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FACULTY OF LAW

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Assignment topic: "A Critical Analysis of *Prince* and an Objective Justification for the Decriminalisation of Marijuana in South Africa"

DECLARATION

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2. **I acknowledge and understand that plagiarism is wrong, and that it constitutes academic theft.**

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4. **This assignment is my own work, or the unique work of a group, if a group assignment.**

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Introduction

The case of *Prince v President of the Law Society, Cape of Good Hope*[1] (hereinafter "*Prince*"), involved, *inter alia*, a constitutional challenge to the laws prohibiting the possession and use of marijuana (herein interchangeable with "cannabis"). The challenge was based on the s15(1)[2] right to freedom of conscience, religion, thought, belief and opinion. The challenge was unsuccessful, the highest court in our land finding the prohibition to pass constitutional muster (even in so far as is it did not grant an exemption to Rastafaris). This essay will use *Prince* as a point of departure, in order to assess whether the judgment has closed the door on the possibility of marijuana decriminalisation and/or legalisation. It will be submitted that *Prince* suffered from two fatal flaws, namely, that s15 of the Constitution was too narrow of a right for a successful challenge and that two concessions should never have been made, as they was based on insufficient evidence and misinformation. These were: that the governmental objective, served by prohibition, is legitimate; and that the limitation/prohibition does serve its purpose. After having dealt with the history of *Prince*, a hypothetical challenge will be undertaken, within the framework of the s9(1) constitutional right to equality, such submitted as being a much broader and appropriate platform from which to analyse the relevant issues and debates. S9(1) has been interpreted, and this will be explored within the body of this text, as meaning that a rational connection must exist between the challenged provision (or the differentiation that it creates) and a legitimate governmental objective, in order to pass the '*Harksen*' test.[3] It is submitted that this enquiry can be divided into two separate enquiries and it is based on this submission that the hypothetical challenge will be structured. The test speaks of a 'legitimate governmental objective'. Thus, the first enquiry will, necessarily, involve looking into whether prohibiting marijuana is, in fact, legitimate and not, simply, arbitrary. While the impetus of this essay will be to push for decriminalization, the second half of the enquiry will involve an assumption that the governmental objective is legitimate, essentially, assuming the writer's conclusion, to the first enquiry, as being incorrect. Thus, the second enquiry is framed accordingly, as follows. Assuming a legitimate governmental objective, is there a 'rational connection' between it and the differentiation that the law creates, i.e. does

[1] 1998 (8) BCLR 796 (C).
[2] of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution).
[3] *Harksen v Lane* 1998 (1) SA 300 (CC) para 53.

the law/differentiation achieve what it has been designed to achieve? In order to analyse these issues, the use of a comparator will be required. Thus, for the current purpose, recreational marijuana users will be contrasted with recreational users of tobacco and alcohol. Within this framework, various statistics, medical evidence, histories and debates will be used to reach the, hopefully, logical conclusion that, because marijuana is insufficiently legally and medically differentiable from tobacco and alcohol, it should be classed accordingly and decriminalised.

A Thought to Ponder, Before We Get Started…

"'Investigators who rely on the opinions of high echelon officials, who have no direct acquaintance with the use of marijuana… usually reach the conclusion that marijuana is a highly dangerous drug which produces much violent crime and insanity,' says Lindesmith. 'These conclusions, as we have suggested, may be a reflection of upper-class hostility toward an unfamiliar lower-class indulgence.' For, he writes 'denunciations of the weed come characteristically from persons of the classes which prefer whiskey, rum, gin and other alcoholic beverages[4] and who do not themselves use marijuana. Such persons, *overlooking the well-known effects of alcohol* [italicised for emphasis], commonly deplore the effects of hemp upon the lower classes and often believe that it produces murder, rape, violence and insanity.'"[5]

***Prince* – Stirring the Constitutional Pot**

The applicant had fulfilled most of the statutory requirements, in order to be admitted as an attorney, but had yet to undertake his mandatory period of community service, as was required by s2A(a)(ii) of the Attorneys Act 53 of 1979. The Law Society of the province declined to register him for community service, saying that, due to two previous convictions for possession of marijuana and his expressing an intention to continue using it, he was not a 'fit and proper person', as is required of an applicant wishing to become an attorney. Prince was Rastafari and claimed to only use 'dagga' ritually, as part of his religious beliefs.

[4] The writer prefers Black Label Beer.
[5] E R Bloomquist (M.D.) *Marijuana* (1968) 80.

Numerous alternative arguments were submitted on Prince's behalf, the most notable, for the purposes of this essay, being that s4 of the Drugs and Drug Trafficking Act[6] (hereinafter "Drugs Act") failed to exempt the possession and use (of marijuana) for religious worship, which was protected under the Constitution, and was, therefore, unconstitutional. In short, the court rejected this and other arguments, finding that the applicant's constitutional rights were outweighed by legitimate state interests (the reasons for marijuana prohibition) and thus, that they could be justifiably limited, according to s36 of the Constitution. It is intended that the above simplifies the judgment to a large extent, as, considering the aim of this essay, it is submitted as sufficing that the writer focus only on those parts of the judgment that will be scrutinised later in this text.

The Minister of Justice and the Attorney-General both intervened as respondents, so as to oppose the application. The Attorney General annexed, to his application for intervention, an affidavit by Brigadier Venter, the National Head of the Narcotics Bureau.

> "… Venter states that the purpose of the Drugs Act was to bring South Africa into line with international drug norms and in particular with the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (Vienna 1988). Brigadier Venter points out that the Drugs Act was formulated after careful consideration of the problems imposed by drug trafficking in South Africa and the problems of adequately protecting society from what he described as a menace … that *in his experience* [italicised for emphasis] young people began with dagga … and then 'graduate' to other drugs … cannabis is therefore a dangerous 'stepping stone' to other drugs and ultimate abuse and addiction."[7]

[6] "Use and possession of drugs. – No person shall use or have in his possession – (a) any dependence-producing substance; or (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance." It should, here, be noted that there are various exemptions that are made, for instance for medicinal use, on prescription, presuming that practitioners are permitted to prescribe the substance. Part 3 of Schedule 2 to the Act lists cannabis as an undesirable dependence-producing substance.

[7] *Prince* 984

There are numerous problems with the above submissions by Brigadier Venter, which will be dealt with in turn.

It is not doubted that South Africa, as far as possible, should attempt to legislate so as to adhere to international norms and obligations. It is essential, however, to remember that, according to s2 of the same, the Constitution is the supreme law of the Republic. Thus, a law, even if legislated to give effect to an international obligation, will not stand unless it passes constitutional muster. This is one of the benefits of being a 'sovereign state' as expressed in s1 of the Constitution. We are, thus, free to pick and choose laws according to the *boni mores* of South African society. At best, 'international obligations' have but persuasive value. As will emerge, later in this text, South Africa also had a greater role to play, in the establishment of this international obligation on prohibition, than is commonly known. This fact was never brought to the attention of the court in *Prince*.

