challenges.

The state of Alaska's Marijuana Control Board made history in 2018 when it initiated an on-site consumption regulation. This allows Alaskans and tourists to consume cannabis and cannabis products on-site. The licensed retailers must comply with a set off standards set out in regulations. Alaskans are taking the step forward in de-stigmatising the use of cannabis and setting standards of use similar to that of tobacco and alcohol.

Canada legalised cannabis for medical purposes in 1996 on the basis of the constitutionally entrenched rights to liberty and security. The Canadian judge saw no constitutional value in forcing individuals to choose between health and incarceration. The recreational use of cannabis in Canada was legalised in 2018 with the aim of preventing its use by underage individuals. Canada has also implemented a cannabis tracking system that has been recommended as one of the more effective ways to prevent cannabis drug trafficking. The Canadian drug tracking system is currently being amended and will be enforced in October 2019. In order to ensure that legislation is effective it needs to be amended and updated regularly to ensure that it relevant.

Mexico legalised the recreational use of cannabis in 2015, based on the right to engage in recreational activities without the interference of the State. The applicants in the matter argued that their constitutional right to the free development of a person's personality was being violated by the prohibition of cannabis. The court ruled in their favour. In 2018 the Mexican Supreme Court ruled that cannabis could be used for medical purposes based on the same constitutional arguments that were used to justify the recreational use of cannabis.

Malawi is a country with a similar Constitution to South Africa. However cannabis has not been legalised. Punishment for the use, trafficking and cultivation of cannabis are severe. Malawi has however, initiated measures

towards the decriminalisation of industrial cannabis. Industrial cannabis provides economic benefits to the country, as opposed to legalising cannabis for medical or recreational use. To date no constitutional challenge has been made in the Malawi High Court. The use of Malawi in the literature review was to highlight the contrast between countries that have taken on the challenge to decriminalise cannabis based on the medical or recreational needs of individuals, and those that view decriminalisation as a lucrative opportunity, that is not safe to legalise in their own country.

South Africa can use international laws to structure legal frameworks. The State can use legislation that is currently in place in Alaska and Canada as guidelines. The goal in decriminalising the use of cannabis must be to find a broadly acceptable balance of a complex range of harms, benefits, and rights with limited resource availability. It is submitted that the right balance would not be achieved if there is a blanket prohibition on the use of cannabis. Instead cannabis use needs to be understood as a socially and economically ingrained pastime for which there is clearly considerable popular demand and a rich history. The properties of cannabis were considered before a decision was made to legalise its private use. The narcotic itself was however decriminalised based on a constitutional implication and not solely on its properties. In my opinion the courts waste considerable time and resources' trying to prove that cannabis is harmful and hazardous. Statistics have shown that regardless of its legal standing, cannabis is being used illicitly regardless. The point however is that cannabis has been used for centuries and should not be confined and limited based on the harm it may cause. Researchers, scientists, political leaders, policy makers and the general public should rather assist in finding the best way to address those harms. Cannabis has the potential to become a revolutionary drug that could be beneficial if it is used and administered in a safe and controlled manner.

The South African government should take advantage of the industrial sector and work on producing cannabis for commercial use, similar to that proposed by the Malawian government. It would be the optimal time to boost the South

African economy, given the quality of cannabis that is grown in South Africa. South Africa has initiated the cannabis licence application procedures to plant, produce or trade in cannabis for medicinal and educational intentions. Industrialisation of cannabis has already been creating jobs. Legalisation further gives government institutes the opportunity to regulate cannabis cultivation and use.

Legislation needs to be formulated based on what is best for the citizens of South African. Legislative decisions should be based on the probability of risk and available finances. Policy reform should also embody the aspect of certainty. Legislation should also be consistent with policies that are already in place and which govern substances such as alcohol, tobacco and nicotine. Legislation should also embody a degree of flexibility so that procedures and policies may be adapted based on performance. Regulatory systems also need to be addressed. Legislation should have the ability to evolve by developing monitoring and evaluation systems. Finally, there should always be a level of transparency and accountability so that every legislative decision is justifiable. These are some of the factors to take into consideration when setting out policies, procedures and limitations on the use, possession and cultivation of cannabis.

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