The Brigadier points out that there are various 'dangers' associated with the use and possession of marijuana and that these are the 'menaces' against which we need to fight, i.e. this is the 'legitimate state interest' on which prohibition is based. As was alluded to in the introduction, detailed analysis will suggest that marijuana cannot be considered a 'menace' when the state tolerates tobacco and alcohol. This strikes at the heart of the state interest being 'legitimate'. Furthermore, that if one accepts that it is a 'menace' (the assumption contrary to the writer's first conclusion, so as to allow for the second analysis), prohibition is, in fact, not the best way of 'protecting' the public. These issues will be given more meaning in the writer's attempt to frame the debate within s9(1) of the Constitution.

Finally, the Brigadier proposes the classical 'gateway drug' argument. Whilst it may be true, and this is widely disputed, that marijuana leads to more serious drugs, the argument relies on the classification of marijuana as a 'drug' within the context of prohibition. Suppose that marijuana were classified in the same category as tobacco and alcohol, as the writer argues it should be. Thus categorised, is it still the 'gateway drug'? Framed like this, is it not apparent that tobacco and alcohol are, actually, the

real 'stepping stones'?[8] The only reason they are not identified as the culprits is because, despite their medical classification as such, tobacco and alcohol are not considered 'drugs' in the popular sense of the word. The marijuana gateway theory is, thus, a mere result of popular, media and legal-policy bias.

The Minister and the Attorney-General also annexed, to their papers, the affidavit of Dr Tuviah Zabow, "an associate professor of psychiatry at the University of Cape-Town and head of the Forensic Psychiatry Unit at Valkenberg Hospital, Cape-Town."[9] The doctor referred to various harmful effects from marijuana's psychoactive chemical 'tetrahydrocannibinol' (hereinafter "THC" as it is commonly abbreviated), including hallucination (although, compared to other drugs, it is extremely mild) …

> "… intoxication, panic attacks, memory deficits and psychosis. The disturbed behaviour is frequently observed in persons presenting for psychiatric

[8] L S Wallisch and L Y Liu "Texas School Survey of Substance Use Among Students: Grades 4-6" (1998) *Texas Commission on Alcohol and Drug Abuse* http://www.tcada.state.tx.us.research/survey/grades4-6/1998/ (accessed 24 October 2009). "Fewer than 4 percent of elementary students had ever tried marijuana, and about 2.6 percent had used it within the past school year. **The age of the first use for trying marijuana was older than for any of the substances asked about in the survey** [bolded for emphasis]." This should be contrasted with: "Almost 10 percent of elementary students had smoked cigarettes during the past school year, and 2 percent had used chewing tobacco or snuff. About 24 percent of students had smoked cigarettes in their lifetime, and 5 percent had ever used smokeless tobacco … Some 30 percent of elementary students had ever tried alcohol, and 20 percent had tried it during the past school year. The percentage of students who drank alcohol in the past school year almost doubled between fourth and sixth grades and continues to rise through the twelfth grade … About 12 percent of elementary students had used inhalants in their lifetimes and about 9 percent had used them within the past school year. Correction fluid, closely followed by glue and spray paint, were the most commonly used … About 33 percent of all elementary students said that they had been offered alcohol and 28 percent reported that they had been offered tobacco. Some 10 percent had been offered inhalants and 10 percent had been offered marijuana. While only 4 percent of students have ever tried marijuana, about one third of those who had been offered it had ever tried it [compare this to half the rate with tobacco and almost 100 percent with alcohol]. Since 1994, the perceived availability of tobacco and alcohol has declined slightly, while the availability of inhalants and marijuana has increased." Note: The writer intentionally chose statistics from an elementary school, as this is submitted as reflecting the earliest usage and thus the earliest causal 'gateways'. Although the information is from the United States, it is submitted that the vast disparities between substance usage rates would indicate a sufficiently obvious trend, which would likely find analogy in South Africa. Consideration should, of course, be given to potential variables, but, such analysis finds its place in the field of statistics and not within the limits of this essay.
J McNulty "Dutch drug policies do not increase marijuana use, first rigorous comparative study finds" (2004) *UC Santa Cruz Currents Online* http://www.ucsc.edu/currents/03-04/05-03/drug_study.html (accessed 20 October 2009). "The study found no evidence that lawfully regulated cannabis provides a 'gateway' to other illicit drug use. In fact, marijuana users in San Francisco were far more likely to have used other illicit drugs--cocaine, crack, amphetamines, ecstasy, and opiates--than users in Amsterdam, said Reinarman. 'The results of this study shift the burden of proof now to those who would arrest hundreds of thousands of Americans each year on the grounds that it deters use,' said Reinarman."

[9] *Prince* 984.

> evaluation in emergency clinical situations as well as in the hospital population. The chronic use of cannabis has, *by my personal observation* [italicised for emphasis], produced cognitive, emotional and volitional deterioration. The use of dagga within certain cultural/cult groups (such as Rastafarians) has resulted in behavioural problems being referred to this hospital … Cannabis is a *potentially* [italicised for emphasis] dangerous drug and as such a *public health concern* [italicised for emphasis], especially with regard to the increased use evident in adolescents."[10]

The main problem identifiable in the above quotation is that it constitutes the expert evidence of *one* doctor, who has based his conclusions on *personal observation*. There is, in fact, extensive, worldwide debate over the effects of marijuana, with many authoritative studies conceding that they could not link it to the adverse effects that they had hypothesised would follow its usage. These studies will be dealt with extensively, later in this text. The point that is currently essential to note is that there exists controversy on the adverse medical effects of marijuana, such that does not exist in the conclusive medical world of tobacco and alcohol. While the conclusion of this observation should be obvious, it will be explored more thoroughly in the relevant discussion, below. It should, however, be noted that the court took cognisance of Professor Ames' views, which contradicted those of Dr Zabow, but limited their persuasive value, due to the conclusion in her Journal article, which pushed for decriminalisation, only within the medical-use context.[11]

Adv. Trengove made, in the writer's respectful opinion, two fatal concessions, which were, most likely, based on a lack of proper information and evidence as to marijuana's effects.

> "As far as the importance of the purpose of the Drugs Act is concerned, namely to control the use of dependence-producing substances which includes cannabis, Mr *Trengove* very fairly conceded that this was 'an important objective' … As far as the relation between the limitation and its purpose is

[10] *Prince* 984-985.
[11] *Prince* 988.

> concerned, here again, Mr *Trengove* has very fairly conceded that the prohibition advances the purpose sought to be achieved."[12]

The first concession is logical only insofar as one assumes marijuana's adverse effects and its rightful classification as a 'drug' instead of as a substance comparable to tobacco and alcohol. It is also assumed, by the writer, that, due to the context of the case, that by 'control' was meant 'prohibition'. Thus, if one finds marijuana to be on-par with tobacco and alcohol, as this essay sets out to prove, then it follows that its prohibition is not 'an important objective', as the latter two substances are not prohibited. Once again, this issue will be thoroughly explored in due course.

The second concession is, again, one based on lack of evidence and misinformation. As will be more fully explored at the appropriate point, there is an abundance of evidence to suggest that prohibition creates more problems than it solves. Adv. Trengove went on to argue for less restrictive means, capable of achieving the same objective.[13] Unfortunately, this argument was framed within the context of his brief and involved a suggestion that Rastafari followers be exempt from the provisions of the Drugs Act, insofar as its relation to marijuana use and possession. While this argument failed, it is ironic, and again this will be explored fully in due course, that studies indicate general decriminalisation to be the solution to most of the problems created by prohibition. Thus, decriminalisation better serves the objective that criminalisation/prohibition seeks to achieve. The second concession should, thus, also not have been made.

Prince – Adding Herb to the Constitutional Pot

Mr Prince was, understandably, unsatisfied with the outcome of his case. He, therefore, authored a communication to the United Nations Human Rights Committee, alleging that his human rights were being infringed. The Committee considered all information provided by Prince, as well as that provided on behalf of

[12] *Prince 986.*
[13] *Prince* 986.

South Africa (the "State Party"). The Committee's views on the matter are expressed, and made public by decision, in a document dated 14 November 2007.[14]

Prince made extensive reference to the *Prince* judgment and claimed violations, by South Africa, of his rights under article 18, paragraph 1; article 26; and article 27 of the International Covenant on Civil and Political Rights, which, along with its protocol, entered into force for South Africa respectively on 10 March 1999 and 28 November 2002.[15] It does not serve to repeat the facts of *Prince,* to which the aggrieved Prince made reference. Thus, only those portions of the document will be considered, which provide new insights for current purposes.

The Committee considered that the Constitutional Court, in *Prince*, had followed a sound procedure in undertaking the s36 limitations analysis.[16] Also on their plates were various arguments, by *Prince*, relating to the Rastafari religion and how it is unfairly differentiated from other religions in South Africa.[17]

The State Party sought fit to communicate its position, in relation to Prince's complaint.

> "It argues that domestic remedies have not been exhausted, as the author [Prince] did not, in his applications, to the domestic courts, seek to have the prohibition on cannabis declared unconstitutional and invalid, and to have such prohibitions removed from the respective act *for the benefit of the whole population* [italicised for emphasis], as is the usual way in challenging legislative provisions which are believed to be inconsistent with the Constitution."[18]

Two very important things emerge from the above communication. Firstly, the state does not close the door on the decriminalisation of marijuana. Secondly, it suggests that, if attempted, this should be for the benefit of the entire South African population.

[14] United Nations – International Covenant on Civil and Political Rights - Project CCPR/C/91/D/1474/2006 (ninety-first session; 15 October – 2 November 2007).
[15] United Nations – International Covenant para 1.
[16] United Nations – International Covenant para 2.5.
[17] United Nations – International Covenant para 3.3.
[18] United Nations – International Covenant para 4.1.

Thus emerges the second flaw in Prince's attempts. He, very narrowly, attempted to declare the prohibition unconstitutional, but only insofar as the rights of the Rastafari are concerned (essentially, he pushed for an exemption). It is here that the writer submits the best indication to lie that decriminalisation might be achieved by a broad-based constitutional attack on the validity of prohibition and that such attack would best be framed within the s9(1) constitutional right to equality.

Furthermore, the state party emphasised that Prince did not challenge the prohibition on the use and possession of cannabis, accepting that it served a legitimate state interest (the writer's views on this concession have already been briefly discussed and will be given more detail, when appropriate), but simply alleged that Rastafaris should be exempt, i.e. that prohibition was overbroad. Here, the state indicates a willingness to hear argument on the legitimacy of the interest allegedly served and whether it is, in fact, being served.

Having considered the *Prince* Judgment, the Committee pointed out the following:

> "A differentiation based on *reasonable and objective criteria* [italicised for emphasis] does not amount to prohibited discrimination within the meaning of article 26 … The limitation therefore does not violate the right to equal treatment before the law [having looked at South Africa's s36 analysis]."[19]

It must be remembered that the committee was limited to considering the evidence that was led in *Prince* which, due to the unfortunate concessions and one-sided opinions, could lead one to a conclusion of justifiable limitation. The quotation does, however, imply that differentiation based on 'unreasonable' or 'subjective' criteria would lead to an inference of discrimination. Thus, if, under the equality provision, one were able to prove that there was no 'objective' reason to differentiate cannabis users from tobacco and alcohol users, then not only would the provision offend our Constitution, but also s26 of the International Convention on Civil and Political Rights.

[19] United Nations – International Covenant paras 4.9 & 4.10.

Prince also argued,[20] in response to a state submission in this regard, that if hypothetical exceptions could be made to the prohibition, for medical and professional purposes, and effectively enforced by the State Party, then exceptions should also be made for religious use, as this would impose no additional burdens. This argument will be discussed when the writer gets to the appropriate section, which deals with the ranking of the various uses for marijuana.

Having established areas in which the writer believes the *Prince* judgment to have gone wrong and having discussed the arguments that the State Party has indicated might be open for debate, it is finally appropriate to turn to what is submitted would be a sound strategy, if or when the prohibition of marijuana next faces constitutional scrutiny.

Equality as the Right on Which Decriminalisation Must Follow

General

S9(1) of the Constitution states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." Without interpretation, this right is extremely broad. Fortunately, there are a string of Constitutional Court judgments that have given the provision meaning.

Harksen v Lane[21] established certain stages of enquiry, that need to be conducted, in order to establish whether there has been an infringement of s9. The judgment dealt with the Interim Constitution,[22] in which equality fell under s8. Despite different wording as to these provisions, the test, as was established for s8 of the Interim, is still used today to interpret s9 of the final Constitution.

The *Harksen* test involves, essentially a two-fold enquiry, in relation to s9(1). An applicant must first show that, either individually or as a group of persons, he is being treated differently (thus the need for a comparator). Secondly, it must be shown that such differential treatment, or differentiation, is not rationally connected to a

[20] United Nations – International Covenant para 5.5.
[21] para 53.
[22] Constitution of the Republic of South Africa, Act 200 of 1993.

legitimate governmental objective.[23] Only if these two things cannot be shown, will the test progress on to the subsequent provisions of s9, which will then involve allegations of unfair discrimination and the involvement of the Promotion of Equality and Prevention of Unfair Discrimination Act,[24] which was enacted to give effect to s9(3) of the Constitution. If the original two-stage, s9(1), enquiry is fulfilled, then there is no need to move onto subsequent sections and the court will find the provision to have breached the applicant's right to equality. S9(1) deals with so called 'naked preferences' and it is around these that the writer's argument will be based.

> "It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."[25]

Furthermore, s9(1) is a rationality exercise and is less concerned, than its subsequent sections, with the subjective element of discrimination. It deals with raw differentiation as only being justified according to reason.

> "The analysis in terms of s9(1) does not require an ascertainment of the specified ground or a consideration of whether the discriminatory ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner … Section 9(1) requires an investigation into whether the impugned provision differentiates between categories of people and if it so does whether there is a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to achieve."[26]

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[23] *Harksen* para 53.
[24] 4 of 2000.
[25] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25.
[26] *City of Cape Town v AD Outpost (pty) Ltd* 2000 (2) SA 733 (C) 743.

This established, it is now appropriate to say that the following constitutional analysis will take place within the confines of s9, as it is assumed that the writer can satisfy the elements of the *Harksen* test, as they relate to s9(1). There is much to be said for marijuana prohibition and its relation to the equality sections subsequent to s9(1), but this would require another entire article and will, thus, not be discussed in this text.

Furthermore, it should be noted that most of the judgments that deal with s9(1),[27] tend to treat the *Harksen* test as inclusive of the s36 analysis, presumably so as to avoid unnecessary repetition, as the s36 analysis involves much the same test as does *Harksen*. This essay will do the same. In putting s4 of the Drugs Act to the *Harksen* test, s36 will not be repeated, although it will, as and where applicable, play its part in so far as the writer's analysis considers many of the same factors that would be considered if the s36 test were applied.

Use of a comparator

The *Harksen* test implies the use of a comparator. In order to be considered equal, there is a need for something against which one's position may be judged, i.e. equal in comparison to, or, being treated differently to whom? Thus, in *Hoffman*, when invoking equality, a comparator was used between HIV positive individuals and HIV negative individuals. Only by comparing the two, can one see if, firstly, they are being treated differently and then, considering the similarities and differences between the two, whether the state is serving a legitimate objective in treating them differently.

Thus, as should be apparent, recreational marijuana users (this includes potential marijuana users who only avoid the substance because of prohibition) will be compared to recreational users of tobacco and alcohol. By comparing the two classes, the similarities and differences between them can be assessed, in order to establish

[27] For example, *Harksen v Lane* 1998 (1) SA 300 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); *City of Cape Town v AD Outpost* 2000 (2) SA 733 (C); *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA); *Hoffman v South African Airways* 2001 (1) SA 1 (CC); *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

whether the difference is sufficient to justify prohibition, i.e. is there a legitimate state interest?

Ranking of marijuana users

The writer submits that there exist three categories of marijuana users. These are separated conceptually, as the reality is that many people will use for more than one purpose. Firstly, there are those that would consume marijuana for the many alleged health and/or medicinal benefits. These people could be termed 'medical marijuana users' and are submitted as ranking first, i.e. they are the most justified in wanting to consume it. Secondly, there are those people, such as Prince, who wish to consume marijuana for religious or spiritual purposes. The only reason that these individuals would be ranked lower than medical marijuana users is that there is no scientific method to produce evidence as to the efficacy that marijuana has in achieving the purpose of its consumption, i.e. there is no objective way to tell if it, for example, connects one to god, whereas empirical observation can tell if THC reduces the prevalence of cancer. Finally, there are those who would use marijuana for pleasure or vice, i.e. recreational marijuana users. The reason that the writer would rank these users as lowest is that their motive for consumption is purely subjective. It benefits only themselves and each person differently. Although it could be argued that pleasure is beneficial, it can hardly be considered on-par with medical treatment, nor, if ones accepts this for the sake of religious tolerance, equal to the purpose of establishing a bond with the god who is responsible for one's existence and eternity.

Assuming this ranking to be correct, it makes sense to frame the constitutional challenge according to the equality of recreational marijuana users, as, if one establishes inequality with regards to them, then it automatically follows in the context of the other two, i.e. if prohibition cannot be justified within the context of recreation, then is certainly cannot be justified with regards to medical and religious use.

Application of the *Harksen* test

The first stage of the enquiry is easy to satisfy. Recreational marijuana users are treated differently to recreational tobacco and alcohol users. This is evident from the fact that recreational tobacco and alcohol users face no criminal consequences for use

or possession under the Drugs Act, whereas recreational marijuana users are prohibited from use or possession according to s4 and will face criminal prosecution if found non-compliant.

The second stage in the *Harksen* test involves establishing whether there exists a legitimate governmental objective, to which differentiation is rationally connected. If one unpacks what has just been said, it is clear that there are two issues at play. The first involves whether the governmental objective is legitimate. It is submitted that only if this is found to be so, should one proceed to asking whether there exists a rational connection between the differentiation and the objective. There would be no point in asking if there existed a rational connection between the differentiation and an *illegitimate* objective. Thus, if the objective is illegitimate, s9(1) has been infringed. If it is legitimate, s9(1) may still be infringed if the objective is not served by the differentiation.

In order for a governmental objective to be legitimate, it would have to be based on a good reason. What constitutes a 'good' reason can only be judged with regard to the *boni mores* of society. A logical method of judging what these *boni mores* are, in relation to a specific question, is to draw analogies with situations similar to that which is in question. Thus, for example, if the question was whether the law should condone the carrying of a heavy stick, it would be logical to look to the fact that the law (based on *boni mores*) allows the carrying of a knife. Because a stick is as (probably less) dangerous than a knife, logic would dictate that one should be allowed to carry a stick. Although public safety is, standing alone, a 'legitimate governmental objective', it loses its legitimacy when it condones the carrying of a knife, but not the carrying of a stick. The only way to justify the prohibition on carrying sticks, would be to prohibit the carrying of knives. Only then would public safety, within context, be a legitimate reason to prohibit carrying a stick. Conversely, if one wanted to legitimately allow the carrying of knives, one would have to condone the carrying of sticks. This exercise in logic should be noted, as it forms the basis of several comparisons below.

This logic also applies to the prohibition of marijuana. Brigadier Venter, in *Prince*, described the governmental objective as "protecting society from …a menace."[28] Without context, as in the above example, this seems to be a legitimate objective. However, as we have seen, legitimacy cannot be analysed in a vacuum. Given context, it stands to reason that marijuana can only be considered a 'menace' if it is shown to be more harmful than tobacco and alcohol. It needs *not* be shown that it is harmless, as the condonation of tobacco and alcohol indicate that, according to our *boni mores*, a metaphorical line has already been drawn in the sand (represented by tobacco and alcohol), i.e. that, when it comes to the recreational use of substances, harmful effects will, up to that line, not be considered a problem to the extent that justifies prohibition. Thus, if the objective is to protect society from something, which, by analogy, is not a menace, then the objective cannot be legitimate. What logically follows, then, is that the writer produce evidence, to facilitate a comparison between marijuana, on the one hand, and tobacco and alcohol, on the other.

Craig Paterson is currently writing a thesis, to be submitted for an MA (History) at the end of 2009, on 'the relationship between prohibition and the resistance to prohibition, in order to establish how the southern African cannabis complex developed into such a large trade'. A section of this deals with reasons as to why marijuana was criminalised in South Africa. The writer was referred to him by Dr Kirkaldy, of the Rhodes University History Department, who described Paterson as knowing "…more about the topic than anyone in South Africa." What follows are some highlights from his unsubmitted thesis, although it must be said that the limits of this essay do not allow the writer to do Paterson justice.[29]

During the height of the colonial era, there existed various popular theories, emanating from, *inter alia,* Darwin. What follows is an amalgamation and significant

[28] *Prince* 984.

[29] C Paterson *Prohibition and Resistance* (MA [History] research in progress, Rhodes University, 2009). Paterson makes extensive reference to other authorities such as, *inter alia*: M Du Toit *Cannabis in Africa – A survey of its distribution in Africa, and a study of cannabis use and users in multi-ethnic South Africa* (1980); JH Mills *Cannabis Britannica* (2003); M Earleywine (ed) *Pot Politics – Marijuana and the Costs of Prohibition* (2007); M Chanock *The Making of South African Legal Culture, 1902-1936: fear, favour and prejudice* (2001); and M Earleywine *Understanding Marijuana – A New Look at the Scientific Evidence* (2002). He, very kindly, leant these to the writer, along with emailing the writer selected sections of his thesis. The above authors have, as far as possible, been referred to in this text, although some content still comes from Paterson's unsubmitted work.

simplification of the era's prevailing thoughts. *Social Darwinism* was associated with the evolution of different races. A popular implication of this was that different races should be kept within the environment in which they evolved. This involved keeping different people separate, to avoid 'culture shock'. 'Civilised man', due to ages of evolution within a 'civilised environment' had strayed away from savagery and, thus, criminality. The native populations of the colonies, the 'savages', were associated with crime, as they were said to have evolved to be more aggressive. The native population, therefore, needed to be kept controlled and separate, because social contact might have resulted in the 'social degeneration' of the 'civilised' white man.[30] This also meant that, within the field of psychiatry, there were separate ideas of what constituted 'insane' in the context of a 'savage' and what constituted 'insane' in the context of a 'civilised man' (*enthopsychiatry*).[31] The following was said by Captain Mills, the Cape's Under Colonial Secretary, and serves as an excellent example of how these ideas were applied.

> "With regard to the Kafir, the closer you can assimilate his condition to that of his normal state the better. I think it would be a mistake to confine Kafirs to a house and tie them to one spot. For this reason, I think the asylum on Robben Island is particularly suited to natives."[32]

The increasing racialisation of psychiatry in the colonies may be observed in the first 'whites only' mental asylum, Valkenburg, which was opened in 1891.[33] Dr Tuviah Zabow, the expert medical opinion in *Prince,* was the head of psychiatry in this hospital.

And how, one may ask, does this apply to marijuana?

> "The use of the asylums to control 'undesirables' in the colonies can be seen in the case of British India. It also marks a major point in the process of cannabis prohibition. It was through the Indian asylum system that the

[30] Thus can be seen the origins of apartheid justification.
[31] C Paterson *Prohibition and Resistance* 30-34 (accounting for the entire paragraph).
[32] HJ Deacon "Madness, Race and Moral Treatment: Robben Island Lunatic Asylum, Cape Colony 1846-1890" (1996) 7 *History of Psychiatry* 287 at 294.
[33] S Swartz "Changing Diagnoses in Valkenburg Asylum, Cape Colony, 1891-1920: a longitudinal view" (1995) 5 *History of Psychiatry* 431 at 438.

> connection between cannabis use and insanity was first brought into colonial politics. India, having built a network of insane asylums across the country to separate insane Indian soldiers … 'found that they were useful places in which to place those that they found dangerous and disruptive in the local population.'"[34]

It would appear that hoards of people were being dragged to the asylums, by the police. On the admission papers, a section required that the officers fill out the 'cause of insanity, which was a difficult task considering the thousands of vagrants and poor being admitted. "… judging from the style of answers furnished by the police … it would appear that if a man be a ganjah-smoker the drug is invariably put down by them as the cause of insanity."[35]

From the above, it is ironic to note that, whilst hemp was viewed as the number one cause of insanity in India, in England, at the same time, Indian hemp was being experimented with to *treat* insanity![36]

It would seem that these theories on the effects of marijuana (on Indians) spread throughout the English colonies, including, of course, Natal, in which the 'Indian Immigrants Commission Report' was published in 1887. Thus began the first push for prohibition in South Africa, although, at the time, it related only to Indian immigrants.[37] Many debates around prohibition followed over the years, although it is the true reason behind this push that needs illumination.

> "In contrast to the little said on insanity, the report [Indian Immigrants Commission Report] noted that 'it renders the Indian immigrant unfit and unable to perform with satisfaction to the employer, that work for which he has been specifically brought to the Colony.' Every symptom of a 'mild case' was related to the effectiveness of the individual in providing labour or purely descriptive, and the first three conditions which the commission attributed to

[34] Mills *Cannabis Britannica* 85 (quote within quote) in C Paterson *Prohibition and Resistance* 35 (main quote).
[35] Mills *Cannabis Britannica* 85-86, quoting a Dr Simpson.
[36] Mills *Cannabis Britannica* 73.
[37] C Paterson *Prohibition and Resistance* 36.

> cannabis were 'unsteadiness in the performance of work, incapacity for exertion, [and] undermining of the nervous power.'"[38]

It would seem that the majority of calls for prohibition came from estate managers, concerned with lazy labourers. Also essential to note, is how the commission dealt with the non-Indian use of 'dakkha'. "As we are strongly convinced that the smoking of hemp is as baneful to the Kaffir as it is to the Indian…"[39] Thus, the 'savages', mentioned above, are also considered as being susceptible to marijuana insanity. But, it would seem that the main concern was not so much cannabis use as it was cannabis trading. Many white farmers were now growing it to service the immigrant and indigenous demand and many white store-merchants were selling it in their shops.

> "It appears that inter-racial contact was the concern here. This could be supported by the criminological view in which criminality was 'infectious: criminality spread from lower races to higher.' Inter-racial contact by 'whites' with Indians or African, and Indians with Africans, led to the degeneration of the former in each case. Cannabis trading, it was claimed, facilitated this degeneration. The Indian Immigration Commission Report framed future debates on cannabis in South Africa. The themes presented in this report (labourer indolence, crime and insanity) recurred throughout debates on cannabis up to the point of prohibition in 1922."[40]

It should be noted that prohibition existed in the Cape Colony as far back as 1891, as based on the same fears evident in Natal. This time, however, it was a 'coloured' problem.[41] It is this thinking, Paterson submits, which forms the same basis of apartheid law, which would follow in the decades to come.[42] As the years went by,

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[38] C Paterson *Prohibition and Resistance* 38.
[39] C Paterson *Prohibition and Resistance* 39, again quoting the Indian Immigrants Commission Report.
[40] C Paterson *Prohibition and Resistance* 39-40.
[41] M Chanock *South African Legal Culture* 95.
[42] "These ideas of biological and moral configuration, and of social environment, were so accepted in South Africa that these same ideas became the foundation for apartheid law later in the twentieth century. It could be said that the foundations of apartheid law and the prohibition of cannabis were almost identical. In each case it was a body of laws passed to ensure that the 'non-white' population could be made of use to the 'white' population while trying to minimise the threat which that population posed to the 'white' ruling class. While apartheid laws sought to keep specific kinds of people in specific social environments, minimizing contact between groups, the laws against cannabis

and having signed the Treaty of Versailles, which included putting measures in place to suppress cocaine and opiates, pressure mounted to include cannabis in the list of prohibitions created by national legislation. "In 1921, the Council of the League of Nations had called for an 'Advisory Committee on the Traffic in Opium and *Dangerous Drugs'* [italicised for emphasis] and it was in 1923 that *South Africa* [italicised for emphasis] wrote to the committee … This was accepted at the second Opium Conference of 1924 and became international law in 1925."[43]

From the above, it would probably come as a surprise to Brigadier Venter, as it did to the writer, to see that South Africa is responsible for the international obligation, under which it seeks cover. As pointed out by Paterson,[44] with the inclusion of marijuana on the International List of Habit-Forming Drugs, the need to justify or debate prohibition fell away.

But, as has been submitted elsewhere in this text, South Africa is a sovereign state, with the Constitution as the supreme law of the land. Despite self-imposed 'international obligations', we now have and duty to justify and debate prohibition. Thus, historical and contemporary reasons for marijuana prohibition need to be judged on their legitimacy and, as has been discussed, to do so involves judging them within the context of tobacco and alcohol. The potential harms ('menaces') of marijuana will now be examined separately.

Medical evidence in *Prince* pointed to marijuana's intoxicating effects. Seen in isolation (i.e. the stick without the knife), it is easy to see why society might view this as a problem. People lose control of themselves and, therefore, create the possibility that they might put themselves, or others, in danger. With marijuana, this occurs due to the senses being affected, which can result in loss of perception, disorientation and

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(and other vices such as alcohol) served to protect the 'white' population in circumstances where such interaction was unavoidable. – C Paterson *Prohibition and Resistance* 44.

[43] C Paterson *Prohibition and Resistance* 45-46. The letter read as follows: "Pretoria 28th 1923 … With reference to your letter … on the above subject … I have the honour to inform you that, from the point of view of the Union of South Africa, the most important of all the habit-forming drugs is Indian Hemp or 'Dagga' and this drug is not included in the International List. It is suggested that the various Governments being parties to the International Opium Convention should be asked to include in their list of habit-forming drugs the following: Indian Hemp: including the whole or any portion of the plants cannabis indica or cannabis sativa. Signed, J.C. Van Tyen, for Secretary to the Prime Minister."

[44] C Paterson *Prohibition and Resistance* 46.

loss of control (in severe cases, but effects depend on dosage, weight etc.).[45] However, let us not lose sight of the intoxicating effects of alcohol. In the past, people in South Africa have drunk to the point where it has been argued that they lack the criminal capacity to act.[46] Many would argue alcohol to be far more intoxicating than marijuana[47] and, yet, it is not prohibited by the Drugs Act. The menace of alcohol intoxication is controlled by measures such as prohibiting driving under the influence of alcohol,[48] punishing someone for drunk and disorderly behaviour or allowing a dismissal, provided the procedure and substance of the hearing was fair, in cases where an employee has come to work intoxicated[49] (this has obvious implications for those who would drive or pitch up to work under the influence of marijuana). Clearly then, the *boni mores* do not consider intoxication as a menace that the public need complete censorship against. Preventing it altogether is, therefore, not a legitimate governmental objective.

Historical references and medical evidence in *Prince* point to the potential of marijuana to cause insanity (used as a broad term for many mental illnesses). As we have seen, this theory began because of the carelessness of lazy Indian police officers. Today, most studies will indicate that many people with psychological problems smoke marijuana. Important to note, however, is that it has never been found, conclusively, to be the cause of their disorders, although it is thought that it might be an aggravating factor.[50] Let us assume, however, for the sake of argument, that a future study does find a link between heavy marijuana usage and insanity. Would preventing this be a legitimate governmental objective? Again, in a vacuum, it would appear so, but one needs to consider the context of our comparators. The *boni mores* and the law, allow a person to consume such excesses of alcohol that they develop an associated mental illness known as *delirium tremens*, which is of such a serious nature that it excludes criminal capacity.[51] On the same set of logical rules as we have followed previously, it follows, therefore, that preventing insanity, as caused by a recreational substance, is not a legitimate governmental objective. This is obviously

[45] M Earleywine *Understanding Marijuana* 97-120.
[46] *S v Chretien* 1981 (1) SA 1097 (A).
[47] ER Bloomquist *Marijuana* 80.
[48] S65(1) of the National Road Traffic Act 93 of 1996.
[49] J Grogan *Workplace Law* (2008): 182.
[50] M Earleywine *Understanding Marijuana* 114.
[51] CR Snyman *Criminal Law* 5ed (2008) 222-223.

subject to contextual limits, i.e. if insanity resulted one-hundred percent (or a significantly large proportion) of the time, it is doubted one could dispute legitimacy, but, because excess alcohol *does* cause *delirium tremens* and excess marijuana *might* do, the objective is not legitimate in the context of this discussion.

Many times, it has been pointed out that the use of marijuana is responsible for increased crime. This argument suffers the same logical flaw as suggesting marijuana to cause mental illness. Just because many criminals are found to use marijuana, does not lead to the conclusion that marijuana use is the cause of the crime, just as the observation that many of the insane use it, does not allow one to conclude it as the cause of their insanity. Although admittedly speculative, it is submitted as being likely that the correlation exists only due to marijuana traditionally being used more by the poor, who are, out of desperation, more likely to resort to crime. In order to be thorough, however, let us assume that links have been found to increased criminality. The colloquial term 'liquid courage' needs only to be summoned, to establish that the same can be said for alcohol. It is often used to invoke confidence and the same invocation might be used before the commission of a crime. Also worthy of mention is the well-documented side effect of alcohol, namely, aggression.[52] Within the writer's chosen context, therefore, prevention of crime is not a legitimate state objective.

There are also the other ill effects that are alleged to accompany marijuana use, such as lung-disease (presuming it is smoked)[53], various types of respiratory tract cancer, insomnia and a whole host of others. The blatant reality is that the scientific data does not back up this allegation. For example, a recent large-scale study by the David Geffen School of Medicine at the University of California, assessed the possible link between cannabis use and an increased risk of lung cancer.[54] The researchers hypothesised that, due to marijuana containing most of the carcinogens found in

[52] C West "The Effect Of Alcohol On Aggression" (2007) *Psychological Science.* http://www.medicalnewstoday.com/articles/77303.php (accessed 27 October 2009). "The link between alcohol and aggression is well known. It appears that alcohol has the potential to both increase and decrease aggression, depending on where one's attention is focused … *Psychological Science* is ranked among the top 10 general psychological journals for impact by the Institute for Scientific Information."
[53] Other methods include ingesting it or inhaling the 'smokeless' vapour by means of devices specially designed for medical marijuana use.
[54] P Armentano "Marijuana and Lung Cancer: Another Marijuana Myth Goes Up in Smoke" (2007) http://www.drugscience.org/Archive/bcr1/n1_armentano.html (accessed 20 October 2009).

tobacco, levels of lung cancer would increase proportional to the individual's level of use. What they found certainly comes as a surprise. Contrary to their hypothesis, it was found that cannabis smokers displayed, on average, lower levels of lung cancer than not only tobacco smokers, but also those control individuals who smoked nothing at all.[55] It would appear that THC kills off old and weak cells, before they have the chance to mutate and turn cancerous. Separate study findings, did, however find a twenty-fold increase in the risk of lung cancer for people who smoked two or more packs of cigarettes a day.[56] People who drink excess amounts of alcohol, for long periods, can also look forward to cancer (especially liver), mental health problems, heart disease, stroke, thread veins and brittle nails, diabetes, sexual health problems, pancreatitis and memory problems.[57] Again, with tobacco and alcohol, as a contextual line in the sand, it is evident that government cannot consider it a legitimate objective to prevent people from recreationally drugging themselves into poor health.

Finally, there is the argument as to marijuana's dependence-producing qualities. This is reflected in the wording of s4 of the Drugs Act.[58] The simple fact, for current purposes, is that both tobacco and alcohol are more addictive (dependence producing)

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[55] P Armentano "Lung Cancer". "While the investigators' failure to demonstrate a positive association between cannabis use and cancer may seem surprising to some, the bottom line is that scientists overseas have been studying pot's potential anti-cancer properties for nearly a decade. Most recently, investigators at Italy's Instuto di Chemica Biomolecolare reported in the May issue of the Journal of Pharmacology and Experimental Therapeutics that compounds in marijuana inhibit cancer cell growth in animals and in culture on a wide range of tumor cell lines, including human breast carcinoma cells, human prostate carcinoma cells, and human colectoral carcinoma cells. Previous studies by European researchers have shown that cannabis' constituents can reduce the size and halt the spread of glioma (brain tumor) cells in animals and humans in a dose dependent manner. Separate preclinical studies have also shown marijuana to inhibit cancer cell growth and selectively trigger malignant cell death in skin cancer cells, leukemic cells, and lung cancer cells, among other cancerous cell lines …But none of these findings should come as a surprise to the US government, which ironically, sponsored the first experiment ever documenting pot's anti-cancer effects in 1974 at the Medical College of Virginia. The results of that study, reported in an August 18, 1974, Washington Post newspaper feature, were that marijuana's primary psychoactive component **'THC' slowed the growth of lung cancers, breast cancers and a virus-induced leukemia in laboratory mice, and prolonged their lives by as much as 36 percent** [Bolded for emphasis]."

[56] M Kaufman "Study finds no cancer-marijuana connection" (2006) *Washington Post* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/25/AR2006052501729.html (accessed 03 October 2007).

[57] Author unknown "How alcohol affects your health" (2009) *National Health Service (United Kingdom)* http://www.nhs.uk.Livewell/over60's/Pages/Longtermeffects.aspx (accessed 27 October 2009).

[58] "… any dependence-producing substance; or … dangerous dependence-producing substance or any undesirable dependence producing substance."

than marijuana.[59] Once again, preventing the use of dependence-producing substances, that fall within the limits created by tobacco and alcohol, cannot be said to be a legitimate governmental objective, for the same reasons as have applied above.

Thus, it would seem that, by applying the stick and the knife scenario to the context of marijuana vs. alcohol and tobacco, the objective of preventing a 'menace' cannot be seen as a legitimate governmental objective, when the menace is allowed within one context and not in an objectively comparable other. It is submitted that the various possible 'menaces' of marijuana have been dealt with and have all proved to be less severe than those caused by the use of tobacco and alcohol. As with the stick example, prohibition would, thus, only be legitimate if the state also prohibited tobacco and alcohol. Seeing as this does not appear to be on the cards, it follows that marijuana should be decriminalised (i.e. s4 of the Drugs Act declared unconstitutional), as the governmental objective (preventing its uses and possession) has been shown to be illegitimate and, thus, at loggerheads with s9(1) of the Constitution.

It now serves the purpose of covering all bases, to deal with the second half of the s9(1) *Harksen* test, i.e. to establish whether prohibition (differentiation in this context)

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[59] Author unknown "The Most Addictive Drugs" (2009) *Addiction Treatment Resources for Parents of Young Teens and Adults* http://www.drugrehabtreatment.com/most-addictive-drugs.html (accessed 27 October 2009). "Despite the difficulty in determining which drugs are the most addictive, Dr. Jack E. Henningfield of the National Institute on Drug Abuse and Dr. Neal L. Benowitz of the University of California at San Francisco attempted to define the most addictive drugs by ranking six psychoactive substances on the five criteria they found most applicable to addiction: 1. Withdrawal – The severity of withdrawal symptoms produced by stopping the use of the drug. 2. Reinforcement – The drug's tendency to induce users to take it over and over again. 3. Tolerance – The user's need to have ever-increasing doses of the drug to get the same effect. 4. Dependence – The difficulty in quitting, or staying off the drug, usually measured by number of users who eventually become dependent. 5. Intoxication – The degree of intoxication produced by the drug in typical use … the substances ranked as follows, from most to least addictive: 1. Nicotine [tobacco] 2. Heroin 3. Cocaine 4. Alcohol 5. Caffeine 6. Marijuana".
M Earleywine *Understanding Marijuana* 32. It is important to note that this study chose a few common substances and ignored a host of others that, in fact, put marijuana much lower on the list. "Another study had experts rank 18 drugs on how easily they 'hook' people and how difficult they are to quit. Marijuana ranked 14th, behind the legal drugs nicotine (ranked first), alcohol (ranked 8th), and caffeine (ranked 12th). Only hallucinogens (MDMA, mushrooms, LSD, and mescaline) ranked lower than marijuana (Franklin, 1990)."
Although definitions of addiction seem to differ, it would seem that marijuana is 'psychologically' addictive, in the sense that one craves the feeling that it gives you, similar to how some might claim to be addicted to chocolate, as it gives them comfort. This differs, to a degree, from 'physical addiction', such as that experienced with nicotine, where withdrawal involves distressful physical symptoms such as the shakes, pain etc. Marijuana has been found to have no, or minimal, physical withdrawal symptoms. M Earleywine *Understanding Marijuana* 32-36 & 44-47.

serves the purpose for which it was designed. Thus, for the purpose of this analysis, let it be assumed that the writer's previous conclusion is incorrect and that legitimacy was established, i.e. marijuana is a worse menace than tobacco and alcohol and, thus, its use and possession should be prevented or discouraged. Essentially, this argument serves as an alternative to that presented on legitimacy.

> "It is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the Legislature could be improved in one respect or another."[60]

With respect, the writer cannot disagree more. It is submitted that within the rationality review, lies aspects of the s36 constitutional analysis, especially the enquiry as to "less restrictive means to achieve the purpose."[61] A rational scheme would be one "based on or in accordance with reason or logic."[62] Logically, although the *Harksen* test does not explicitly mention less restrictive means, it follows that, where there is a superior, less restrictive alternative, it is irrational to choose the inferior, more restrictive option. Where, therefore, government operates on a less effective, more restrictive scheme, knowing another more effective, less restrictive, alternative to exist, it should be concluded that there is *not* a rational link between the scheme and the governmental objective. Thus, if decriminalisation could be shown more effective and less restrictive than prohibition, it would follow that prohibition is not linked to the purpose of preventing or limiting marijuana use and possession.

> "The Netherlands follows a policy of separating the market for illicit drugs. Cannabis is primarily purchased through coffee shops. Coffee shops offer no or few possibilities for purchasing illicit drugs other than cannabis. Thus The Netherlands achieve a separation of the soft drug market from the hard drugs market - and separation of the 'acceptable risk' drug user from the 'unacceptable risk' drug user …The Netherlands does not differ greatly from

[60] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* para 17.
[61] S36(1)(e) of the Constitution. It should be noted that, should the court decide to conduct both the *Harksen* and s36 enquiry, which, as has been seen, does not seem to be often done (to avoid repetition), the writer submits that this argument could be used so as to satisfy s36(1)(e).
[62] C Soanes & A Stevenson (eds) *Concise Oxford English Dictionary* 11 ed (2006) 1193.

> other European countries. In contrast, a comparison with the US shows a striking difference in this area: 32.9% of Americans aged 12 and above have experience with cannabis and 5.1% have used in the past month. These figures are twice as high as those in the Netherlands."[63]

From the above, it may be observed that there is either no advantage (in the case of Europe) or disadvantage (in the USA) to the prohibition of marijuana, presuming the objective is to minimise its use. Other studies have suggested that prohibition, in fact, aggravates the 'menaces' that are alleged to be connected to marijuana use and possession. In this regard, crime rates would be a good place to start. Marijuana prohibition pushes up the price of the substance, as suppliers need to be compensated for the criminal risk that they incur. High prices mean that an incentive is created to partake in 'dealing', as there is often far more money to be made in the illicit trade compared to legitimate job opportunities. Because there is no legal framework in place to enforce illegal contracts and settle disputes, people often 'take the law into their own hands' and resort to violence.[64] Furthermore, mandatory minimum sentences have the effect that more-hardened criminals are let out of over-crowded prisons early, in order to make space for those non-hardened 'criminals' convicted of possession.[65]

> "[H]istory has shown that increased crime is a result of prohibition of any controlled substance. By examining the murder rates over the past ninety years, Noble prize winner Milton Friedman had found that the homicide rate began to rise more steeply during prohibition, but then declined sharply after 1933 when alcohol was again legalized. Even in the case in our more recent treatment of drugs, Friedman has found the same trend to hold true; the homicide rate began to soar after President Nixon launched the war on drugs."[66]

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[63] MD Abraham *Places of Drug Purchase in the Netherlands* (1999) & Netherlands Ministry of Health, Welfare and Sport, Drug Policy in the Netherlands *Progress Report September 1997-September 1999* (1999), quoted in "The Netherlands Compared With The United States" *Drug War Facts* http://www.drugwarfacts.org/cms/node/67 (accessed 25 October 2009). Also see S Fisk "Memorandum - Marijuana Prohibition in the United States" (2005) www.unc.edu/~sfisk/Marijuana_Memo.doc (accessed 10 October 2009) 4.
[64] S Fisk "Memorandum" 3.
[65] S Fisk "Memorandum" 3.
[66] S Fisk "Memorandum" 3.

It is also clear that possible criminal consequences do not seem to serve as any kind of significant deterrent for use, possession and dealing. In 1982 and in 2000, eighty-eight-point-five percent (numbers unchanged over eighteen years) of American high school seniors reported having 'easy' access to marijuana, despite increases, over these years, in the enforcement of drug laws.[67]

With the above taken to be the problem, Fisk proposes a few solutions.

> "These include increased spending on rehabilitation, the removal of mandatory minimums, *de facto* and *de jure* decriminalization, as well as the legalization and controlled distribution of marijuana."[68]

Rehabilitation has been shown to be seven-times more cost effective than domestic law enforcement, when it comes to addressing drug abuse. This would also allow for far fewer lives to be damaged by the experience of being sent to prison.[69] It also follows logically, that the repeal of minimum sentences would assist in freeing up the back-log in the courts and allow judges to focus on more serious issues. The money saved could also be allocated to more important state needs, such as education, housing etc.[70] A final proposed solution is the complete legalization of marijuana.

> "If marijuana was legalized and the distribution of it was controlled by the government, it would be treated in largely the same manner as alcohol. Marijuana would not be sold to underage individuals and the advertising of it would most likely be illegal. However, through managing its distribution, the government would be able to monitor and control the quality of the drug and also exercise large "sin taxes." The revenues obtained from the taxes could be used to fund government projects, or even increase efforts to combat drug use through public awareness and education. The benefits of this method encompass all of the benefits associated with decriminalization, but also

[67] S Fisk "Memorandum" 4.
[68] S Fisk "Memorandum" 5.
[69] S Fisk "Memorandum" 5.
[70] S Fisk "Memorandum" 5.

include the added benefits of the elimination of all criminal activity associated with marijuana as well as the collection of revenue for the government."

It may, from the above, be concluded that there do exist more effective, less restrictive alternatives to prohibition, such that render it an irrational means to what, for these purposes, has been assumed to be a legitimate end. Once again, s4 of the Drugs Act falls foul of s9(1) and the *Harksen* test.

Appropriate Relief

S38 of the Constitution allows the court to grant 'appropriate relief' or any order that is 'just an equitable' including an order of constitutional invalidity.[71] This must, necessarily, involve a balancing exercise, whereby competing interests are weighed up, the violation is corrected, future violations are deterred, consideration is given to the possibility of compliance and that fairness is afforded to all those affected by the order. "Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'."[72]

S9(1) is clearly infringed by s4 of the Drugs Act, for reasons that are given extensively above. A declaration of constitutional invalidity (in relation to marijuana's inclusion), would therefore be appropriate, i.e. that it in future be read, so that marijuana is excluded from its ambit (effectively, a deletion of Part 3, Schedule 2). This would remedy the defect, benefit society as a whole and open the door for the regulated and controlled use of marijuana (as with tobacco and alcohol).

It could be argued that such a declaration would 'open the floodgates' on the decriminalization of all kinds of dangerous drugs. The writer would submit that, whilst this may be true for some drugs, this would be handled on a case-by-case basis and would require expert medical and other evidence, so as to show that the drug in question fell within the allowable limits of harm, as set by tobacco, alcohol and marijuana (assuming the latter was decriminalised).

[71] *Hoffman* para 42.
[72] *Hoffman* para 45.

One Last Point to Ponder

Argentina and Mexico have recently taken steps towards decriminalising drugs, as a direct backlash to the USA's 'war on drugs'. Argentina's Supreme Court ruled it unconstitutional to punish people for using marijuana for personal consumption, which followed Mexico's trend of decriminalising possession of small amounts of marijuana and other drugs. Brazil and Ecuador are considering following suit.[73] Argentina's reform was based on Article 19 of their Constitution, whereupon it was held that:

> "The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit."[74]

Conclusion

There are various criticisms that may be leveled against the *Prince* judgment, mostly based on a lack of evidence and understanding on the effects of marijuana. Prince also challenged the prohibition of marijuana too narrowly. He chose the right to freedom of religion and sought exemption only for followers of Rastafari religion. South Africa pointed out, to the United Nations, that reform might be possible, if prohibition were to be challenged under a broader right, for the benefit of all. This 'broader right' turns out to be the right to equality, specifically under s9(1) of the Constitution, as given meaning by the *Harksen* test. Using the comparator of tobacco and alcohol, allows objective criteria to be applied, whereby it emerges that there are no (and that there never were) objective differences between those vices/recreations and marijuana, for the purpose of identifying a 'menace'. This renders the governmental objective, to limit use of marijuana, illegitimate and contrary to s9(1) of the Constitution. Furthermore, it emerges that there exists no rational connection between prohibition and the service of the objective, as a viable alternative exists, meaning that the s4 of the Drugs Act fails the *Harksen* test on two fronts. Therefore, S4 of the

[73] R Carroll & T Phillips "Mexico and Argentina move towards decriminalising drugs" (2009) *The Guardian* http://www.guardian.co.uk/world/2009/aug/31/mexico-argentina-decriminalise-drugs (accessed 05 October 2009).

[74] JC Hidalgo "Argentina Decriminalizes Personal Drug Consumption" (2009) *Cato at Liberty* *http://www.cato-at-liberty.org/2009/08/25/argentina-decriminalizes-personal-drug-consumption/* (accessed 05 October 2009)

Drugs Act infringes the right to equality, in that its prohibition of marijuana use and possession, is unconstitutional and, thus, invalid.

Word Count: [8813]

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